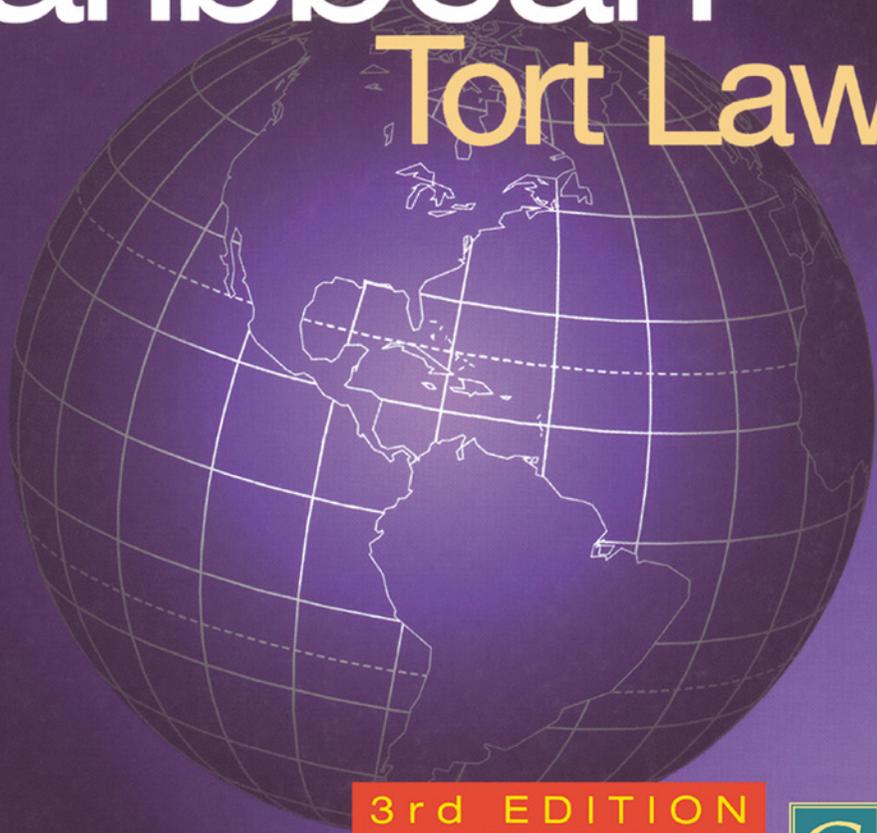


COMMONWEALTH CARIBBEAN LAW SERIES

**Gilbert Kodilinye**

# Commonwealth Caribbean Tort Law



3rd EDITION

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# COMMONWEALTH CARIBBEAN TORT LAW

Third Edition



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# COMMONWEALTH CARIBBEAN TORT LAW

Third Edition

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University of the West Indies



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*To Vanessa*



## PREFACE

The law of tort is an area of primary importance in the study and practice of the common law in the Caribbean. This work has been conceived as a basic text for students of tort law in the various institutions of higher learning in the region, particularly for those reading for the LLB degree. It is expected that it will also be essential reading for students of the new CAPE Law syllabus, and for those taking paralegal courses. Previous editions of the work have also been widely used by legal practitioners, many of whom have said that they find the case references and commentaries helpful in preparation for tort litigation. It is hoped that this new edition will serve their needs to an even greater extent. Although primarily conceived for the legal fraternity, the book contains much material that will be of interest to those other professionals, such as business executives, insurance managers, industrialists and journalists, who may require some knowledge of tort law in the Caribbean context.

The contents of the book have been dictated to some extent by the availability of Caribbean case law on the various topics, and those areas in which local litigation is negligible or non-existent have been omitted, whilst those in which local case law is abundant have been given extended treatment. The emphasis throughout this edition is firmly on those topics which are of most relevance and importance to West Indian society, and the materials utilised are those which most clearly explain and illustrate the application of tort principles in the Caribbean context.

This third edition incorporates all the relevant new case law appearing since 1999, including important decisions of Caribbean courts such as *Bonnick v Morris*, *Mitchell v Charles*, *Gordon v Panday* and *Geest plc v Lansiquot*, as well as the House of Lords decisions in *Reynolds v Times Newspapers Ltd* and *Lister v Hesley Hall Ltd*.

I owe a debt of gratitude to Timothy Alleyne for his sterling work in researching unreported Caribbean judgments for inclusion in this edition, and to my lovely wife, Vanessa Kodilinye (Attorney at Law, Barbados), who patiently and cheerfully assisted me in incorporating additional material and made many useful suggestions for improving the text. Finally, I should like to express my profound gratitude to Ruth Massey and her colleagues at Cavendish Publishing for again creating an excellent finished product.

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1 June 2003



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# CHAPTER 1

## INTRODUCTION

### DEFINITION

A tort may be defined broadly as a civil wrong involving a breach of duty fixed by the law, such duty being owed to persons generally and its breach being redressable primarily by an action for damages.

The essential aim of the law of torts is to compensate persons harmed by the wrongful conduct of others, and the substantive law of torts consists of those principles which have been developed to determine when the law will and when it will not grant redress for damage suffered. Such damage may take any of several different forms, such as physical injury to persons; physical damage to property; injury to reputation; and damage to economic interests.

Monetary damages is the usual remedy for a tort. The other important remedy is the injunction, which is a court order forbidding the defendant from doing or continuing to do a wrongful act. Whether the plaintiff is claiming damages or an injunction, he must first prove that the defendant has committed a recognised tort, for the law of torts does not cover every type of harm caused by one person to another. The mere fact that D's act has caused harm to P does not in itself give P a right to sue D; P must go further and show that D's act was of a type which the law regards as tortious.

### TORT DISTINGUISHED FROM OTHER LEGAL CONCEPTS

#### **Tort and crime**

The main purpose of the criminal law is to protect the interest of the public at large by punishing those found guilty of crimes—generally by means of imprisonment or fines, and it is those types of conduct which are most detrimental to society and to the public welfare that are treated as criminal. A conviction for a crime is obtained by means of a criminal prosecution, which is usually instituted by the State through the agency of the police or at the discretion of the Director of Public Prosecutions. A tort, on the other hand, is a purely *civil* wrong which gives rise to civil proceedings, the purpose of such proceedings being primarily not to punish wrongdoers for the protection of the public at large, but to give the individual plaintiff compensation for the damage which he has suffered as a result of the defendant's wrongful conduct.

Although it is not disputed that the basic function of the law of torts is to compensate plaintiffs, there is a school of thought which points to what may be called the 'deterrent' aspect of tort law. The essence of this view is that the possibility of liability in tort may have the effect of inducing persons to modify their behaviour so as to avoid harming others; it is suggested that tort law 'teaches people that wrongful acts do not pay and, as a consequence, people will act more carefully'.<sup>1</sup> Protagonists of this viewpoint, for instance, to the deterrent effect of the libel laws which are designed to curb the power of newspapers to destroy the reputations of individuals by publishing defamatory matter.

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1 McKendrick, *LLB Tort Textbook*, 5th edn, 1993, Sydney: HLT, p 2.

Even more significant, according to this school of thought, has been the expansion of the tort of negligence, which has encouraged the governing bodies of professionals, such as the accounting profession, to produce codes of practice which guide their members as to the standard of care expected of them in the interest of the public. Lastly, it is pointed out that the court has power in certain very limited circumstances to award 'exemplary' or 'punitive' damages against a tortfeasor.

However, the 'deterrent' theory has two main weaknesses. In the first place, the general principle of the law of negligence that a person has a duty 'to take reasonable care' is too vague to have any realistic impact on most persons' standard of behaviour. Secondly, the deterrent theory fails to take into account that, in practice, tort damages will most often be paid by the tortfeasor's insurers on the terms of his liability insurance policy. This significantly reduces the deterrent effect on the tortfeasor because he passes the bill on to the insurance company.

Although there are fundamental differences between criminal and tortious liability, it is significant that some torts, particularly trespass, have strong historical connections with the criminal law, and that the same act may be both a tort and a crime. For example, assault, battery and false imprisonment are both crimes and torts, being derived from the ancient writ of trespass, whereby 'the defendant is not only accused of a breach of the King's peace, but, if he fails to appear to the writ, he will be outlawed, and, if he is found guilty, he will be punished by fine and imprisonment'.<sup>2</sup> Because of this common historical origin, today the ingredients of the torts are virtually identical to those of the crimes.

There are, in addition, several examples of conduct which is both criminal and tortious. For instance, if A steals B's bicycle, he will be guilty of the crime of theft (or larceny); at the same time, A will be liable to B for the tort of conversion. Again, if A wilfully damages B's goods, he is liable for the crime of malicious damage to property and for the tort of trespass to chattels.

The effect in such cases is that the civil and criminal remedies are not alternative but concurrent, each being independent of the other. The wrongdoer may be punished by imprisonment or fine, and he may also be compelled in a civil action for tort to pay damages to the injured person by way of compensation. There is, however, a principle, known as the rule in *Smith v Selwyn*,<sup>3</sup> according to which, if the wrongful act is a felony, no action in tort can be brought against the defendant until he has been prosecuted for the felony, or a reasonable excuse has been shown for his not having been prosecuted.<sup>4</sup>

2 Fifoot, *History and Sources of the Common Law*, 1949, London: Stevens, p 45.

3 [1914] 3 KB 98. Under this rule, the victim of an aggravated assault, for example, cannot sue his assailant in tort unless and until the latter has been prosecuted.

4 In *Hibbert v AG* (1988) Supreme Court, Jamaica, No CL H-187 of 1982 (unreported), Gordon J held that the production of a letter from the Director of Public Prosecutions, indicating that no criminal prosecution for assault was advised, satisfied the rule in *Smith v Selwyn*.

In *Buckle v Dunkley* (1966) Court of Appeal, Jamaica, Civ App No 29 of 1965 (unreported), it was held that if the victim of an alleged felony reports the facts to the police and the latter decide not to prosecute, the victim is entitled to go ahead with his civil action, since he will have taken all the steps that the law requires him to take to procure the prosecution of the alleged offender.

In *Koonoo v Ramoutar* (1984) High Court, Trinidad and Tobago, No 3237 of 1978 (unreported), Collimore J held that the effect of the rule in *Smith v Selwyn* is not that the bringing of a criminal prosecution is a condition precedent to the plaintiff's civil cause of action, but that his cause of action will be stayed to allow the criminal prosecution to take precedence. Accordingly, the limitation period for the civil action begins to run from the time of the wrongful act.

Lastly, an important distinction between tort and crime is that, to succeed in a criminal trial, the prosecution must prove its case 'beyond reasonable doubt', whereas in an action in tort, the plaintiff is merely required to establish his claim 'on a balance of probabilities'. It is thus easier for a plaintiff to succeed in tort than for the prosecution to secure a conviction in crime. One effect of this difference between the standards of proof is that, where the alleged tortfeasor has been acquitted in criminal proceedings, such acquittal is not conclusive evidence of lack of fault in the civil action, where a lesser degree of proof of wrongdoing is required.

### Tort and contract

Tort and contract are both areas of the civil law and there is a much closer relationship between them than there is between tort and crime. The precise relationship between tort and contract is a matter of debate and there is a school of thought which argues that tort and contract should be subsumed under a law of obligations'.

The traditional distinction made between tort and contract is that in tort the duties of the parties are primarily fixed by law, whereas in contract they are fixed by the parties themselves. In other words, contractual duties arise from agreement between the parties, whilst tortious duties are created by operation of law independently of the consent of the parties.

This distinction may be misleading, however, for, in the first place, although it is true that duties in contract are created by agreement between the parties themselves, nevertheless parties to a contract are also subjected to those underlying rules of contract which the law imposes upon them. Secondly, the duties owed by two contracting parties towards one another are frequently not duties which they expressly agreed upon but obligations which the law implies, such as the terms implied under the sale of goods and hire purchase legislation.<sup>5</sup> Conversely, some duties in tort can be varied by agreement, for example, the duties owed by an occupier of premises to his lawful visitors; and liability in tort can be excluded altogether by consent (under the doctrine of *volenti non fit injuria*).

Sometimes, a wrongful act may be both a tort and a breach of contract. For example:

- (a) if A has contracted to transport B's goods, and due to A's negligence the goods are lost or damaged, A will be liable to B both for breach of the contract of carriage and for the tort of negligence;
- (b) a dentist who negligently causes injury in the course of extracting a tooth may be liable to the patient both for breach of an implied term in his contract with the patient to take reasonable care, and for the tort of negligence.

In addition to those cases where the same set of facts can give rise to claims in both contract and tort (as in the cases of the carrier and the dentist), there are areas where there is an overlap between the principles of tort and contract, and it is here

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5 For examples in the Commonwealth Caribbean, see Sale of Goods Act, Cap 371, Hire Purchase Act 1987 (Antigua); Sale of Goods Act, Ch 310, Hire Purchase Act, Ch 315 (The Bahamas); Sale of Goods Act, Cap 317, Hire Purchase Act, Cap 328 (Barbados); Sale of Goods Act, Cap 214, Hire Purchase Act, Cap 220 (Belize); Sale of Goods Act, Cap 349, Hire Purchase Act 1874 (Jamaica); Sale of Goods Act, Ch 82:30, Hire Purchase Act, Ch 82:33 (Trinidad and Tobago).

that the argument that contract and tort are part of one law of obligations is at its most persuasive. Such areas include fraudulent misrepresentation in contract, which is the *alter ego* of the tort of deceit; negligent misrepresentation, which was developed in the law of tort but applies equally to contract law; remoteness of damage, which is a concept common to both contract and tort, although the concept is not applied in exactly the same way in each branch of the law; and agency, which is recognised in both, though again is not applied in quite the same way.

One of the most significant distinctions between tort and contract concerns the aim of an award of damages. Tort law is designed to protect the status quo, in that the plaintiff's position should not be made worse by the defendant's acts. This aim is expressed in terms of the quantum of damages, viz, that the plaintiff should be restored, as far as possible, to the position he would have been in had the tort not been committed. In contract, on the other hand, the defendant is liable to put the plaintiff into the position he would have been in had the contract been carried out; in other words, damages are intended to fulfil the plaintiff's expectation of benefit from the contract.

### *DAMNUM SINE INJURIA*

This means literally 'damage without legal injury'. It is a basic principle that damage is not actionable in tort unless such damage amounts to *legal injury*. Thus, if the defendant's act is in itself lawful, he cannot be sued in tort, however much damage the plaintiff may have suffered as a result of it.

It is for the courts themselves to decide what is and what is not legal injury. Social and commercial life would become intolerable if every kind of harm were treated as a legally redressable injury; for example, business competition which drives a trader out of business is not actionable in tort,<sup>6</sup> since the well being of society depends upon the right of every person to compete in business. There are many kinds of harm which, for various reasons, fall outside the scope of the law of torts. In some cases, the harm complained of may be too trivial (*de minimis non curat lex*), or too indefinite or incapable of proof; in others, policy may require that the court should balance the respective interests of the plaintiff and the defendant, and that the defendant's interest should prevail;<sup>7</sup> in others, harm may be caused by the defendant's exercising of his own rights, or where he does damage to the plaintiff in order to prevent some greater evil befalling himself.<sup>8</sup> In other cases, the harm caused may be protected by some other branch of the law, such as where a statute or the criminal law provides a remedy, or where the harm consists merely of a breach of contract or breach of trust.

### *INJURIA SINE DAMNO*

This means literally legal injury without damage'. Normally, in order to succeed in tort, the plaintiff must prove that he has suffered actual damage (for example, injury to his person or property or reputation) as well as legal injury. There are

6 Unless it involves the deception of the public (ie, in passing off: see below, Chapter 11).

7 Eg, in the tort of nuisance. See below, Chapter 7.

8 The defence of necessity.

some torts, however, where actual damage need not be proved and it is sufficient to show an infringement of the plaintiff's legal rights (that is, legal injury). Torts which are actionable without proof of damage are known as 'torts actionable *per se*': examples are trespass, which is actionable although no harm at all is caused to the land, person or chattel, as the case may be, and libel (that is, defamation in written form), which is also actionable although no actual damage<sup>9</sup> is proved.

## THE FORMS OF ACTION

In order to understand the categories, boundaries and definitions of modern torts, it is necessary to look at their historical origins. Torts were developed in England from about the 13th century onwards in the King's common law courts, in which every action had to be commenced by the issue of a royal writ. Each writ was in a set form, known as a form of action. There was a limited number of recognised forms of action, and each plaintiff had the difficult task of fitting his claim into an existing form: if his claim did not fit, he had no remedy. This system of writs and forms of action dominated the law of torts and, indeed, the whole common law system, until the forms of action were eventually abolished by the Common Law Procedure Act in 1852. Before the abolition of the forms of action, the question in every tort claim was not, 'has the defendant broken some duty owed to the plaintiff?' but, 'has the plaintiff any form of action against the defendant, and, if so, what form?'

The main forms of action in tort were: (a) the writ of *trespass*; and (b) the writ of *trespass 'on the case'*, or, simply, 'the action on the case'. The writ of trespass lay only for forcible, direct and immediate injury to land, persons or chattels, for example, where the defendant throws a stone at the plaintiff, striking him as he walks along the street. The action on the case, on the other hand, covered all injuries that were indirect and consequential or non-forcible, for example, where the defendant negligently leaves a heap of stones in the street over which the plaintiff stumbles and is injured (indirect injury), or where the defendant interferes with the plaintiff's enjoyment of his land (non-forcible injury).

Before 1852, it was vital to choose the correct form of action—'trespass' for direct, forcible injury; 'case' for indirect or non-forcible injury—and, if the plaintiff made the wrong choice, his claim failed. Today, all that the plaintiff needs to do is to set out the relevant facts in his statement of claim. Nevertheless, the distinction between direct and consequential injury still remains. Thus, the modern tort of trespass is concerned with direct injuries, whilst the tort of nuisance (derived from the action on the case) covers indirect injuries. It is no longer necessary for the plaintiff to plead any particular form of action, but he must nevertheless show that some recognised tort has been committed, and he can do this only by showing that the defendant's conduct comes within the definition of trespass, nuisance, negligence etc, as the case may be. The boundaries and definitions of modern torts thus depend to a large extent on the boundaries of the old forms of action; hence Maitland's celebrated remark: 'The forms of action we have buried, but they still rule us from their graves.'<sup>10</sup>

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9 As to the meaning of 'actual damage' in this context, see below, p 228.

10 Maitland, *Forms of Action at Common Law*, 2nd edn, 1936 (repr 1962), Cambridge: CUP, p 296.

## INTENTION AND NEGLIGENCE

In the majority of torts, it must be shown that the defendant's invasion of the plaintiff's rights was either *intentional* or *negligent*. An act is intentional when it is done *with full advertence to its consequences and a desire to produce them*. It is of course impossible to prove what went on in the defendant's mind, for 'the Devil himself knoweth not the thought of man'.<sup>11</sup> However, the court may presume the defendant's intention by looking at what he said or did and at all the surrounding circumstances. Further, it is a well known principle of law that 'a party must be considered to intend that which is the necessary or natural consequence of that which he does'.<sup>12</sup> Thus, for example, if D fires a shot at P's dog, intending to frighten it, and the bullet in fact kills the dog, D cannot escape liability by pleading that he only intended to frighten the animal, for it must be presumed that the natural consequence of shooting at the dog will be to kill it.

Negligence differs from intention, in that intention denotes a desire for the consequences of the act, whereas if the defendant is negligent he *does not desire the consequences of his act but is indifferent or careless as to the consequences*. Negligence in the law of torts is used in two senses:

- (a) to mean the independent tort of negligence; and
- (b) to mean a mode of committing certain other torts—such as trespass or nuisance.

The tort of negligence is by far the most economically important of all torts, and its ramifications are seen in many facets of modern society. Carelessness is the main ingredient of this tort, but the concepts of 'foreseeability', 'proximity' and 'public policy' are also necessary elements.

## STRICT LIABILITY

In some torts, the defendant is liable even though the damage to the plaintiff occurred without intention or negligence on the defendant's part. These are usually called torts of strict liability, the most important examples being liability for dangerous animals and liability under the rule in *Rylands v Fletcher*.<sup>13</sup> Thus, for instance, if D keeps a wild animal, such as an elephant or a lion, he will be liable for any damage caused by the animal, even though the damage was unintended by him and he was in no way careless in allowing it to happen.

## MOTIVE AND MALICE

'Motive' means the reason behind a person's doing of a particular act. Motive is generally irrelevant in the law of torts. Thus, if the defendant's act is unlawful, the fact that he had a good motive for doing it will not exonerate him. For example, if D locks his adult relative in her room to prevent her from going out with a man whom D believes to be of bad character, D will be liable to her for false imprisonment, and the fact that D had a good motive will not excuse him. Conversely, if the defendant's

11 *Year Book*, Pasch 17 Edw 4 fol 2, pl 2, *per* Brian CJ.

12 *R v Harvey* (1823) 107 ER 379, p 383.

13 (1866) LR 1 Ex 265.

act is lawful, the fact that he had a bad motive for doing it will not make him liable. Thus, where D was annoyed because the plaintiff corporation had refused to purchase his land at an inflated price in connection with its scheme for supplying water to a town and, by way of spite, abstracted water which flowed in undefined channels under his land, thereby preventing the water from reaching the plaintiff's adjoining reservoir, he was not liable to the plaintiff, since he had committed no tort. Abstracting the water was a lawful use of his own land, and the fact that his motives for doing so were malicious was irrelevant.<sup>14</sup>

There are some torts, however, in which malice is relevant, such as malicious prosecution, nuisance and defamation. Depending upon the context, malice may mean:

- (a) 'spite' or 'ill-will';
- (b) 'wrongful or improper motive', that is, a motive which the law does not recognise as legitimate; or
- (c) the intentional doing of a wrongful act without just cause or excuse.

In the first sense, the presence of malice in the defendant's conduct is a factor to be taken into account in determining liability in nuisance, whilst, in the second sense, malice may prevent him from relying on certain legal defences, notably fair comment and qualified privilege in defamation actions. Malice in this sense is also an essential ingredient of the tort of malicious prosecution. Malice in the third sense, which means simply 'intentional conduct', is a purely technical form of words used in pleadings.

## RECEPTION OF THE LAW OF TORTS IN THE CARIBBEAN

The law of torts has been received into Commonwealth Caribbean jurisdictions as part of the common law of England. The method of reception has varied from one territory to another, principally according to whether the particular territory was subject to settlement, or to conquest or cession.<sup>15</sup> In the case of settled colonies, the British subjects who settled there were deemed to have taken English law with them and there was no need for statutory provisions expressly receiving the common law into those territories. In the case of conquered or ceded colonies, on the other hand, the law in force at the time of cession or conquest remained in force until altered by or under the authority of the Sovereign. In the latter class of territory, English law would not generally apply without statutory reception provisions.<sup>16</sup>

Although the distinction between settled colonies on the one hand and conquered and ceded colonies on the other is a useful guide to the method of reception of English law, it has rightly been pointed out that 'the story of the reception of English law in the various parts of the Caribbean is a tangled one'<sup>17</sup> and it is by no means easy to identify the precise method of reception in all the islands. Fortunately, this exercise may be left to the legal historians, as it is clear

14 *Bradford Corp v Pickles* [1895] AC 587.

15 See Roberts-Wray, *Commonwealth and Colonial Law*, 1966, London: Stevens, pp 539–43; Patchett, 'Reception of laws in the West Indies' (1972) JLJ 17, p 55; Wylie, *Land Law of Trinidad and Tobago*, 1981, Port of Spain: Government of Trinidad and Tobago, p 5.

16 *Ibid*, Roberts-Wray, pp 540–41.

17 *Ibid*, Wylie, p 5.

that, in practice, all jurisdictions in the Commonwealth Caribbean today apply the common law of England, including the law of torts, as modified by local statutory provisions. It will be sufficient, therefore, to give a few examples of methods of reception in the region.<sup>18</sup>

### **Antigua**

There is no general statutory reception provision. The original settlers are deemed to have taken with them English law in force in 1632. (The position in St Kitts-Nevis-Anguilla, Montserrat and The Virgin Islands is similar.) The Summary Jurisdiction Act, Cap 80 and the Supreme Court Act, Cap 81, by their terms assume that the rules of common law and equity apply.

### **The Bahamas**

The basic law in force is laid down in the Declaratory Act, passed in 1799, the effect of which is that the common law in force in England in 1799 is in force in the islands so far as it had not been altered by 'enumerated' statutes of the United Kingdom. The Turks and Caicos Islands are subject to the same provision.

### **Barbados**

The basic substantive law of England was brought to Barbados by the settlers in 1627. Now, s 31 of the Supreme Court of Judicature Act, Cap 117 provides that, 'in every civil cause or matter commenced in the High Court, law and equity shall be administered by the High Court'; and s 37 provides that 'the court shall give effect to all legal claims and demands and all estates, titles, rights, duties, obligations and liabilities existing by the common law'.

### **Dominica**

Dominica was originally acquired by conquest, not by settlement, and so English law did not take effect without express application. A Proclamation dated 8 October 1763, after stating that the Governors of certain colonies (including Dominica, Grenada, St Vincent and Tobago) were directed to call Assemblies with power to make laws, continued: '...in the meantime, and until such Assemblies can be called...all persons inhabiting in or resorting to our said colonies, may confide in our Royal Protection, for the enjoyment of the benefit of the law of our Realm of England.'

Section 27 of the Supreme Court Act, Cap 28 provides that s 24 of the Judicature Act 1873 (England and Wales), which lays down that law and equity are to be concurrently administered in the Supreme Court, 'shall extend to, and be in force in, the Colony'.

### **Grenada**

Grenada was a colony acquired by cession under the Treaty of Paris 1763. In 1779, it passed again into French hands, but it was finally restored to Britain, with the Grenadines, by the Treaty of Versailles in 1783. A Proclamation of 1784 decreed

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<sup>18</sup> *Op cit*, Wylie, fn 15, pp 843–65.

that, by the restitution in 1783 of the islands 'to our Crown, all our subjects inhabiting the same became entitled to the enjoyment of the benefits of the laws of England...that such laws accordingly became in force and all other laws...ceased and determined'.

### **Guyana**

When this territory was acquired by cession from Holland in 1814 and became 'British Guiana', Roman-Dutch law was in force. By the Civil Law of British Guiana Ordinance, Rev Laws, 1953, Cap 2, Roman-Dutch law ceased to apply, except as otherwise provided by the Ordinance, and the common law of the colony was declared to be the common law of England as at 1 January 1917, including the doctrines of equity, as then administered in the English courts.

### **Jamaica**

Jamaica was acquired by conquest, not by settlement. By s 37 of the Interpretation Act, Cap 165, 'all such laws and statutes of England as were, prior to the commencement of 1 Geo II Cap 1 [that is, prior to 1727], introduced, used, accepted or received, as laws of this Island, shall continue to be laws in the Island, save in so far as any such laws or statutes have been or may be repealed or amended by a Law of the Island'.

### **St Lucia**

The basis of the civil law of St Lucia is French law. The Custom of Paris was applied to St Lucia in 1681 and French Ordinances also extended to the island. Since 1803, when St Lucia was captured by the British, property rights under the existing laws were preserved but, subsequently, substantial importation of English law took place. The civil code, based on French law, has been assimilated to the law of England with respect to, *inter alia*, contracts, torts and agency.

### **Trinidad and Tobago**

At the time of Trinidad's cession by Spain to Britain in 1797, Spanish law governed the island, but thereafter English law was gradually substituted. Section 12 of the Supreme Court of Judicature Act 1962, Ch 4:01 now provides that 'the common law, doctrines of equity, and statutes of general application of the Parliament of the United Kingdom that were in force in England [on 1 March 1848] shall be deemed to have been enacted and to have been in force in Trinidad as from that date and in Tobago as from 1 January 1889'.



## CHAPTER 2

### TRESPASS TO THE PERSON

#### INTRODUCTION

Trespass to the person comprises three torts:

- (a) assault;
- (b) battery; and
- (c) false imprisonment.

These torts, which are derived from the ancient writ of trespass, protect persons from interference with their personal liberty and are actionable *per se*, that is, without proof of damage. In the words of Lord Reid:

English law goes to great lengths to protect a person of full age and capacity from interference with his personal liberty. We have too often seen freedom disappear in other countries, not only by *coups d'état*, but by gradual erosion; and often it is the first step that counts. So it would be unwise to make even minor concessions.<sup>[1]</sup>

In the Commonwealth Caribbean, civil actions for assault and battery are comparatively rare (except as adjuncts to actions for false imprisonment), presumably because litigants prefer to seek redress in the criminal rather than the civil courts. On the other hand, actions for false imprisonment are common, and a considerable body of case law has accumulated around the tort.

#### Assault and battery distinguished

Battery is the intentional application of force to another person. Assault is the intentional putting of another person in fear of an imminent battery.

In popular speech, the word 'assault' connotes the application of physical force to the person, but in the law of torts, the actual application of force to the person is not an assault but a battery, and an assault means any act which puts the plaintiff in *fear* that a battery is about to be committed against him. Thus, to slap the plaintiff on the face is a battery, but to approach him menacingly with a clenched fist is assault; to throw an object at him is an assault so long as the object is still in the air, but if the object strikes him there is a battery. Very often, the threat of violence will be immediately followed by the actual application of violence to the plaintiff's person, so that the defendant will have committed both an assault and a battery, for example, where the defendant first points a loaded gun at the plaintiff and then fires a shot which hits him.

Although the distinction between assault and battery in the law of torts is clearly established, it has to be admitted that, in Caribbean and other jurisdictions, the courts have tended to blur the distinction and to describe as an 'assault' conduct which in strict law amounts to battery. In *Williams v AG*,<sup>2</sup> for instance, the plaintiff was leaving the Montego Bay police station with a friend who had shortly before been released on bail, when the station guard, in hurrying them out of the station, used obscene

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1 *S v McC* [1972] AC 24, p 43.

2 [1966] Gleaner LR 51 (Court of Appeal, Jamaica).

and insulting language. The plaintiff remonstrated with the officer, whereupon the defendant constable held the plaintiff, pushed him against a wall so that his head and elbow struck against it, hit him twice in the stomach and pushed him out of the station. Such conduct clearly amounted to battery by the constable, but the Jamaican Court of Appeal treated the plaintiff's action as one for 'assault' and increased the magistrate's award of damages for the 'high-handed and unwarranted attack'.

The tendency to describe a physical attack as an 'assault' rather than as a battery may be due to the fact that, in criminal law, the offences of common assault and aggravated assault connote the application of physical violence to the person. As James J pointed out in *Fagan v Metropolitan Police Comr*,<sup>3</sup> 'for practical purposes today, "assault" is generally synonymous with the term "battery" and is a term used to mean the actual intended use of unlawful force to another person without his consent'.

## ASSAULT

An assault is a direct threat made by the defendant to the plaintiff, the effect of which is to put the plaintiff in reasonable fear or apprehension of immediate physical contact with his person. Thus, in *Stephens v Myers*,<sup>4</sup> where, at a parish council meeting, an altercation took place between the plaintiff and the defendant, and the defendant approached the plaintiff menacingly with a clenched fist but his blow was intercepted by a third party, the defendant was liable for assault. And in the Jamaican case of *Hull v Ellis*,<sup>5</sup> the defendant was held liable for assault when, holding a revolver in her hand, she accosted the plaintiff as he was riding his donkey along a public road and asked him where he had got the piece of wood he was carrying.

In assault, the act of the defendant must have been such that a reasonable man might fear that violence was about to be applied to him. The test is objective, not subjective. Thus, if a person of ordinary courage would not have been afraid, the fact that the particular plaintiff was afraid will not make the defendant liable. Conversely, the fact that the plaintiff was exceptionally brave and was not afraid will not prevent him from succeeding in his claim if a person of ordinary courage would have been afraid.<sup>6</sup>

Although it is clear that pointing a loaded gun at the plaintiff is an assault,<sup>7</sup> it is not clear whether there will be an assault where the gun is unloaded or a toy gun and the plaintiff mistakenly believes the gun to be real and loaded. One view is that there will be no assault because there would be no means of carrying the threat of shooting into effect.<sup>8</sup> Probably the better view, however, is that there would be an assault,<sup>9</sup> on the ground that an assault 'involves reasonable apprehension of impact of something on one's body, and that is exactly what happens when a firearm is pointed by an aggressor'.<sup>10</sup>

3 [1968] 3 All ER 442, p 445.

4 (1830) 172 ER 735.

5 (1966) Court of Appeal, Jamaica, Civ App No 36 of 1965 (unreported).

6 Fleming, *The Law of Torts*, 8th edn, 1993, Sydney: LBC Information Services.

7 *Mensah v R* (1945) 11 WACA 2 (PC).

8 *Stephens v Myers* (1830) 172 ER 735, per Tindal J; *Blake v Barnard* (1840) 173 ER 985, per Lord Abinger CB.

9 *R v St George* (1840) 173 ER 921, per Parke B.

10 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 67.

## Words

Whether words alone can amount to assault is debatable. Holroyd J in an old case had said that ‘No words, or singing are equivalent to an assault’,<sup>11</sup> but the better view is that there will be an assault if the words are sufficient to put the plaintiff in reasonable apprehension of a battery, as where threatening words are uttered in darkness and the plaintiff cannot see the aggressor.<sup>12</sup>

While it is debatable whether words alone can constitute an assault, it is clear that words may negative what would otherwise be assault. Thus, where, during a quarrel between the plaintiff and the defendant, the latter put his hand on his sword and said, ‘If it were not assize time, I would not take such language from you’, there was no assault because the words had negated the apprehension of immediate contact caused by the placing of the defendant’s hand on his sword.<sup>13</sup> Such a situation must be distinguished, however, from a conditional threat, which can amount to assault. For example, if the defendant approaches the plaintiff with the words, ‘If you don’t give me your money, I’ll break your neck’, there would clearly be an assault, because the situation would cause reasonable apprehension of immediate violence.<sup>14</sup>

Since there must be apprehension of immediate contact, it is clear that threatening words will not amount to assault if there is no capability of immediate violence, for example, where threats are uttered over the telephone, or where the defendant threatens the plaintiff as a bus is leaving the bus stop with the defendant on board.

## BATTERY

A battery has been defined as ‘a direct act of the defendant which has the effect of causing contact with the body of the plaintiff without the latter’s consent’.<sup>15</sup>

Battery connotes an intentional act on the defendant’s part. It is not absolutely clear whether or not a battery can be committed by negligence. The better, and more modern, view is that trespass to the person cannot be committed negligently.<sup>16</sup>

It is not necessary that there should be any bodily contact between the defendant and the plaintiff. It is sufficient if the defendant brings some material object into contact with the plaintiff’s person.<sup>17</sup> Thus, for example, it is battery to throw stones at the plaintiff; to spit in his face; to knock over a chair in which he is sitting;<sup>18</sup> or to set a dog upon him.<sup>19</sup>

It is not necessary that any physical harm should have been caused to the plaintiff. Thus, for example, it is battery to hold a man’s arm in the process of arresting him

11 *R v Meade and Belt* (1823) 1 Law CC 184.

12 See *R v Wilson* [1955] 1 WLR 493; *Trindade, FA* (1982) 2 OJLS 211, pp 231, 232; *Handford, PR* (1976) 54 Can BR 563.

13 *Tuberville v Savage* (1669) 1 Mod Rep 3.

14 See *Read v Coker* (1853) 13 CB 850.

15 *Op cit*, *Trindade*, fn 12, p 216.

16 See *Letang v Cooper* [1965] 1 QB 232; *Wilson v Pringle* [1987] QB 237.

17 *Heuston and Buckley, Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 121.

18 *Scott v Wilkie* (1970) 12 JLR 200 (Court of Appeal, Jamaica); *ibid*, *Heuston and Buckley*.

19 *McKendrick, LLB Tort Textbook*, 5th edn, Sydney: HLT, p 188.

unlawfully,<sup>20</sup> or to take his fingerprints without lawful justification.<sup>21</sup> Nor, it seems, is battery necessarily a hostile act.<sup>22</sup> Thus, it may be battery to subject the plaintiff to horseplay which involves physical contact, or to kiss a woman against her will.<sup>23</sup> On the other hand, 'contacts conforming with accepted usages of daily life'<sup>24</sup> are not actionable. Thus, to jostle or push a person in a crowded bus or sports stadium will not constitute battery, though it may be otherwise if the defendant uses violence to force his way through in a 'rude and inordinate manner'.<sup>25</sup> Nor will it be battery to touch a person in order to draw his attention to something.<sup>26</sup>

## DEFENCES TO ASSAULT AND BATTERY

### Defence of person or property

An assault or battery is justified if committed in reasonable defence of oneself or another.<sup>27</sup> What is reasonable depends on the circumstances. Two principles are clear:

- (a) the battery must be committed in actual defence from attack and not by way of retaliation after an attack;
- (b) the self-defence or defence of another must be reasonably commensurate with the attack. If P threatens D with a deadly weapon, D may defend himself with a deadly weapon.<sup>28</sup> But, if P merely punches D with his fist, D would be justified in defending himself with his fists, but he would not be justified in pulling out a gun and shooting P,<sup>29</sup> unless, perhaps, P were a karate expert who was capable of using his hands as deadly weapons. In *Cachay v Nemeth*,<sup>30</sup> C, N and N's wife were present at a private party. C was acting in an irritating manner by attempting to kiss N's wife, against the latter's will. N struck C a karate blow to the side of the head, breaking C's jaw. It was held that N was entitled to act in defence of his wife, but that he had used excessive violence and was liable in battery.

Assault or battery is also justified if done in defence of one's own property (whether land or chattels)<sup>31</sup> or property which one is defending as agent of the owner or occupier. Again, the force used must be no more than necessary.<sup>32</sup> Where the battery is in defence of land, the following distinction is made: If P enters D's land forcibly, D may at once use reasonable force to remove him; but if P enters peaceably and

20 See *Collins v Wilcock* [1984] 3 All ER 374; *Merson v Cartwright* (1994) Supreme Court, The Bahamas, No 1131 of 1987 (unreported), per Sawyer J; *Lundy v Sargent* (1998) Supreme Court, The Bahamas, No 693 of 1998 (unreported), per Marques J.

21 See *Padilla v George* (1967) High Court, Trinidad and Tobago, No 2143 of 1965 (unreported); *Samuels v AG* (1994) Supreme Court, Jamaica, No S 415 of 1992 (unreported).

22 *F v West Berkshire HA* [1989] 2 All ER 545, pp 563, 564, per Lord Goff.

23 *Op cit*, Winfield and Jolowicz, fn 10, p 65.

24 *Collins v Wilcock* [1984] 3 All ER 374, p 378.

25 *Cole v Turner* (1704) 90 ER 958.

26 *Donnelly v Jackman* [1970] 1 All ER 987.

27 *Op cit*, Heuston and Buckley, fn 17, p 128.

28 *Turner v Metro-Goldwyn-Mayer Pictures Ltd* [1950] 1 All ER 449, p 471.

29 *Cook v Beal* (1697) 91 ER 1014.

30 (1972) 28 DLR (3d) 603. See, also, *Lane v Holloway* [1968] 1 QB 379.

31 Brazier, M, *Street on Torts*, 10th edn, London: Butterworths, p 88.

32 *Collins v Renison* (1754) 96 ER 830.

without force, then D must first request P to leave before any force will be justifiable. If P, after being requested to leave, resists D's attempt to eject him, he may himself be liable for assault and battery.

### Parents' and teachers' authority

A parent or guardian has a right at common law to punish a child and will not be liable for trespass to the person in so doing, provided that the amount of force or detention used is reasonable in the circumstances.<sup>33</sup>

Similarly, a schoolteacher having charge of a child has a right to discipline the child by way of reasonable chastisement or confinement.<sup>34</sup> It used to be thought that this right arose from a delegation of authority by the child's parent to the teacher,<sup>35</sup> but the modern view is that a schoolteacher has an independent right to punish pupils for the purpose not only of training them in good behaviour, but also of maintaining order and discipline in the school as an organisation.<sup>36</sup>

In *Mayers v AG*,<sup>37</sup> K, the head teacher of a secondary school in Barbados, gave a female pupil three lashes with a leather strap as punishment for rubbing 'cow itch' on a teacher's desk. The pupil suffered minor injuries as a result. The questions arose as to (a) whether K had the right to administer corporal punishment; and (b) whether the punishment was reasonable in the circumstances. Chase J held that K, as head teacher, had the right to inflict corporal punishment both at common law and under s 4 of the Prevention of Cruelty to Children Act 1904 and s 18 of the Education Act,<sup>38</sup> and that K's decision to administer immediate punishment for the breach of discipline was justified in the circumstances. He further held that K had used no more force than was reasonably necessary in the circumstances, and that the minor injuries caused to the girl's person were accidental and unintended. K was, therefore, not liable for assault and battery.

### Consent

Where the plaintiff consents to what would otherwise amount to an assault or battery by the defendant, the latter will have a complete defence.<sup>39</sup> Thus, for example, a participant in a boxing or wrestling match cannot recover damages from his opponent for blows inflicted upon him during the bout, for he will be taken to have consented to them.<sup>40</sup> Nor can a footballer complain of tackles or other bodily contact which he encounters during the normal course of the game. It is possible, however, that a sportsman could recover damages from an opponent who commits a deliberate 'foul' against him with the intention of causing actual bodily injury:<sup>41</sup> *a fortiori*, if the defendant delivers a blow quite unconnected with

33 *Op cit*, Fleming, fn 6, p 91.

34 *Ryan v Fildes* [1938] 3 All ER 517.

35 *Mansell v Griffin* [1908] 1 KB 160; *Cleary v Booth* [1893] 1 QB 465, p 468.

36 *Ramsay v Larsen* (1964) 111 CLR 16.

37 (1993) High Court, Barbados, No 1231 of 1991 (unreported).

38 Cap 41.

39 *Chapman v Ellesmere* [1932] 2 KB 431.

40 *Wright v McLean* (1956) 7 DLR (2d) 253.

41 *Lewis v Brookshaw* (1970) *The Times*, 10 April.

the normal course of play, as where, in an off-the-ball incident, an amateur rugby footballer struck an opponent a blow with his elbow which fractured the opponent's jaw.<sup>42</sup>

Another example of consent is where a patient enters a hospital for a surgical operation or a dentist's surgery for dental treatment. Such a patient cannot sue for battery or false imprisonment in respect of any force applied to him during the treatment or any confinement under anaesthetic or otherwise.<sup>43</sup> If the patient is a minor, he may consent in law if he fully understands the nature and consequences of the proposed treatment;<sup>44</sup> otherwise, his parents may consent on his behalf to any treatment to which a reasonable parent would consent.<sup>45</sup>

An apparent consent will be inoperative if it is induced by fraud or concealment. Thus, there may be an actionable battery where, for example, the plaintiff permits the defendant to touch him with a piece of metal which, unknown to him but known to the defendant, is charged with electricity, or where a naive girl submits to indecent contact by a doctor who deceives her into believing that his act is a necessary part of the treatment.<sup>46</sup>

#### ASSESSMENT OF DAMAGES FOR ASSAULT AND BATTERY

Where the plaintiff is physically injured as a result of an assault and battery by the defendant, damages are assessed in the same way as in cases of physical injury caused by negligence, and the same heads of general damage, such as pain and suffering, loss of amenities, loss of expectation of life and loss of earnings, apply.<sup>47</sup> But apart from the damages for any physical injury, which are compensatory, the plaintiff may recover *aggravated* damages for injury to his feelings, that is, for any indignity, disgrace, humiliation or mental suffering occasioned by the assault. For instance, in the Trinidadian case of *Sudan v Carter*,<sup>48</sup> where a 26 year old student was knocked unconscious by a karate 'black belt' who was employed as a 'bouncer' at a disco, Hosein J considered that the circumstances surrounding the assault warranted an award of aggravated damages. He said:

The plaintiff was assaulted in the presence of friends and a crowd of persons and suffered the indignity of being knocked to unconsciousness by a bully who must have found the plaintiff an easy prey upon whom to demonstrate his martial skills. The second defendant's unmitigated rancour still seemed to pervade his cold blooded expression and attitude at the trial.

Further, the circumstances at the entry to the [disco] must have been such as to create in the mind of the plaintiff a suspicion which found expression in an instantaneous accusation that racism was practised, especially upon sight of persons of fair complexion being admitted merely by payment of the required admission fee.

42 *Colby v Schmidt* (1986) 37 CCLT 1.

43 Unless the treatment is outside the scope of the patient's express or implied consent.

44 *Johnston v Wellesley Hospital* (1970) 17 DLR (3d) 139.

45 *S v McC* [1972] AC 24, p 57.

46 *Op cit*, Fleming, fn 6, p 75.

47 McGregor, *Damages*, 15th edn, 1988, London: Sweet & Maxwell, para 1615; *Butler v Smith* (1996) High Court, BVI No 125 of 1993 (unreported), per Georges J.

48 (1992) High Court, Trinidad and Tobago, No 1735 of 1990 (unreported).

The result was that his dignity and pride must have been bruised... All these factors, to my mind, would attract an award of aggravated damages.

Where the assault is carried out by a police officer or other government official, *exemplary* (or 'punitive') damages may also be awarded under the rule in *Rookes v Barnard*, which established, *inter alia*, that 'oppressive, arbitrary or unconstitutional action by a servant of the government'<sup>49</sup> may attract an award of exemplary damages, the purpose of such an award being 'to punish the defendant and to deter him from similar behaviour in the future'.<sup>50</sup> In the case of *Quashie v Airport Authority of Trinidad and Tobago*,<sup>51</sup> two supplementary police officers who were employed by the Airport Authority unlawfully seized the plaintiff, a taxi driver, at the Crown Point Airport in Tobago. One officer held the plaintiff's arms behind his back while the other struck him repeatedly in the face. The plaintiff was then handcuffed and taken to the security charge room, where he was detained for several hours. The plaintiff was later charged with entering a protected area and resisting arrest. The charges were dismissed by the magistrate. Wills J awarded exemplary, as well as aggravated, damages for the assault and detention. He said:

In this case, there can be no doubt that beating and/or assaulting a person at a public place and an international airport and then having him arrested and handcuffed and taken to a cell or jail, where he is kept for hours without justification, could be a most humiliating and traumatic experience, which must require a court to compensate him for his injured feelings. In addition thereto, where the agency through which he has suffered such a humiliating and harrowing experience is a State or statutory body, there must also be awarded damages as a punitive measure to deter others who may be like-minded.

In the circumstances of this case, I hold the view that aggravated and exemplary damages ought to be awarded, since the conduct of the defendants, Bernard and Guerra, was, to say the least, outrageous and compounded by the fabrication of the charges as justification for inflicting a severe and humiliating beating at an airport where people had been arriving and departing. Can it be doubted that such conduct would certainly send a bad signal to citizens and would-be visitors?

In the Jamaican case of *Scott v Wilkie*,<sup>52</sup> however, where a lifeguard at a public beach assaulted the plaintiff by knocking over a chair on which he was sitting and hitting him with it, the magistrate's award of exemplary damages was overruled by the Court of Appeal, on the ground that there was 'nothing in the evidence which suggested that the defendant/appellant pretended in any way to act under a cloak or disguise of authority; the incident was simply one of two individuals in their private capacity'. Edun JA continued:

It may well be that, because of his physique and towering strength, the St Ann Parish Council appointed the defendant/appellant a lifeguard because they must have considered that a lifeguard must be gifted with a greater strength of endurance to withstand the ordeal of saving lives. But that is far from saying that every act of the appellant in his employment must necessarily be clothed with authority oppressively exercised. Therefore, the conclusion of the learned resident magistrate that the appellant's action was a gross abuse of authority was unwarranted by the evidence.

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49 [1964] AC 1129, p 1226, *per* Lord Devlin.

50 *Op cit*, Winfield and Jolowicz, fn 10, p 745.

51 (1992) High Court, Trinidad and Tobago, No T 176 of 1988 (unreported).

52 (1970) 12 JLR 200.

It was held, however, that aggravated damages could properly be awarded, since this was a case of 'a big man bullying a small man', which must have been 'a source of humiliation' to the plaintiff.

## FALSE IMPRISONMENT

'False imprisonment' is a misleading term. 'False' normally means 'fallacious' or 'untrue', but in this tort it means merely 'wrongful' or 'unlawful'. 'Imprisonment' usually involves locking a person in jail, but in this tort it has a much wider meaning and includes not only incarceration in prison, but any physical restraint; for example, where a police constable restrains a suspect by taking hold of his arm, or where a whimsical lecturer locks his students in a lecture hall after a lecture. As Coke CJ once said: 'Every restraint of the liberty of a free man is an imprisonment, although he be not within the walls of any common prison.'<sup>53</sup>

It is a fundamental requirement of the tort that the plaintiff's freedom of movement in every direction must have been restricted. A partial restraint is not sufficient.<sup>54</sup> Thus, for example, if the plaintiff lives in a house with two outer doors, one opening on to the street and the other into a yard in the possession of a third party, it is not false imprisonment on the part of the defendant to bar the street door, for the plaintiff can escape through the yard, and it is immaterial that, in so doing, the plaintiff will commit a trespass against the third party. But the means of escape must be reasonable. It will not be reasonable if it exposes the plaintiff to danger to life or limb.<sup>55</sup>

Nothing short of actual detention and complete loss of freedom can support an action for false imprisonment. Thus, for example, where an arrestee is subsequently released on bail, the arresting officers cannot be liable for false imprisonment for the period after the arrestee has been released from actual custody, notwithstanding that his liberty may be circumscribed by the terms of the bail bond.<sup>56</sup>

In order to be an actionable false imprisonment, the restriction upon the plaintiff's liberty must be unlawful.<sup>57</sup> It has been held, however, that a prisoner who was wrongfully confined to his cell by the prison authority in breach of prison rules had a good cause of action in false imprisonment, even though his original imprisonment was lawful.<sup>58</sup>

It seems that an occupier of premises is entitled to impose restrictions by way of contract on the right of visitors to leave those premises, without being liable for false imprisonment.<sup>59</sup> This is, however, subject to the requirement that the restrictions must be reasonable. In *Robinson v Balmain Ferry Co Ltd*,<sup>60</sup> the defendants, who operated a ferry, charged one penny on entry to the ferry and another penny on exit. R paid to enter, but then decided not to travel on the ferry and demanded

53 Statute of Westminster II, c 48.

54 *Bird v Jones* (1845) 115 ER 668.

55 *Op cit*, Heuston and Buckley, fn 17, p 125.

56 *Syed Mohamed Yusuf-ud-Din v Secretary of State for India* (1903) 19 TLR 496, p 499; *Merson v Cartwright* (1994) Supreme Court, The Bahamas, No 1131 of 1987 (unreported).

57 *Weldon v Home Office* [1990] 3 WLR 465.

58 *Ibid*.

59 See Tan, KF (1981) 44 MLR 166.

60 [1910] AC 295.

to be allowed to leave. The defendants refused to allow R to leave until he paid the exit fee. It was held that the defendants were not liable for false imprisonment in refusing to allow R to leave, because the condition that one penny be paid on exit was a reasonable one to impose.

Similarly, in *Herd v Weardale Steel Co Ltd*,<sup>61</sup> the employers of a miner were held not liable in false imprisonment for refusing to bring the miner to the surface of the pit on demand and before the end of his shift. The reasoning of the court was that the miner had voluntarily gone down the mine and the employers were under no obligation to bring him back up until the shift had ended. But both *Herd* and *Robinson* have been criticised on the ground that the reasoning in those cases would seem to allow a person to be imprisoned for a mere breach of contract<sup>62</sup> (the agreement to pay the exit fee in *Robinson*, and the contractual obligation to remain down the pit until the end of the shift in *Herd*). Moreover, there is authority for the view that a defendant is not entitled to impose unreasonable terms or conditions as he pleases. Thus, where an innkeeper locked the plaintiff in the premises when the latter refused to pay his bill, the innkeeper was liable for false imprisonment.<sup>63</sup>

It is now settled that it is false imprisonment to detain a person where that person is unaware he is being detained. In *Meering v Grahame-White Aviation Co Ltd*,<sup>64</sup> M was suspected of stealing a keg of varnish from the defendant's factory. He was taken to the defendant's office for questioning. While M was in the office, and unknown to M, two of the company's security officers stationed themselves outside to prevent him from leaving. It was held that an action in false imprisonment might lie in such circumstances. According to Atkin LJ:<sup>65</sup>

...a person could be imprisoned without his knowing it. I think that a person can be imprisoned while he is asleep, while he is in a state of drunkenness, while he is unconscious, and while he is a lunatic... Of course, the damages might be diminished and would be affected by the question whether he was conscious of it or not.

Atkin LJ's view was criticised on the grounds that it was inconsistent with an earlier authority<sup>66</sup> and that one of the reasons he gave for his view was that, while the captive was unaware of his confinement, his captors might be boasting of it elsewhere—a rationale which sounds more like defamation than trespass to the person. But Atkin LJ's view has been confirmed by the House of Lords in *Murray v Ministry of Defence*.<sup>67</sup>

Another characteristic of the tort is that it may be committed without the use of physical force: the use of authority is enough. Thus, if police officers wrongfully order the plaintiff to accompany them to the police station for questioning and the plaintiff obeys, the officers may be liable for false imprisonment, even though they never touched the plaintiff. On the other hand, an invitation made by police officers to the plaintiff to accompany them to the police station cannot be false imprisonment if they make it clear to him that he is entitled to refuse to go, for

61 [1915] AC 67.

62 See Dias and Markesinis, *Tort Law*, 1984, Oxford: Clarendon, pp 242, 243.

63 *Sunbolt v Alford* (1838) 150 ER 1135.

64 (1919) 122 LT 44. See, also, below, p 22.

65 *Ibid*, p 53.

66 *Ie; Herring v Boyle* (1834) 3 LJ Ex 344.

67 [1988] 2 All ER 521.

then there will be no restraint. Thus, for example, in *Davis v AG*,<sup>68</sup> where the defendant police sergeant ‘invited the plaintiff to accompany him to the station and he agreed to go, after a full explanation of the events and a caution’, King J (Ag) held that there was ‘nothing amounting to compulsion... The plaintiff was not arrested, and...the action for false imprisonment must fail’. The principle was explained by Deyalsingh J in *Bostien v Kirpalani’s Ltd*,<sup>69</sup> thus:

It is clear from the authorities that to constitute false imprisonment there must be a restraint of liberty...a taking control over or possession of the plaintiff or control of his will. The restraint of liberty is the gist of the tort. Such restraint need not be by force or actual physical compulsion. It is enough if pressure of any sort is present which reasonably leads the plaintiff to believe that he is not free to leave, or if the circumstances are such that the reasonable inference is that the plaintiff was under restraint, even if the plaintiff was himself unaware of such restraint. There must in all cases be an intention by the defendant to exercise control over the plaintiff’s movements or over his will, and it matters not what means are utilised to give effect to this intention. The circumstances of each case have to be considered and these circumstances will, of course, vary and sometimes vary considerably from case to case. In each the question is: ‘On the facts as found, did the defendant exercise any restraint upon the liberty of the plaintiff?’ It is a question of fact, turning sometimes on an isolated link in the chain of circumstances, and the authorities, with rare exceptions, are helpful only on the general principles laid down.

It is thus a question of fact in each case as to whether there was a restraint or not. In *Clarke v Davis*,<sup>70</sup> for instance, C came under suspicion by the police, who were investigating certain irregularities at the Public Works Department. On pay day, C was allowed to draw his money and was then immediately accosted by a uniformed constable and accused of having drawn pay without having worked for it. He was invited to show the police where he had done the work, and later to accompany them to the barracks at Lucea to make a statement. At no time was C physically manhandled or restrained. On the issue of whether C had been under restraint sufficient to ground an action for false imprisonment, Lewis JA, in the Jamaican Court of Appeal, said:<sup>71</sup>

Assuming that he was invited to show the police where he had done this work, the question arises whether, in the circumstances, he could have reasonably refused to go. In my view, in those circumstances, the appellant could have done nothing other than to go with the police, and he went with them... In the face of this situation, his salary having been taken from him under circumstances of an implied accusation and the fact that he was in a police car, surrounded by three police officers, was his agreement to go to [the barracks at] Lucea, as the police say, a true consent, or was it merely a submission to circumstances of authority against which he could not resist? He said in evidence that he considered himself to be under arrest. I am clearly of the opinion that, in those circumstances, the appellant was under restraint and was bound to submit to the wishes of the police officers.

After making the statement, C’s money was returned to him and he was allowed to go. The police officers were held liable for false imprisonment, as they had no

68 (1990) High Court, Barbados, No 1028 of 1985 (unreported).

69 (1979) High Court, Trinidad and Tobago, No 861 of 1975 (unreported). See also below, p 23.

70 (1964) 8 JLR 504 (Supreme Court, Jamaica).

71 *Clarke v Davis* (1964) 8 JLR 504 (Supreme Court, Jamaica), p 505.

reasonable cause for detaining C, and the defence under s 39 of the Constabulary Force Law<sup>72</sup> was not, therefore, available to them.<sup>73</sup>

In *Chong v Miller*,<sup>74</sup> a police constable, M, received a report that C was in possession of 'Peaka Peow' lottery tickets, which was an offence under the Gambling Law (Laws of Jamaica, No 28 of 1926). C was entering a tram when M called out to him. C got off the tram and, at the request of M, turned out his pockets without protest. No illegal tickets were found in C's possession and, in an action for false imprisonment brought against M, the first question was whether there had been an arrest or detention of C. The Full Court held on the facts that there had been a detention, since, although M never physically restrained or even touched C, C believed that if he tried to escape M would seize him, and 'in this he was correct, for [M], the defendant, said so'.

Another common example of a detention without physical restraint which may be sufficient to ground an action in false imprisonment is where a store detective or security officer, suspecting that a woman has stolen an item from the store, approaches her and 'invites' her to open her bag or to accompany him to the manager's office for questioning. In many cases, a person accosted in this way will comply with the 'invitation', whether in submission to the show of authority or in order to avoid an embarrassing scene in a public place.

An example of this type of situation is *McCollin v Da Costa and Musson Ltd*.<sup>75</sup> Here, the plaintiff entered the defendant's department store in Bridgetown shortly before closing time and selected an item. The cashier's till had already been closed for the day. The plaintiff therefore paid the exact purchase price to the cashier, but she could not be given a receipt. The cashier omitted to remove the electronic tag from the item, which she wrapped in the store's bag and handed to the plaintiff. As the plaintiff walked through the exit an alarm sounded and the fourth defendant, a security guard employed by Brink's Barbados Ltd, the third defendant, stepped across to the plaintiff and asked her if she had purchased anything from the store. The second defendant, an employee of Da Costa's, suggested that the plaintiff should return to the cashier for the tag to be removed. The plaintiff protested but handed the bag to the second defendant, who took it to the cashier for the tag to be removed from the item. The second defendant apologised to the plaintiff for any inconvenience that had been caused to her, and the plaintiff left the store. The plaintiff claimed damages for false imprisonment. Rocheford J (Ag) held that the actions of the fourth and second defendants amounted to a detention of the plaintiff against her will and all four defendants were liable for false imprisonment. He said:

Counsel for the plaintiff submitted that the invitation made by the fourth defendant to the plaintiff to go further back into the store and the invitation made by the second defendant to the plaintiff to go with him across to the counter nearby together amounted to an invitation coupled with a compulsion, and that the plaintiff was not free to go. He referred the court to *Meeting v Grahame-White Aviation Co Ltd*.<sup>76</sup> In that case, the plaintiff was met at his house by a works' police officer, a Mr Dorry, who

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72 Cap 72, 1953 edn.

73 See below, p 36.

74 [1933] JLR 80 (Full Court, Jamaica).

75 (1982) High Court, Barbados, No 213 of 1981 (unreported).

76 (1919) 122 LT 44.

informed him that his presence was desired at the defendant company's works. The plaintiff along with Mr Dorry and another works' police officer, a Mr Liddington, whom they met on the way, went to the defendant company's office. The plaintiff was taken or invited to go to the waiting room of the office to wait until he was wanted. The two works' police officers remained in the immediate neighbourhood of the waiting room in which was the plaintiff. The plaintiff asked what he was there for, what they wanted him for, and said that if they did not tell him he would go away. They told him that what they wanted him for was to make inquiries because there had been things stolen and he was wanted to give evidence. On that statement, he stayed. Then, a Metropolitan Police officer and a Mr Hickie arrived. The jury was asked the question, 'Had the plaintiff been detained in the waiting room before the detective and Hickie arrived?'. The answer was 'yes'. Warrington LJ said this:<sup>77]</sup>

On behalf of the defendant company, it is contended before us that there was no evidence that the plaintiff had been detained in the waiting room before the detectives and Hickie arrived. They say that he was perfectly free to go when he liked, and that he knew that he was free to go when he liked, that he could have gone away if he pleased; he did not desire to go away, and, accordingly, that he was never under any compulsion or under anything which could amount to any imprisonment. In my opinion, there was evidence on which the jury might properly come to the conclusion that, from the moment that the plaintiff had come under the influence of these two men, Dorry and Liddington, he was no longer a free man.

I have already found that the fourth defendant, who was dressed in a uniform that conveys the possession of some authority to arrest, approached the plaintiff and asked her if she had purchased anything from the store. It was reasonable for the plaintiff to believe, at that point in time, that she had been required to prove to the fourth defendant that she had purchased the item. She had not been given a receipt. This was a most damaging omission on the part of an employee of the first defendant. It is the fact that the plaintiff could not have proved, there and then, that she had purchased the item. It was reasonable for her to believe, also, that the fourth defendant, in the absence of being shown a receipt, would have been compelled to conclude that she had stolen the item. It must be noted that the second defendant stated in his evidence in cross-examination:

If an innocent person goes through the door onto the sidewalk, he (the security guard) would ask for a bill. If no bill was produced, he would suspect that the person took the item from Da Costa and Musson without proof of purchase, and detain him.

The plaintiff, at that moment in time, had the choice of leaving the store with the item and no receipt and thereby running the considerable risk of being arrested by the fourth defendant while on the sidewalk, or of abandoning the item in the store, and leaving the store without it, a very suspicious manner of behaving indeed, or of remaining in the store and proving that she had purchased the item. The first two choices were ruled out altogether as not being genuine options. She chose the third, and decided to remain in the store, notwithstanding the fact that she was in a hurry to get to her husband's office in time to obtain assistance in getting to her home. Her choice was not a free one. In my opinion, the principles set out in the statement of Warrington LJ in *Meering v Grahame-White Aviation Co Ltd*<sup>[78]</sup> should be adopted. There is, therefore, evidence on which I can conclude that the plaintiff, from that point in

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77 *Ibid*, p 46.

78 *Ibid*, p 46.

time, was no longer a free woman, for it cannot be said that she remained in the store willingly. In fact, she remained in the store because to do otherwise might have resulted in her arrest and could certainly have resulted in the forfeiture of her reputation for honesty.

Rocheford J (Ag) also found the second defendant, as well as the third and first defendants (as employees of the fourth and second defendants respectively), liable for false imprisonment.

The opposite conclusion was reached in *Bostien v Kirpalani's Ltd.*<sup>79</sup> In this case, the plaintiff had purchased a bedspread at the defendant's store. Two days later, she returned to the store to exchange it for one of a different colour. She was unable to produce the cash bill or the bag with which the bedspread had been sold. The store manager mistakenly formed the impression that the plaintiff had 'shoplifted' the bedspread that day and he refused to exchange it or to give it back to the plaintiff. The plaintiff, who was a graduate teacher at a well known school in San Fernando, became extremely angry at the accusation made against her and she telephoned her brother to come and 'see the matter out'. The plaintiff was invited to accompany the manager to his office and, after a brief discussion at which the plaintiff, her brother, a police constable and the manager were present, the manager again refused to exchange or to return the bedspread. The plaintiff and her brother then left the store.

Deyalsingh J held that the plaintiff had not been under restraint and the defendant was not liable for false imprisonment. He explained:

I find as a fact that at no time at all did the manager exercise or intend to exercise any restraint on the liberty of the plaintiff. There was no constraint over the plaintiff's person or will, either before Mr Christian or the police arrived on the scene, or after. She could, if she wished, have left at any time but chose to remain, not because she was under any restraint or because of any belief on her part that she was under any restraint, but rather to 'see the matter out'. The manager had, out of deference to her, invited her up to the office to inform her that he could not, as a result of his investigation, exchange the bedspread for her. He intended to keep the bedspread, but I am satisfied that no 'charge' or formal accusation was made to the plaintiff that she had stolen the bedspread and that no restraint was intended or exercised over the plaintiff's liberty on that day; neither did the plaintiff believe that she was under any such restraint.

## LAWFUL ARREST

It is a defence to an action for false imprisonment (as well as for assault and battery) that the restraint upon the plaintiff was carried out in the course of a lawful arrest, the onus of proof of the lawfulness of the arrest being on the defendant.<sup>80</sup> In the Commonwealth Caribbean, the common law principles have been heavily overlaid with statutory provisions giving powers of arrest and special defences to police officers, and the topic is one of considerable complexity. An arrest may be either with warrant or without warrant.

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<sup>79</sup> (1979) High Court, Trinidad and Tobago, No 861 of 1975 (unreported).

<sup>80</sup> *Cummings v Demas* (1950) 10 Trin LR 43 (West Indian Court of Appeal). See below, pp 32–36.

## Arrest with warrant

A warrant of arrest is an authority in writing, issued by a justice of the peace or magistrate, or by any court having civil or criminal jurisdiction, addressed to a police officer (the usual case) or to any other person, to arrest an offender and bring him before the court. A police officer or other person who arrests within the terms of the warrant will have a complete defence to any action for false imprisonment, assault or battery.

In most jurisdictions, statutory provisions give an arresting officer a defence where he arrests a person in obedience to a defective warrant or a warrant issued without jurisdiction. For instance, s 34 of the Constabulary Force Act (Jamaica) (formerly s 40 of the Constabulary Force Law, Cap 72, 1953 edn) provides:

When any action shall be brought against any constable for any act done in obedience to the warrant of any justice, the party against whom such action shall be brought shall not be responsible for any irregularity in the issuing of such warrant or for any want of jurisdiction of the justice issuing the same...

Where a constable arrests the wrong person (that is, a person other than the one named in the warrant), he may be liable for false imprisonment. In the Trirddadian case of *Dash v AG*,<sup>81</sup> a constable who arrested one Herbert Dash (of Diego Martin), instead of another Herbert Dash (of Belmont) named in the warrant, was held liable for false imprisonment. Characterising this as ‘a *bona fide* mistake by a careless and not over-bright policeman’, Cross J pointed out that there was ‘no onus on a person arrested on a warrant to prove he was not the person named therein’.

In another Trirddadian case, *Maharaj v AG*,<sup>82</sup> the warrants named the plaintiff as ‘Mary’, whereas her correct name was Kamaldaye Maharaj. The arresting constables gave evidence that the plaintiff was known to them as ‘Mary’, and there was no doubt that she was the person for whom the warrants were intended, and that she was well aware of that fact. Nevertheless, Mendonca J held that the constables had no defence to liability for false imprisonment. He explained:

Section 106(6) of the Summary Courts Act, Ch 4:20, provides, *inter alia*, that the warrant of arrest shall name or otherwise describe the person to be arrested. The defendants will be liable for the wrongful arrest of the plaintiff if she is not named or described in the warrants, even though she was the person charged with the offences and the party for whom the warrants were issued (see *Hoye v Bush*).<sup>[83]</sup> The question, therefore, it seems to me, comes to this: was the plaintiff named or described in the warrants?

81 (1978) High Court, Trinidad and Tobago, No 3293 of 1973 (unreported). In *Laird v AG* (1974) 21 WIR 416, where a constable served a summons on the wrong person, Fox JA took the view (dissenting) that ‘the proper course for the person served is to obey the summons in the first instance and then apply to the court to have the service set aside. The fact that the constable may have been mistaken in the identity of the person whom he has served should not be allowed to obviate the peril to the person of a warrant being issued for his arrest if he disobeys the summons’ (p 426). This view was grounded in public policy, since ‘in Jamaica at the present time, there is an overwhelming need to strengthen the sense of responsibility and discipline and to assert the supremacy of law and order in all sections of the community’.

82 (2002) High Court, Trinidad and Tobago, No 2587 of 1998 (unreported). This judgment also contains an interesting summary of recent awards of damages in similar cases of false imprisonment.

83 (1840) 133 ER 548.

The warrants named the plaintiff as Mary. According to the evidence on behalf of the defendants, the plaintiff was known to them as Mary and was referred to by them as Mary and she never protested that her name was otherwise. It has, however, been established that the plaintiff's name is Kamaldaye Maharaj and not Mary. I do not view the defendants' evidence as saying that they knew her only name to be Mary. I think this is consistent with the fact that when the plaintiff was brought to the Arima Police Station her name was recorded in the station diary as 'Mary Maharaj'. The case of *R v Hood*<sup>[84]</sup> demonstrates the importance of naming the person in the warrant fully and accurately. In that case the warrant directed the constable 'to arrest Hood by whatever name or names he may be called, being one of the sons of Samuel Hood.' Samuel Hood had four sons living together. It appeared that the Hood arrested, namely George Hood, was the right person. The Court held that the warrant gave no authority to arrest George Hood. It is clear on the evidence that when the warrants were obtained, it was intended to name the plaintiff, but the warrants failed to do so. As was stated in *Greenwood v Ryan*,<sup>[85]</sup> if a man whose name is AB calls himself CD he ought not to be named as CD in the warrant as that is not his name. I therefore hold that the warrants do not name the plaintiff.

Counsel for the defendants, however, submitted that Mary was an alias and therefore it came within the requirement to 'otherwise describe' the person to be arrested in section 106(6) of the Summary Courts Act. However, it is clear that Mary was not intended to be a description of the plaintiff but rather to name the plaintiff. 'Mary' in my judgment cannot amount to a description of the plaintiff. It is important to note that the warrant is directed to 'all constables'. The person to be arrested must be described with sufficient detail and clarity to enable any police officer to apprehend the correct person. There could have been no objection if the warrants contained, for example, a physical description of the plaintiff with the addendum of such words as 'known as Mary' (see *Greenwood v Ryan, supra*).

The warrants, therefore, in my judgment, failed to describe or to name the plaintiff. In the circumstances, the arrest of the plaintiff was not in obedience to the warrants.<sup>[86]</sup>

### Arrest without warrant

At common law, certain powers of arrest without warrant are given to police officers and private citizens. One who carries out an arrest within the scope of any such power will have a good defence to an action for false imprisonment, as well as for assault and battery. It is a cardinal principle, however, that in the absence of statutory authority a police officer has no right or power to *detain a person for questioning* unless he first arrests him.<sup>87</sup> As White J emphasised in the Jamaican case of *Marshall v Thompson*,<sup>88</sup> where a constable 'takes a suspect to the police station

84 (1830) 168 ER 1272.

85 (1846) 1 Legge 275 (Aus).

86 Mendonca J also held that the constables were not protected by s 36(1)(h) of the Summary Courts Act, Ch 4:20, which provides that 'any police officer may arrest without a warrant... any person for whom he has reasonable cause to believe a warrant of arrest has been issued', since this was not a case of arrest without a warrant but one of arrest under warrants which had been issued, albeit that they were defective.

87 *R v Lemsatef* [1977] 2 All ER 835; *Pedro v Diss* [1981] 2 All ER 59; *Collins v Wilcock* [1984] 3 All ER 374; *Jack v Bruce* (1950) 10 Trin LR 68 (High Court, Trinidad and Tobago). In *Davidson v Williams* (1990) High Court, Trinidad and Tobago, No 2085 of 1988 (unreported), it was explained that the police may interrogate a person who has been lawfully arrested, provided that the interrogation is not 'oppressive'.

88 (1979) Supreme Court, Jamaica, No CL M-101 of 1976 (unreported). See also *Francis v Commissioner of Police* (2001) Supreme Court, The Bahamas, No 1432 of 1999 (unreported); *Francis v AG* (2001) Supreme Court, The Bahamas, No 113 of 1998 (unreported).

without arresting him in order to question him, then to decide, in the light of his answers, whether to charge him, this would be unlawful and would constitute [false] imprisonment’.

Common law powers of arrest without warrant may be summarised thus:

- A police officer or private citizen may arrest without warrant a person who, in his presence, commits a breach of the peace, or who so conducts himself that he causes a breach of the peace to be reasonably apprehended. There is no power to arrest after a breach of the peace has terminated, unless the arresting officer or private citizen is in fresh pursuit of the offender or reasonably apprehends a renewal of the breach of the peace.
- A police officer or private citizen may arrest without warrant (a) a person who is in the act of committing a felony;<sup>89</sup> and (b) a person whom he suspects on reasonable grounds to have committed a felony. But in (b), there is a distinction between arrest by a police officer and arrest by a private citizen, in that a private citizen who wishes to justify such an arrest must prove that a felony has actually been committed, whether by the person arrested or by someone else; and if, in fact, no such felony has been committed, he will be liable for false imprisonment and/or assault and battery. It will be no defence that he had reasonable grounds for believing the arrestee to be guilty. A police officer, on the other hand, has a good defence, whether a felony has actually been committed or not, so long as he can show that he had reasonable grounds for suspicion. This is known as the rule in *Walters v WH Smith and Son Ltd*.<sup>90</sup>
- A police officer, but not a private citizen, may arrest without warrant any person whom he suspects on reasonable grounds to be about to commit a felony.

The Criminal Law Act 1967 abolished the distinction between felonies and misdemeanours, as far as England and Wales was concerned, and, in codifying the common law powers of arrest on suspicion, replaced the term ‘felony’ with ‘arrestable offence’. Sections 2 and 3 of the Criminal Law Act, Ch 10:04 (Trinidad and Tobago) are along the same lines.<sup>91</sup> Section 2(1) abolishes the distinction between felony and misdemeanour, and s 3(1) defines ‘arrestable offence’ as including capital offences, offences for which a person (not previously convicted) may be sentenced to imprisonment for a term of five years, and attempts to commit any such offences.

Section 3 further provides:<sup>92</sup>

89 There is no power at common law to arrest on suspicion of commission of a misdemeanour. Thus, in *Shiwamangal v Jaikaran and Sons Ltd* [1946] LRBG 308 (Supreme Court, British Guiana), Luckhoo CJ (Ag) held that the defendant, a private person, could not justify the arrest of a person suspected of having committed the offence of wilful trespass, as the offence was merely a misdemeanour, ‘for which class of offence a private person can never justify an arrest. So jealous is the law of the liberty of the subject that a private person cannot properly arrest another for an offence which is a misdemeanour without going to a magistrate and first obtaining a warrant’ (p 315). It may be added that a police constable would be in no better a position, in the absence of a statutory power to arrest without warrant.

90 [1914] 1 KB 595. See also *Narayan v Kellar* [1958] LRBG 45 (Supreme Court, British Guiana), p 64; *Salmon v Roache* (1995) Court of Appeal, Jamaica, Civ App No 23 of 1995 (unreported), per Patterson JA.

91 See *Samlal v AG* (1998) High Court, Trinidad and Tobago, No S 3801.

92 Section 3(3) and (4) reproduce the rule in *Walters v WH Smith and Son Ltd* [1914] 1 KB 595 in statutory form.

- (2) Any person may arrest without warrant anyone who is, or whom he, with reasonable cause, suspects to be, in the act of committing an arrestable offence.
- (3) Where an arrestable offence has been committed, any person may arrest without warrant anyone who is, or whom he with reasonable cause suspects to be, guilty of the offence.
- (4) Where a police officer, with reasonable cause, suspects that an arrestable offence has been committed, he may arrest without warrant anyone whom he with reasonable cause suspects to be guilty of the offence.<sup>[93]</sup>
- (5) A police officer may arrest without warrant any person who is, or whom he with reasonable cause suspects to be, about to commit an arrestable offence.
- (6) For the purposes of arresting a person under any power conferred by this section, a police officer may enter (if need be, by force) and search any place where that person is or where the police officer with reasonable cause suspects him to be.

Section 4(1) provides that:

...a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large.

### Arrest on reasonable suspicion

A police officer or private citizen who arrests a person without warrant on reasonable suspicion of having committed a felony (or arrestable offence) has the burden of proving that he had reasonable cause for believing that the arrestee was guilty of the offence. In carrying out an arrest, a police constable may often be in a difficult position. On the one hand, if he delays making an arrest, vital evidence may be lost and a crime may go unpunished; on the other hand, if he acts too hastily in arresting, he may be held liable for false imprisonment. The test for determining whether an arresting officer had reasonable cause for making the arrest is whether a reasonable person, assumed to know the law and possessed of the information which was in fact possessed by the officer, would believe that there was at the time of the arrest reasonable and probable cause for it.<sup>94</sup>

93 See *Paul v AG* (1998) High Court, Trinidad and Tobago, No CV 369 of 1982 (unreported); *Olivierre v Maharaj* (1994) High Court, Trinidad and Tobago, No 72 of 1985 (unreported); *Barcoo v AG* (2001) High Court, Trinidad and Tobago, No 1388 of 1989 (unreported). Also, powers of arrest in certain circumstances (eg, where a person is found in possession of anything which may reasonably be suspected to be stolen property) are given to police officers in Trinidad and Tobago by s 36(1) and (2) of the Police Service Act, Ch 15:01. See *Sibbons v Sandy*, below, p 28; *Sahabdool v AG* (2002) High Court, Trinidad and Tobago, No SCV 2176 of 1988 (unreported). Compare the Police Act, Cap 167 (Barbados), s 20(1)(a), which empowers any member of the police force to arrest without warrant any person whom he suspects upon reasonable grounds to have committed a felony. See also Police Act, Cap 244, ss 22, 26 (Grenada); Police Act, Cap 187, s 22 (Antigua); Police Act, Cap 16:01, s 17 (Guyana); Police Act, Cap 109, ss 41, 43 (Belize); Police Act, Cap 167, s 22 (Montserrat); Constabulary Force Act, s 15 (Jamaica). In *Johnson v AG* (2000) Supreme Court, The Bahamas, No 895 of 1998 (unreported), Marques J pointed out that s 30 of the Police Act, Ch 191, gives to a police officer all the powers that he may be invested with at common law, including the common law power to arrest on reasonable suspicion of the commission of a felony.

94 *Dallison v Caffery* [1964] 2 All ER 610, p 619, per Diplock LJ; *Williams v AG* (2001) Supreme Court, The Bahamas, No 592 of 1995 (unreported); *Seetaram v AG* (2001) High Court, Trinidad and Tobago, No 35 of 1999 (unreported).

Among Caribbean illustrations of the exercise of powers of arrest are *Sibbons v Sandy* and *Jangoo v Gomez*. In *Sibbons v Sandy*,<sup>95</sup> the plaintiff was a vendor in the San Fernando Central Market. Two other vendors in the market reported to the defendant constable (S) that they had lost a bag of oranges which, they said, they had seen at the plaintiff's stall. As a consequence, S arrested the plaintiff and, later the same day, handed him over to another police officer (F), who preferred charges of larceny of the oranges against the plaintiff and locked him in a police cell. Before and after his arrest, the plaintiff had insisted that he had bought the oranges from an Indian boy who would be returning to the market the following Tuesday. The plaintiff subsequently appeared before the magistrate and the charge of larceny of the oranges was dismissed.

Eddoo J held that the arrest was unlawful, as S and F had no reasonable and probable cause to suspect that the plaintiff had stolen the oranges, and they were liable for false imprisonment. He explained:

The questions which must be considered are:

- (a) whether Sandy and Fortune had reasonable and probable cause for suspecting that the plaintiff had stolen the oranges;
- (b) whether they were justified in arresting and imprisoning him without a warrant.

As police officers, both Sandy and Fortune had the common law right to arrest without warrant any person whom they reasonably suspected of having committed a felony (now 'an arrestable offence'), whether the offence had been committed or not. This has been confirmed by the power conferred upon them by s 36(1)(d) of the Police Service Act, Ch 15:01.

There is no doubt that both Sandy and Fortune acted on information received. They had no personal knowledge of any of the relevant facts, and so, it is necessary to enquire whether the information they had justified them in giving credit to it, and whether the suspicion which it aroused was a reasonable suspicion.

There is also no doubt that the plaintiff, from the very inception of the accusation against him, was making a claim of right to the oranges which he said he bought from an Indian boy, and that the boy would be returning on the following Tuesday with more oranges. The statement given to Fortune on the day of arrest is to the same effect.

In *Irish v Barry*, Wooding CJ, speaking about 'proper and sufficient grounds for suspicion' and of arrest without warrant, had this to say:<sup>[96]</sup>

The right or power to arrest without warrant ought never to be lightly used. Those who possess it ought, before exercising it, to be observant, receptive and open minded, not hasty in jumping to conclusions on inadequate grounds. Caution should be observed before depriving any person of his liberty, and more especially so when no prejudice will result from any consequent delay. I am not in the least concerned, because I think it wholly irrelevant, that further enquiry may have elicited no additional information or thrown no greater light on the investigation in hand. What is important is that in such a case as this, no person should exercise the power of arrest unless he had proper and sufficient grounds of suspicion. If he does, then he is acting hastily and/or ill-advisedly. In all cases, therefore, the facts, known personally and/or obtained on information, ought carefully to be examined...

95 (1983) High Court, Trinidad and Tobago, No 1001 of 1975 (unreported).

96 (1965) 8 WIR 177, p 182.

I have no doubt that Sandy acted precipitately in arresting the plaintiff. The plaintiff testified that he had been carrying on his business as a vendor at the Central Market since 1941. He was known to Sandy and to Sonnyboy and Nanan, and presumably to many other persons. Sandy made no inquiries, even though the plaintiff was insisting that he had bought the oranges from an Indian boy who would be returning the following Tuesday. He made no inquiries from persons who were present or easily accessible, for example, from Louisa James, who carried on her business at the adjoining stall. She gave evidence in the magisterial proceedings in support of the plaintiff's allegations. The offence was compounded when the plaintiff was put into the custody of Fortune. Although Fortune testified that he made inquiries before charging the plaintiff, it is evident that he made no attempt to elicit information from Louisa James or other persons who were accessible, more so having regard to the plaintiff's insistence that he had bought the oranges. There was no reason why either Sandy or Fortune could not have waited until the following Tuesday when the plaintiff said that Koylass would be returning. This was not a case where it was necessary to arrest the plaintiff in order to prevent his escape, even if Sandy or Fortune harboured a suspicion that the plaintiff had stolen the oranges.

The evidence given by Clifton Koylass in the magisterial proceedings was to the effect that he had sold the oranges to the plaintiff. This evidence was not assailed in cross-examination. That of Louisa James was to the effect that Koylass first approached her to sell the oranges, and that, after she refused the offer, the plaintiff bought them. Her evidence also was not assailed in cross-examination. It is evident that the magistrate discharged the plaintiff on the basis of this evidence. It is reasonable to assume that, if Sandy and Fortune had taken the trouble to enquire from these two witnesses the true state of the facts, they would not have arrested and imprisoned the plaintiff so precipitately. I hold that the defendants have failed to discharge the burden of proving that they had reasonable or probable cause for arresting and imprisoning the plaintiff. His claim for unlawful arrest and false imprisonment succeeds.

In *Jangoo v Gomez*,<sup>97</sup> J was employed as a Senior Clerk at the Port Authority, where he had worked for over 17 years. One Friday afternoon, as he was leaving the premises on his way home, J found a parcel behind a container. He took the parcel to S, a customs guard. S told J to take it to the nearby security office, which he did, showing the parcel to G, an estate constable, and another security officer, and explaining how he found it. G called J a 'thief' and accused him of having stolen the parcel. G arrested J and later took him to a police station. J was kept in custody until the following Monday morning. He was charged with the offence of unlawful possession. The charges were dismissed by the magistrate. J sued G for, *inter alia*, false imprisonment. Mustapha Ibrahim J held that G had no reasonable grounds for suspecting that J had committed a theft and he was liable for false imprisonment. He explained:

A claim for false imprisonment...is really an action of trespass to the person. Once the trespass is admitted or proved, it is for the defendant to justify the trespass and he must justify it by plea (see the judgment of Goddard LJ in *Dumbell v Roberts*).<sup>[98]</sup> In this case, the trespass is admitted and also proved. The defendant contends that the arrest and detention was lawful. The duty of the police when they arrest without warrant is set out in the judgment of Scott LJ in *Dumbell v Roberts*:<sup>[99]</sup>

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97 (1984) High Court, Trinidad and Tobago, No 265 of 1978 (unreported).

98 [1944] 1 All ER 326, p 331.

99 *Ibid*, pp 329–33.

The duty of the police when they arrest without warrant is, no doubt, to be quick to see the possibility of crime, but equally they ought to be anxious to avoid mistaking the innocent for the guilty. The British principle of personal freedom, that every man should be presumed innocent until he is proved guilty, applies also to the police function of arrest—in a very modified degree, it is true, but at least to the extent of requiring them to be observant, receptive and open minded, and to notice any relevant circumstance which points either way, either to innocence or to guilt. They may have to act on the spur of the moment and have no time to reflect and be bound, therefore, to arrest to prevent escape; but where there is no danger of the person who has *ex hypothesi* aroused their suspicion that he probably is an ‘offender’ attempting to escape, they should make all presently practicable enquiries from persons present or immediately accessible who are likely to be able to answer their enquiries forthwith. I am not suggesting a duty on the police to try to prove innocence—that is not their function; but they should act on the assumption that their *prima facie* suspicion may be ill-founded. That duty attaches particularly where slight delay does not matter because there is no probability, in the circumstances of the arrest or intended arrest, of the suspected person running away.

These observations of the learned Lord Justice are very relevant to the facts and circumstances of this case. Estate constables are not police officers within the provisions of the Police Service Act, Ch 15:01. They are constables within the provisions of the Supplemental Police Act, Ch 15:02. Their general powers are set out in s 14(1) of the Supplemental Police Act. It reads thus:

14(1)... Every estate constable, throughout the division in which the estate to which he belongs is situated...shall have all such rights, powers, authorities, privileges and immunities and be liable to all such duties and responsibilities as any member of the police service below the rank of corporal now has or is subject or liable to or may hereafter have or be subject or liable to either by common law or by virtue of any law which now is or may hereafter be in force in Trinidad and Tobago.

It is by virtue of this section that the estate constables exercise powers of arrest, and the obligations and duties placed upon them in the exercise of these powers, as set out in the judgment of the learned judge, are to ensure that the powers are not exercised arbitrarily.

In this case, the defendant, Gomez, made no enquiries of anyone. He acted in clear breach of the directions set out above. I hold that there was no ground whatever for arresting the plaintiff and preferring the criminal charge against him. The defendant, Gomez, acted with great haste and without knowing or caring to know what were the facts. He had made up his mind to arrest and prosecute the plaintiff... I hold that the defendant has failed to justify the trespass and the plaintiff succeeds on the claim of false imprisonment.

### Other statutory powers of arrest

Police constables, customs officers, forestry agents, numerous other officials and even, in some cases, private individuals, are given powers of arrest without warrant by a wide variety of statutory provisions. Examples are: s 41 of the Highways Act, Cap 289 (Barbados); s 41 of the Firearms Act, Ch 198 (The Bahamas); s 48 of the Road Traffic Act, Ch 204 (The Bahamas); s 70 of the Summary Jurisdiction (Procedure) Act, Cap 10:02 (Guyana); s 18 of the Forest Act, Cap 134, Vol V Jamaica;

s 23 of the Dangerous Drugs Act, Cap 90 (Jamaica); s 28 of the Main Roads Act, Cap 231 (Jamaica); s 26 of the Coinage Offences Act, Ch 11:15 (Trinidad and Tobago); s 104 of the Summary Courts Act, Ch 4:20 (Trinidad and Tobago). These powers of arrest are normally exercisable where a person is found committing, or is reasonably suspected to be committing or to have committed, the offence or offences covered by the statute. In considering whether a defendant is entitled to rely on such a provision as a defence to an action for false imprisonment, the court may be faced with difficult problems of statutory interpretation.

A case in which there was no difficulty in applying a statutory provision giving a power to arrest without warrant is the Trinidadian case of *Habre v AG*,<sup>100</sup> which also serves as a reminder that police officers in all jurisdictions have wide statutory powers to regulate road traffic, and that indiscreet and unco-operative conduct by a motorist can easily put him 'on the wrong side of the law'. In this case, the plaintiff had parked his car on the pavement for a few minutes, while he attended to closing the store in which he worked. This constituted an offence under the Motor Vehicles and Road Traffic Act, Cap 45:50. He was approached by the defendant constable, who asked him for his driver's licence and insurance certificate. The plaintiff did not produce the documents and, when asked for his name and address, replied, 'You know who I am; all that information will be given at the police station'. Jones J held that, in these circumstances, the defendant was entitled to arrest the plaintiff under s 9 of Cap 45:50, which provides:

Any constable may arrest without a warrant the driver or conductor of any motor vehicle who within view commits any offence under this Act or under the Regulations, unless the driver or conductor either gives his name and address or produces his permit for examination.

Particular difficulty has arisen in interpreting those provisions which give powers of arrest to constables in relation to persons 'committing' or 'found committing'<sup>101</sup> (as opposed to 'reasonably suspected to be committing') certain offences. If a constable believes on reasonable grounds that a person is committing a particular offence and arrests that person, but it is later established that the arrestee was not in fact committing the offence, the question may arise as to whether the constable is liable for assault and false imprisonment grounded on the unlawfulness of the arrest. In the English case of *Wiltshire v Barrett*,<sup>102</sup> it was held that two constables who had, in purported exercise of their statutory power under s 6(4) of the Road Traffic Act 1960 to arrest any motorist 'committing an offence' under s 6 of that Act, arrested a motorist whom they reasonably suspected to be drunk, were not liable for assault, notwithstanding that the motorist was subsequently found to be innocent. It was held that it was sufficient for the constables to show that the motorist was *apparently* committing an offence under the statute.

Similar issues were under consideration in Jamaica and Trinidad and Tobago in *Chong v Miller* and *Cummings v Demas* respectively, but the courts in those cases took a different view from that taken in *Wiltshire v Barrett*.

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100 (1996) High Court, Trinidad and Tobago, No HCA 3800 of 1990 (unreported).

101 See, for example, Summary Courts Act, Ch 4:20, s 104 (Trinidad and Tobago), which provides that any person who is found committing any summary offence may be taken into custody, without a warrant, by any police officer.

102 [1965] 2 All ER 271.

In *Chong v Miller*,<sup>103</sup> the plaintiff was arrested by the defendant constable on suspicion of being in possession of illegal lottery tickets. No such tickets were, in fact, found in his possession. The defendant relied, *inter alia*, on s 19 of the Constabulary Law (Law 8 of 1867), which empowered a constable to arrest without warrant any person found committing any offence punishable upon indictment or summary conviction. Clark J, delivering the judgment of the Jamaican Full Court, said that:

...‘found committing’ means what it says. As was said by Maule J in *Simmons v Millingen*,<sup>[104]</sup> ‘found committing’ is equivalent to being taken *in flagrante delicto*. To justify arrest under s 19 of Law 8 of 1867, the constable must have perceived with his own senses (whether seeing, hearing or otherwise) the commission of the offence in question. In fact, of course, the plaintiff was found in possession of no lottery tickets and was, therefore, not committing any offence at all at the time he was arrested.

Thus, s 19 did not afford a defence to liability for false imprisonment in this case.

Similar questions of statutory construction were in issue in *Cummings v Demas*,

**Cummings v Demas (1950) 10 Trin LR 43, West Indian Court of Appeal, on appeal from the Supreme Court, Trinidad and Tobago**

D and another police constable were present at a public entertainment known as a ‘Coney Island Show’. Believing that an illegal game of chance was being played, D arrested R, who was in charge of the game. As D was attempting to collect the money lying on the gaming board, the appellant, the manager of the show, held D’s hand to prevent him from removing the money and refused to let go. D then arrested the appellant for obstructing a constable in the execution of his duty. The appellant struggled violently but was eventually subdued and taken to the police station, where he was charged with obstructing a constable and resisting arrest. R was later acquitted of the charge of carrying on a public lottery contrary to s 7(1)(e) of the Gambling Ordinance, Ch 4, No 20, and the appellant was acquitted of the charges of obstruction and resisting arrest. The appellant sued D for damages for, *inter alia*, false imprisonment.

*Held*: (a) the arrest of R was not justified; (b) in seizing the money, D was not acting in the execution of his duty; and (c) when the appellant attempted to prevent D from removing the money, he was not committing any offence for which his arrest could be justified. D was, therefore, liable for false imprisonment.

[Section 104 of the Summary Courts Ordinance, Ch 3, No 4 (now Ch 4:20), which provided that ‘any person who is found committing any summary offence may be taken into custody without warrant by any constable’,<sup>105</sup> and s 21(1)(a) of the Police Ordinance, Ch 11, No 1, which provided that ‘it shall be lawful for any member of the Force to arrest without a warrant any person committing an offence punishable either upon indictment or upon summary conviction’,<sup>106</sup> were interpreted as authorising arrest by a constable only where an arrestee was in fact committing an offence at the time of the arrest. It was not sufficient that the arresting

103 [1933] JLR 80. See also *R v Sampson* (1954) 6 JLR 292 (Court of Appeal, Jamaica).

104 (1846) 135 ER 1051.

105 In *Bruno v AG* (1985) High Court, Trinidad and Tobago, No 671 of 1978 (unreported), Davis J held that a constable was entitled to arrest a person under s 104 for using obscene language (contrary to s 49), which was a summary offence.

106 See also Constabulary Force Act (Jamaica), s 15.

officer reasonably believed the arrestee to be committing an offence, if no offence was in fact being committed.]<sup>107</sup>

Collimore, Malone and Worley CJJ stated:

The gist of the action [for false imprisonment] is the mere imprisonment: the plaintiff need not prove that the imprisonment was unlawful or malicious, but establishes a *prima facie* case if he proves that he was imprisoned by the defendant; the onus then lies on the defendant of proving a justification and he is entitled to succeed if he pleads and proves that the imprisonment was legally justifiable (*Halsbury's Laws of England*, 2nd edn, Vol 33, paras 67 and 80).

Accordingly, when the appellant had proved that he was arrested and imprisoned by the respondents, the onus lay upon them to justify their action. We agree that the action of the appellant in grasping the hand of Demas and so hindering him, even temporarily, from taking up the money lying on the gaming table constituted an obstruction, but it was not an offence unless Demas was at the time acting in the execution of his duty, and this depends upon the questions:

- (a) whether the arrest of Romero was legally justified; and
- (b) whether Demas had any right to seize the money either as a right ancillary to the arrest of Romero, or as a right independent of the right to arrest.

The first question necessitates consideration of the right of a member of the police force of the colony to arrest without a warrant for offences under the Gambling Ordinance and for other summary conviction offences, and it is as well to approach the question from the standpoint of the position of the police at common law.

Although many statutory duties are nowadays imposed upon the police, the principle still remains that, in view of the common law, a policeman is only 'a person paid to perform, as a matter of duty, acts which, if he were so minded, he might have done voluntarily' and, as Scott LJ intimated in the Court of Appeal in his judgment in *Leachinsky v Christie*,<sup>[108]</sup> the foundation on which the freedom of the individual rests is the protection afforded him by the court against unauthorised arrest. Every arrest, whether made by a policeman or by a private individual, is unlawful and constitutes an actionable wrong unless it falls within one or other of the clearly defined cases where the law allows it.

A constable's powers of arrest are derived from three sources: (1) the common law; (2) particular statutes; and (3) the warrant of a magistrate. We observe, first, that s 11 of the Gambling Ordinance provides that any justice who is satisfied by proof upon oath that there is reasonable ground for believing that any place is kept or used as a common gaming house (and this Coney Island show was being so used) may issue a warrant authorising any constable to enter such place, make search therein, arrest all persons there and seize all appliances for gambling and all moneys found therein. Moreover, the section further provides that whenever, owing to the lateness of the hour or other reasonable cause, it shall be inconvenient to obtain a warrant, then it shall be lawful for any commissioned officer of police, or any non-commissioned officer of police not under the rank of sergeant, by night or day, without warrant, to enter any place which he has reasonable grounds for believing is kept or used as a common gaming house, and any such officer shall, upon such entry, have the same powers of search, arrest and seizure as may be exercised by a constable duly authorised by a warrant. It is, however, further provided that no such entry without a warrant shall be made unless such officer is, at the time of entry, in the dress and uniform of the police force.

107 The principle in *Cummings v Demas* was followed in *Bolai v St Louis* (1963) 6 WIR 453, and in *Wade v Cole* (1966) High Court, Trinidad and Tobago, No 882 of 1959 (unreported).

108 [1945] 2 All ER 395.

Sergeant Demas had, it is admitted, not armed himself with such a warrant, nor was any attempt made to bring his action within the purview of the above mentioned provisos to the section. No other section of the Gambling Ordinance confers any power of arrest, and the first named respondent's action can therefore only be justified either at common law or under other particular statutes conferring a general power of arrest.

The common law powers of arrest without warrant are confined to treasons, felonies and breaches of the peace, and these powers the police share with every citizen. The only additional power, under common law, that a constable possesses is the right of arrest on reasonable suspicion that a treason or felony has been committed and of the person arrested being guilty of it (*Halsbury*, Vol 25, para 533). A breach of the peace may be committed when a person obstructs a public officer in the execution of his duty: *Spilsbury v Micklethwaite*,<sup>[109]</sup> per Lord Mansfield CJ. The arrest of the appellant could, therefore, only be justified under the common law provided that Demas was in truth and in fact acting in the execution of his duty when the appellant obstructed him, which brings us back to the justification of the arrest of Romero and/or the seizure of the money.

This arrest was not made under authority of a warrant, nor was it justifiable under the common law or under s 11 of the Gambling Ordinance, and there remain only two statutory provisions available to the respondents; these are s 104 of the Summary Courts Ordinance, Ch 3, No 4 and s 21 of the Police Ordinance, Ch 11, No 1. The former provides (omitting words irrelevant to our present purpose), 'any person who is found committing any summary offence may be taken into custody without warrant by any constable'. Sub-section (1) of s 21 of the Police Ordinance is as follows:

- (1) It shall be lawful for any member of the Force to arrest without a warrant—
  - (a) any person committing an offence punishable either upon indictment or upon summary conviction...

The respondents' case, therefore, was based upon the contention that the two above mentioned sections, which confer upon constables a general power to arrest persons committing or found committing an offence punishable on summary conviction, must be construed as conferring by implication power to arrest persons reasonably suspected of committing such an offence: and in those few words lies the crux of this appeal.

The first observation on this is that if such were the intention of the legislature, nothing would have been easier than to say so in express words. There are numerous instances in other enactments where such express words have been used when the legislature clearly intended to confer the power to arrest upon suspicion; see, for example, Summary Offences Ordinance, Ch 4, No 17, ss 35, 44, 65, and Larceny Ordinance, Ch 4, No 11, s 40... But these comparisons, though significant, are not conclusive:

Our duty is to take the words as they stand and to give them their true construction, having regard to the language of the whole section and, as far as relevant, of the whole Act, always preferring the natural meaning of the word involved, but nonetheless always giving the word its appropriate construction according to the context.<sup>[110]</sup>

It is the duty of the court in construing sections of this nature (said Lord Wright in the same case (p 389)) 'to balance the two conflicting principles, the one that the liberty of the subject is to be duly safeguarded; the other that the expressed intention of the legislature to give powers of arrest beyond those existing at common law should not be too narrowly construed. But in the end, the issue falls to be ascertained by deciding

109 (1808) 127 ER 788, p 789.

110 *Barnard v Gorman* [1954] AC 378, p 384, per Viscount Simon LC.

what is the correct meaning to be attributed to the words of the particular section which gives the power, read according to the recognised rules for construing statutes.

The construction of similar provisions in particular English statutes has been considered by the courts there from time to time with results which are not always easy to reconcile. The cases are well known and we do not propose to review them in detail. They were all considered in the House of Lords in the case of *Barnard v Gorman*. The highest at which the result of the English cases can be put is, we think, expressed in the note to *Halsbury*, para 119, note (f) in the 1949 Supplement:

There is authority for the proposition that the natural construction of a section conferring a power of arrest in the case of the commission of an offence is that it confers a power of arrest in the case of an honest belief on reasonable grounds that the offence has been committed, if the character of the offence is such that in the interests of public safety, or on account of threatened danger to life, limb or property, prompt action is called for.

The note continues:

This proposition also received certain approval of the Court of Appeal in *Barnard v Gorman*, but the House of Lords regarded the question as depending upon the contents of the particular provision concerned rather than upon any supposed general rule of construction.

The problem which faces us is not, as in the English cases, the construction to be put upon a section having reference to particular offences or classes of offences, the character of which can be estimated with reasonable certainty. We have to construe a section which, we believe, has no statutory equivalent in England and which confers a power of arrest in respect of not only all felonies, but also all offences punishable on summary conviction, that is to say, the thousand and one offences, mostly the creatures of modern statutes, which are triable in a magistrate's court. Some of these are petty and some are grave; some may affect the public safety and threaten danger to life, limb or property; others are merely *mala prohibita* and may not even require the element of *mens rea* in the offender. It follows, therefore, that the construction contended for by the respondents, if accepted, will take us much further than any English decision has gone and will confer on the police a power to arrest for misdemeanours (using that term in the wider connotation of all offences other than treasons or felonies) vastly greater than their common law powers.

We cannot accept that construction. In our view, the rule which we must apply is that enunciated by Lord Wright in *Barnard v Gorman*:<sup>[111]</sup>

I thus here define the ambit of the power to detain from the actual language of the statute and not from any implication. I am not prepared to construe the power to detain by holding that 'offender' in the relevant section means actual offender and then reading in by implication as a further definition or extension of the power to detain such words as 'the offender (that is, the actual offender) or such person as the officer reasonably and honestly believes to be an offender'. There are statutes where power to arrest without warrant on reasonable cause to suspect is given in express terms, but, in general, I think such an extension of the express power merely by implication is unwarranted. As Pollock CB said in *Bowditch v Balchin*,<sup>[112]</sup> 'In the case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'.

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111 *Ibid*, p 393.

112 (1850) 155 ER 165, p 166.

We must not give the statutory words a wider meaning merely because, on a narrower construction, the words might leave a loophole; if, on the proper construction of the section, that is the result, it is not for judges to attempt to cure it.

In our view, therefore, the learned Chief Justice misdirected himself in holding that it was sufficient justification for the respondents to show that they honestly and reasonably believed that Romero was committing an offence at the time of his arrest. So stated, the terms of the proposition are far too wide and cannot be supported by authority.

We pass now to consider the Solicitor General's contention that the respondent, Demas, had a right to seize the money on Romero's table, if he believed that an unlawful game was being played, and that this right existed independently of any right to arrest Romero. No authority was given for this proposition and, in the absence of any special local statutory provision, the law on this point is the same as that of England, which is stated in *Halsbury*, Vol 9, para 130, as follows:

A constable, and also, it seems, a private person, may upon lawful arrest of a suspected offender take and detain property found in the offender's possession, if such property is likely to afford material evidence for the prosecution in respect of the offence for which the offender has been arrested.

The origin of the right is the interest of the State in the person charged being brought to trial, which interest necessarily extends as well to the preservation of material evidence of his guilt or innocence as to his custody for the purpose of trial. But this presupposes a lawful arrest.

The law is also stated rather more fully in *Halsbury*, Vol 25, para 538:

A constable may, upon the lawful arrest of a suspected offender, take and detain property found in his possession if the property is likely to afford material evidence in respect of the offence charged, and may retain it for use in court against the person arrested until the conclusion of the trial. A constable should not take property not in any way connected with the offence, but the seizure and detention, otherwise unlawful, of documents and articles in the possession and control of a person arrested will be excused if it should subsequently appear that they are evidence of a crime committed by anyone.

The seizure of the money could, therefore, only be justified by establishing either that Romero's arrest was lawful or that he or someone had committed an offence of which the money was material evidence. As the respondents have failed to establish either of these justifications, it must follow that they have not discharged the onus of showing that Sergeant Demas was acting in the execution of his duty in seizing the money and that the appellant was committing an offence in obstructing him.

### **Statutory protection for constables**

Section 33 of the Constabulary Force Act (Jamaica) provides:

Every action to be brought against any constable for any act by him in the execution of his office, shall be an action on the case as for a tort; and in the declaration it shall be expressly alleged that such act was done either maliciously or without reasonable or probable cause; and if at the trial of any such action the plaintiff shall fail to prove such allegation he shall be non-suited or a verdict shall be given for the defendant.

This section in effect reverses the burden of proof in actions for false imprisonment by requiring the plaintiff to establish lack of reasonable and probable cause or malice on the part of the constable, whereas at common law, the onus is on the defendant to show that he had reasonable cause for the detention of the plaintiff.

The section (and its identically worded predecessor, s 39 of the Constabulary Force Law, Cap 72, 1953 edn) has been successfully relied upon in a number of Jamaican cases.<sup>113</sup>

One question which has been addressed by the courts is whether the arrest by a constable is 'done in the execution of his office' where the constable mistakenly believed he had a statutory power of arrest when in fact he had not, so that the arrest was unlawful. The issue was discussed in *Reid v Sylvester*.<sup>114</sup> In this case, R, a street vendor, was arrested by S, a special constable, for causing an obstruction on a main road, and was charged with an offence under s 25(9) of the Main Roads Law, Cap 231. Section 27(3) of the Law provided:

No person shall be liable to be arrested under this section if, on demand, he shall give his name and address, unless the constable or other person having power of arrest under this section has reason to believe the name and address given to be false.

R was acquitted of the charge and sued S for false imprisonment. It was argued that the arrest was unlawful, since, on a true construction of s 27(3), a prerequisite of a constable's power to arrest was a demand made of the offender for his name and address, and either failure on the part of the offender to comply with the demand or the giving of a name and address which the constable reasonably believed to be false. The Jamaican Court of Appeal held: (a) that the demand of an offender's name and address was not a condition precedent to a constable's power of arrest under the section and the arrest was, therefore, lawful; (b) that even if the arrest was unlawful, S was entitled to rely on s 39 of the Constabulary Force Law, Cap 72 (now s 33 of the Constabulary Force Act). A constable could rely on the section, whether he had acted under a mistake of fact or under a mistaken notion as to his powers of arrest under s 27(3) of the Main Roads Law. Since there was no evidence of malice or lack of reasonable and probable cause on the part of S, he was not liable for false imprisonment. In coming to this conclusion, the court overruled its earlier decision in *Murphy v Richards*,<sup>115</sup> in which it had held that a constable who carries out an arrest under a mistake of fact (for example, where he is mistaken as to the identity of the arrestee) will be protected by s 39, but a constable who arrests under a mistake as to the scope, extent or existence of a power of arrest (a mistake of law) will not be protected. Fox JA struck a cautionary note, however, when he pointed out that it had been emphasised in *Chong v Miller*<sup>116</sup> that:

...where the defendant is a constable and claims to have acted under a *bona fide* mistake as to his legal powers of arrest, this claim should naturally be subject to careful scrutiny before it is accepted. A constable, above all people, may be presumed to know the law as to his own powers of arrest, and it can be only in unusual circumstances that any court would conclude that he was acting in good faith if he acted outside those powers...[the decision was] in no way to be taken as authority for any general proposition that a constable may make arrests which are unlawful and yet escape liability for so doing.

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113 Eg, *West v AG* (1986) Supreme Court, Jamaica, No CL 1980/W-067 (unreported); *Marston v Wallace* [1960] GLR 277; *Reid v Sylvester* (1972) 19 WIR 86.

114 (1972) 19 WIR 86.

115 (1960) 2 WIR 143.

116 [1933] JLR 80, p 88.

On the facts in *Reid*, however, Fox JA took the view that where, as in the present case:

...an answer to the particular legal point upon which the lawfulness or otherwise of the constable's action depends is not immediately apparent, the fact that lawyers ultimately conclude that the constable had acted illegally should be allowed very little, if any, significance in deciding these matters... Even if it is conceded that Constable Sylvester was acting under a mistaken notion of his powers of arrest under s 27 of the Main Roads Law, he was nevertheless honestly endeavouring to discharge his function as a constable and is therefore entitled to the protection of s 39 of the Constabulary Force Law.<sup>117</sup>

### Procedure during and after arrest

An arrest which would otherwise be lawful will be unlawful if the arresting officer neglects to follow the proper procedure during and after the arrest. An arresting officer who fails to observe the required procedure may be liable for false imprisonment. In particular:

- (a) the arrestee must be informed that he is under arrest, and he must be informed of the true ground for the arrest either at the time of arrest or as soon as practicable afterwards;
- (b) after an arrest, the arresting officer must bring the arrestee before a magistrate as soon as reasonably practicable.<sup>118</sup> If a private person makes an arrest, he must give the arrestee into the custody of the police (or a magistrate) as soon as reasonably practicable.

It seems that a police officer, but not a private citizen, may make reasonable further investigations before the arrestee is charged. For example, he may take him to his home or place of work in order to inquire or search; or he may put him on an identification parade.<sup>119</sup> But the officer must not act unreasonably (for example, by detaining the arrestee for three days before taking him before a magistrate, for the purpose of collecting evidence against him).<sup>120</sup>

On the other hand, a lawful arrest is not rendered unlawful by reason of the fact that the arrestee is later released without being charged with an offence before the court. As Osadebay J explained in a recent Bahamian case:<sup>121</sup>

Where a police officer exercises his power of arrest without a warrant on the ground that he honestly believes that he has reasonable cause to suspect that an arrestable offence has been committed, he may release the person arrested without charging him before a court with any offence where his investigation, although diligently pursued, fails to produce *prima facie* proof which must be in the form of evidence that would be admissible in a court of law. If the police, after a diligent investigation,

117 (1972) 19 WIR 86, p 94.

118 *Padilla v George* (1967) High Court, Trinidad and Tobago, No 2143 of 1965 (unreported), *per Rees J*; *Campbell v AG* (1992) 29 JLR 1 (Supreme Court, Jamaica). What constitutes a reasonable time depends on the circumstances of the individual case, and 'no hard and fast rule of inflexible application can be laid down': *Flemming v Myers* (1989) 26 JLR 525 (Court of Appeal, Jamaica), *per Carey P* (Ag); *Edwards v AG* (1992) 29 JLR 386 (Supreme Court, Jamaica), p 394, *per Smith J*.

119 *Edwards v AG* (1992) 29 JLR 386 (Supreme Court, Jamaica), p 395, *per Smith J*.

120 See *Dallison v Caffery* [1964] 2 All ER 610; *Holgate-Mohammed v Duke* [1984] 1 All ER 1054; *Davidson v Williams* (1990) High Court, Trinidad and Tobago, No 2085 of 1988 (unreported); *Flemming v Myers* (1989) 26 JLR 525.

121 *Francis v AG* (2001) Supreme Court, The Bahamas, No 113 of 1998 (unreported).

come to the conclusion that *prima facie* proof of the arrested person's guilt is unlikely to be discovered through further enquiries, it is their duty to release that person from custody unconditionally.

The rule that an arrestee must be informed of the true ground for the arrest was established in the leading case of *Christie v Leachinsky*,<sup>122</sup> where it was held that it is the constitutional right of every citizen to know why he is being detained, so that he will be in a position to know whether he is entitled to resist the arrest. The rule applies whether the person carrying out the arrest is a police officer or a private citizen (including store detectives and private security guards). It is not necessary for the ground of arrest to be expressed in precise technical language. It is sufficient if the arresting officer conveys to the arrestee the substance of the alleged offence.

The rule that an arrestee must be told the reason for his arrest does not apply in two types of circumstance:

- (a) where the arrestee must be taken to have been aware of the reason for the arrest, for example where he is caught 'red handed' in the commission of an offence; or
- (b) where the arrestee made it impossible for him to be told the reason for the arrest by counter-attacking or running away.<sup>123</sup>

In *Davis v Renford*,<sup>124</sup> the Jamaican Court of Appeal held that these exceptions apply equally to s 15(2) of the Jamaican Constitution, which provides that 'any person who is arrested or detained shall be informed as soon as reasonably practicable, in a language which he understands, of the reasons for his arrest or detention'. Thus, where P had been arrested whilst in the process of committing a breach of the peace, he was taken to have been aware of the reason for his arrest and this was sufficient to satisfy both the rule in *Christie v Leachinsky* and the provisions of s 15(2).

A case in which the application of the *Christie v Leachinsky* principle was in issue is the Jamaican case of *R v Smart*.<sup>125</sup> Here, a constable became suspicious when he saw S receive some money from two sailors in a public place. He went up to S, asked for his name and address (which S gave), and told S that he would report the incident with a view to prosecuting him for a breach of the Road Traffic Law, Cap 346. S uttered an obscene word at the constable and started to make a noise and gesticulate with his hands. The constable told S to desist or he would arrest him, but he did not state what offence he would arrest him for. S continued making a noise and a crowd gathered. The constable arrested S without stating the offence for which S was being arrested. A scuffle ensued, in the course of which S assaulted the constable. S was later charged with, *inter alia*, assaulting a constable in the execution of his duty. One of the issues to be decided was whether the arrest of S was unlawful on the ground that S had not been informed of the reason for it.

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122 [1947] AC 573. See *Palmer v Morrison* [1963] Gleaner LR 150 (Court of Appeal, Jamaica); *Small v Trinidad and Tobago Petroleum Co Ltd* (1978) High Court, Trinidad and Tobago, No 540 of 1972 (unreported); *Mills v AG* (1980) High Court, Trinidad and Tobago, No 1009 of 1974 (unreported); *Gill v Anthony* (1990) 42 WIR 72 (Court of Appeal, Belize).

123 *Christie v Leachinsky* [1947] AC 573, pp 587, 588.

124 (1980) 37 WIR 308.

125 (1952) 6 JLR 132.

Carberry J held that the arrest was lawful, since: (a) in the circumstances, S must be taken to have known the reason for his arrest; and (b) by counter-attacking as soon as the constable held him, S had made it practically impossible for the constable to give the reason for the arrest. He said:

Having regard to the charges which were entered against the appellant when he reached the police station, it would appear that the offence for which the appellant was arrested was that of using indecent language, and, under s 2(1) of the Towns and Communities Law, Cap 384, there was authority to arrest for that offence.

It was stated in the course of argument that the locally decided case of *Cooper v Cambridge*<sup>[126]</sup> may have been impliedly overruled by the decision of the House of Lords in *Christie v Leachinsky*.<sup>[127]</sup>

*Cooper v Cambridge* came before the full court on appeal from the decision of a resident magistrate in an action in which damages were sought against a constable for false imprisonment. The constable arrested the plaintiff for noisy and disorderly conduct, which consisted of noisy and indecent language. In the course of his judgment, Barrett-Lennard CJ said, 'It was the commission of a particular offence in his presence, not his label of it, which was the source of his (the constable's) authority', and 'Justice plainly demands that he should not be cast in damages because he called indecent language disorderly conduct'.

In the *Leachinsky* case, Viscount Simon stated:<sup>[128]</sup> 'The requirement that he (the person arrested) should be so informed (for what offence he was being arrested) does not mean that technical or precise language need be used.'

As counsel for the appellant very properly conceded, there would be no conflict between the *Leachinsky* case and *Cooper v Cambridge* if the latter case is understood as having decided that if an offence is committed in the presence of a constable and he intends to arrest for that particular act, the fact that he misdescribes the offence when effecting the arrest does not prevent him from showing that the arrest was lawful. The example given by appellant's counsel very well illustrates this, viz: if a constable arrests for obtaining money by false pretences a man whom he sees 'ringing the changes', the arrest is not unlawful because the constable did not describe the offence as larceny by a trick.

We now consider the alternative submission, that is, that Constable Lucas arrested the appellant without telling him on what charge he was arrested and that, on the authority of the *Leachinsky* case, such an arrest is unlawful.

We agree that it is a fair conclusion on the evidence that, when Constable Lucas held the appellant, he did not say on what charge the appellant was being arrested, but we are of the opinion that this case comes within the exception contained in the third proposition stated by Viscount Simon in the *Leachinsky* case (p 587): 'The requirement that the person arrested should be informed of the reason why he is seized naturally does not exist if the circumstances are such that he must know the general nature of the offence for which he is detained'. This proposition was stated as approving the decision in *R v Howarth*,<sup>[129]</sup> where it is laid down that there is no need to tell a man why he is being arrested when he must, in the circumstances of the arrest, know the reason already. The circumstances which led to the arrest of the appellant occurred immediately before the constable held him; so well was this recognised that, at the

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126 [1931] Clark's Rep 336.

127 [1947] AC 573.

128 *Ibid*, p 587.

129 (1828) 168 ER 1243.

trial, no question was raised as to the appellant not knowing on what charge he had been arrested. Moreover, the appellant counter-attacked as soon as the constable held him and we think that the failure to inform the appellant of the charge on which he was held could also be justified on Viscount Simon's fifth proposition, viz:

The person arrested cannot complain that he has not been supplied with the above information as and when he should be, if he himself produces the situation which makes it practically impossible to inform him, for example, by immediate counter-attack or by running away.

As for the requirement that an arrestee must be brought before a magistrate as soon as reasonably practicable, the Jamaican case of *Flemming v Myers*<sup>130</sup> is instructive. Here, the plaintiff was taken into custody on the instructions of the defendant police officer on suspicion of murder. He was detained at the police station for 13 days, during which time he was subjected to several beatings by the defendant and other police officers. He was eventually discharged by the magistrate, and he brought an action against the defendant for false imprisonment. The trial judge found for the defendant. On appeal to the Jamaican Court of Appeal, Forte JA held that, although the initial arrest of the plaintiff was lawful, his subsequent detention for 13 days before being brought before the magistrate was unreasonable and amounted to a false imprisonment. His Lordship pointed out that, by s 15(3)(b) of the Jamaican Constitution, 'any person who is arrested or detained...upon reasonable suspicion of his having committed or being about to commit a criminal offence, and who is not released, shall be brought without delay before a court'. He continued:

At common law, a police officer always had the power to arrest without warrant a person suspected of having committed a felony. In those circumstances, however, he was compelled to take the person arrested before a justice of the peace within a reasonable time. The fundamental rights and freedoms which are preserved to the people of Jamaica by virtue of the Constitution are rights and freedoms to which they have always been entitled. In *DPP v Nasralla*,<sup>[131]</sup> Lord Devlin, in delivering the judgment of the [Privy Council], acknowledged this proposition. In referring to Chapter III of the Constitution, which preserves the fundamental rights and freedoms, he stated:

This chapter, as their Lordships have already noted, proceeds upon the presumption that the fundamental rights which it covers are already secured to the people of Jamaica by existing law.

It is my view, therefore, that the words 'without delay' as used in s 15(3) ought to be construed in the light of the common law which had previously existed and, in arriving at the appropriate period which would constitute action 'without delay', all the circumstances of the particular case should be examined in order to determine whether the person arrested was brought before the court within a reasonable time.

Forte JA further held in *Flemming v Myers* that the defendant was not protected by s 33 of the Constabulary Force Act, since the detention of the plaintiff for 13 days before he was brought before the magistrate, without any explanation for the long delay, was evidence that the defendant had no reasonable or probable cause for the detention, albeit that the initial arrest was lawful.

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130 (1989) 26 JLR 525 (Court of Appeal, Jamaica).

131 [1967] 3 WLR 13, p 18.

## Arrest through agent

A defendant in an action for false imprisonment may be liable even though he did not personally arrest or detain the plaintiff. He will be liable if he directed or authorised a purely ministerial officer of the law, such as a police constable, to carry out the arrest or detention. In the Jamaican case of *Mullings v Murrell*,<sup>132</sup> the plaintiff was employed as a security guard by a company of which the defendant was personnel manager. Suspecting that the plaintiff had stolen some paint from business premises of a third party, where the plaintiff had been assigned to duty the previous day, the defendant called a police constable and, when asked by the constable what he (the constable) should do with the plaintiff, the defendant replied, 'Lock him up'. The plaintiff was thereafter kept in custody by the police for 18 days. He was charged with larceny, but the case was dismissed. Courtenay Orr J held that the defendant was liable for false imprisonment, as he had 'clearly requested, indeed demanded, that the constable, a ministerial officer, should arrest the plaintiff, and so duly authorised the arrest'.

Similarly, in the Canadian case of *Lebrun v High-Low Foods Ltd*,<sup>133</sup> the proprietors of a supermarket, whose manager, suspecting that P had stolen an item from the store, called the police, were liable for false imprisonment on account of the constable's detention of P for a few minutes in the car park while he searched P's car and found no stolen goods. And in the Guyanese case of *Lander v Gentle*,<sup>134</sup> a doctor who, believing in good faith that P was a dangerous lunatic, caused him to be detained in a mental hospital, was held liable for false imprisonment when it turned out that the detention was unjustified. In such cases, the defendant is liable on the ground that he used the ministerial officer as his agent to effect the arrest or detention.

On the other hand, a person who merely gives incriminating information to a police officer who, in the exercise of his own independent discretion, decides to arrest the plaintiff, will not be liable for false imprisonment;<sup>135</sup> nor will he be liable for false imprisonment if he wrongfully brings a complaint before a magistrate who then issues a warrant for the plaintiff's arrest, for a magistrate is a judicial, not merely a ministerial, officer (though he may be liable for malicious prosecution or the analogous tort of malicious arrest).<sup>136</sup>

An example of the effect of giving incriminating information is *Hughes v McLean*.<sup>137</sup> Here, the defendant, a wheelwright, thinking that certain cart wheels manufactured in his shop were missing, told a constable of his loss and left the matter in the constable's hands for investigation. The constable later arrested the plaintiff on suspicion of theft. No theft had in fact been committed. The plaintiff then sued the defendant for false imprisonment.

It was held that the defendant did not authorise the constable to arrest the plaintiff, nor did he make any charge against the plaintiff which cast a duty on the constable to carry out the arrest. The defendant was, therefore, not liable. Lucie-Smith CJ said:

132 (1993) 30 JLR 278.

133 (1968) 69 DLR (2d) 433.

134 [1941] LRBG 159.

135 *Gosden v Elphick* (1849) 154 ER 1287; *Ryan v Simpson* (1872) 6 SALR 38; *Salmon v Roache* (1995) Court of Appeal, Jamaica, Civ App No 23 of 1995 (unreported), per Rattray P and Patterson JA.

136 *Laird v AG* (1974) 21 WIR 416, p 423.

137 (1921) 4 Trin SC 98 (Supreme Court, Trinidad and Tobago).

The whole question for decision is whether the defendant authorised the constable to act in the matter or whether he *bona fide* gave information to the constable, leaving the constable to make enquiry into the circumstances and act as he might think fit in the matter. There is no proof that a felony had been actually committed, and the defendant would be liable in damages if he authorised the constable to act in the matter; if he made a charge on which it became the duty of the constable to act he would be responsible, but it would be quite a different thing if he simply gave information and the constable thereupon acted according to his own judgment.

The defendant says that, as the plaintiff failed to find the cart wheels, he sent for the constable and told him of the loss and that he left the matter in his hands to investigate. The constable corroborates the defendant and says he suspected the plaintiff knew something of the wheels from his demeanour, and arrested him on his own initiative. On the evidence, I can only come to the conclusion that the defendant, having lost his wheels, called a constable to make enquiry and the constable afterwards acted according to his own judgment. The defendant is, therefore, not responsible and judgment must go in his favour.

### Signing the charge sheet

When a charge is drawn against a prisoner, the charge sheet will normally be signed at the police station by a police officer, who will be responsible for the subsequent detention of the prisoner. On rare occasions, however, a charge sheet may be signed by a private person. Whether or not that person will be liable for the subsequent detention of the prisoner will depend upon whether he is found to have directed or authorised the detention, which is a question of fact in each case. Two Guyanese cases on either side of the line are *Allen v Canzius* and *Bascom v Da Silva*.

In *Allen v Canzius*,<sup>138</sup> the plaintiff, who was a tailor employed by a firm, was asked by the defendant, a fellow employee, whether he had picked up an envelope which the latter had dropped by accident. The envelope had the defendant's name written on it and contained \$11. The plaintiff replied 'No' to the defendant's question. The defendant then complained to the secretary of the firm and went to the police station, bringing a constable back with him. After making enquiries, the constable took the plaintiff to the police station (the defendant accompanying), where the plaintiff was searched. (The envelope was later found elsewhere, empty.) At the police station, a charge of theft was made out against the plaintiff and the defendant signed the charge sheet. Douglas J (Ag) said:

There is not a word disclosed on the evidence showing that the defendant either ordered the arrest of the plaintiff or gave him into custody. There is no doubt that the steps he took were *bona fide* taken under the impression that the plaintiff had stolen his money; and he left it to the police to investigate, and take what course they decided on. In *Sewell v National Telephone Co Ltd*, it is said:<sup>139</sup> 'The act...—that is, signing the charge sheet—... was merely to provide a prosecutor, and that does not let in liability to an action for false imprisonment unless the person who takes that step has taken on himself the responsibility of directing the imprisonment.'

I am not satisfied from the evidence that the defendant directly caused the imprisonment of the plaintiff. I accordingly find for the defendant.

In *Bascom v Da Silva*,<sup>140</sup> the opposite conclusion was reached. Here, the defendant, believing that the plaintiff had stolen a clamp belonging to him, directed L, a rural

138 [1920] LRBG 139 (Petty Debt Court, British Guiana).

139 [1907] 1 KB 557, p 560.

140 [1933] LRBG 157 (High Court, British Guiana).

constable, to arrest the plaintiff, 'with no desire that the matter should come before the magistrate, but only as a means of receiving what he thought was his property'. A charge of theft brought against the plaintiff was dismissed by the magistrate and the plaintiff sued for false imprisonment. One of the questions raised was the effect of the defendant's signing of the charge sheet at the police station after the plaintiff's arrest. McDowell J (Ag) said:

I find as a fact that, had the defendant not signed the charge sheet, Sergeant Green would not have proceeded with the case. With regard to this latter point, it was argued that the signing of the charge sheet was not a false imprisonment, and reliance was placed on *Grinham v Willey*<sup>[141]</sup> and *Sewell v National Telephone Co Ltd*,<sup>[142]</sup> but, in my opinion, these cases are very easily distinguished. In *Grinham v Willey*, Bramwell B said:

An offence was committed; the defendant sent for a policeman, who made an enquiry and on his own authority arrested the plaintiff. The defendant signed the charge sheet; but in doing so he did nothing but obey the direction of the police.

In *Sewell v National Telephone Co Ltd*, Collins MR said:

The defendants in this case had nothing to do, so far as appears in the evidence, with the initiation of the charge against the plaintiff. The man had been taken into custody and not until he was in custody at the police station did the defendant appear on the scene. At that stage, their representative signed the charge sheet on their behalf, and the case of the plaintiff is bare of everything but that fact.

In view of my acceptance of Sergeant Green's evidence, 'I didn't charge him but sent for Da Silva, who came and found Licorish there... the defendant asked me to charge him; I said I wouldn't do it', and 'I didn't charge Bascom, he was already under arrest and I decided it was not a case for the police', this case appears not to be within the above mentioned cases, but rather within *Austin v Dowling*,<sup>[143]</sup> where the defendant's wife gave the plaintiff in charge on an unfounded charge of felony and the defendant subsequently signed the charge sheet. Willes J said:<sup>[144]</sup>

If the defendant had merely signed the charge sheet, according to *Grinham v Willey*, would not have this amounted to no more than making a charge against one already in the custody of a minister of the law who intended to keep him there? But it is found in the case that, though the defendant gave no express direction for the plaintiff's detention, he was expressly told by the inspector on duty that he (the inspector) disclaimed all responsibility in respect of the charge and that he would have nothing to do with the detention of the plaintiff except on the responsibility of the defendant; and that the inspector would not have kept the plaintiff in custody unless the charge of felony was distinctly made by the defendant. Signing the charge sheet with that knowledge, therefore, was the doing of an act which caused the plaintiff to be kept in custody...

I have commented on this point as it was raised during the hearing, but it is only of academic interest, as the claim is for damages for false imprisonment through the medium of the rural constable, Licorish.

Now the common law power of arrest without warrant possessed by a constable *qua* constable and that possessed by a private individual differ in an important way.

141 (1859) 157 ER 934.

142 [1907] 1 KB 557.

143 (1870) LR 5 CP 534.

144 *Ibid*, p 539.

Briefly, a constable may arrest on reasonable suspicion of felony, whereas 'a private individual is justified in himself arresting a person or ordering him to be arrested where a felony has been committed and he has reasonable ground of suspicion that the person accused is guilty of it': *Walters v WH Smith and Son Ltd*<sup>145</sup> and, as the learned Chief Justice says:<sup>146</sup> 'When a person, instead of having recourse to legal proceedings by applying for a judicial warrant for arrest, or laying an information or issuing other process well known to the law, gives another into custody, he takes a risk upon himself by which he must abide, and if in the result it turns out that the person arrested was innocent and that, therefore, the arrest was wrongful, he cannot plead any lawful excuse unless he can bring himself within the proposition of law which I have enunciated in this judgment,' that is, the proposition quoted above.

In my opinion, the defendant has failed to prove the existence of either of the two things which together would justify the action.

The defendant was accordingly held liable for false imprisonment, McDowell J expressing 'strong disapproval of abuses of the law by using threats of criminal proceedings for purely personal ends'.

### Assessment of damages for false imprisonment

There are few established rules as to the assessment of damages in cases of false imprisonment, and the quantum is left very much to the judge's discretion. The main heads of damage appear to be the following:<sup>147</sup>

- loss of liberty;
- injury to feelings (that is, the indignity, disgrace, humiliation and mental suffering arising from the detention);<sup>148</sup>
- physical injury, illness or discomfort resulting from the detention;
- injury to reputation;
- any pecuniary loss which is not too remote a consequence of the imprisonment (for example, loss of business, employment or property).<sup>149</sup>

Some of these heads of damage were assessed in the Trinidadian case of *Quashie v AG*.<sup>150</sup> Here, the plaintiff, a member of a gang of labourers weeding and cutlassing the roadside, was unlawfully arrested by two police constables. He was handcuffed<sup>151</sup> and taken to the police station, where he was detained for 14 hours, without having been told the reason for his arrest or detention. There was also evidence that he had been struck and pushed several times by the constables. The

145 [1914] 1 KB 595, p 605.

146 *Ibid*, p 607.

147 See *op cit*, McGregor, fn 47, para 1619.

148 See *Merson v Cartwright* (1994) Supreme Court, The Bahamas, No 1131 of 1987 (unreported).

149 *Childs v Lewis* (1924) 40 TLR 870.

150 (1992) High Court, Trinidad and Tobago, No 30 of 1987 (unreported).

151 In *Ramsarran v AG* (2001) High Court, Trinidad and Tobago, No S 1597 of 1986 (unreported), the plaintiff, a well known businessman who had voluntarily turned himself over to the police, was handcuffed to a rail. Moosai J pointed out that the alleged offences for which the plaintiff had been charged were summary offences, and s 109 of the Summary Courts Act, Ch 4:20 (Laws of Trinidad and Tobago) provides that a person arrested shall not be handcuffed except in cases of necessity, or of reasonable apprehension of violence, or of attempt to escape, or by order of a court or magistrate. None of these circumstances were present in this case, and the act of handcuffing amounted to oppressive, arbitrary and unconstitutional conduct warranting an award of exemplary damages.

plaintiff was later charged with using obscene language, resisting arrest and assaulting a constable in the execution of his duty. The charges were dismissed by the magistrate. The constables were held liable for assault, false imprisonment and malicious prosecution. On the question of damages, Hosein J had this to say:

In *Walter v Allfools*,<sup>[152]</sup> Lawrence LJ said that ‘a false imprisonment does not merely affect a man’s liberty, it also affects his *reputation*’ ... When that is taken into account, together with the fact of imprisonment for a considerable period without a charge having been brought, the handcuffing for some 14 hours, thereby preventing the plaintiff from taking refreshment (even if that had been offered), and the fact that he was never informed as to the reason for his arrest or told about his right to an attorney, were circumstances which must attract aggravated damages. Further, the plaintiff must have been injured and humiliated and must have sustained a loss of dignity by an unlawful arrest effected in a high-handed and aggressive manner, and by a loss of his freedom before his fellow workers who indeed were shouting, ‘leave the boy alone, he ain’t do nothing’.

In addressing the plaintiff’s claim for exemplary damages, Hosein J continued:

The claim for exemplary damages is founded on the basis that the circumstances surrounding the assault, false imprisonment and malicious prosecution of the plaintiff amounted to oppressive, arbitrary and unconstitutional action by servants of the State.

Constitutional rights are not incidents of levity and their infringement by officers of the State is, and would always remain, a matter of seriousness and concern. In this respect, the plaintiff is entitled to exemplary damages for breach of his constitutional right not to be deprived of his liberty without due process. Deyalsingh J awarded the plaintiff in *Robinson v AG*<sup>[153]</sup> \$15,000 for breach of his rights to freedom of expression of political views and freedom of assembly. I consider an award of \$9,500 to be an appropriate amount in respect of exemplary damages.

Finally, the Bahamian Court of Appeal has emphatically held in the recent case of *Barr v AG*<sup>[154]</sup> that a plaintiff who has received damages for the tort of false imprisonment is not entitled to a further award under Art 19<sup>[155]</sup> of the Bahamian Constitution, where the facts supporting both claims are similar, as ‘the Constitution does not envisage a duplication of claims for unlawful arrest’. This conclusion was mandated by the proviso to Art 28, which states that the Supreme Court shall not exercise its power to make awards where it is satisfied that adequate means of redress are available to the plaintiff under any other law.

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152 (1944) 16 TLR 39, p 40.

153 (1981) High Court, Trinidad and Tobago, No 941 of 1976 (unreported). See below, Appendix 1.

154 (2001) Court of Appeal, The Bahamas, No 18 of 1994 (unreported); see also *Francis v AG* (2001) Supreme Court, The Bahamas, No 113 of 1998 (unreported), *per* Osadebay J.

155 Art 19(1) provides that no person shall be deprived of his personal liberty unless authorised by law, *inter alia*, upon reasonable suspicion of having committed or being about to commit a criminal offence.

## CHAPTER 3

# MALICIOUS PROSECUTION

### INTRODUCTION

The tort of malicious prosecution is committed where the defendant maliciously and without reasonable and probable cause initiates against the plaintiff a criminal prosecution which terminates in the plaintiff's favour, and which results in damage to the plaintiff's reputation, person or property.

In this tort, the law seeks to hold a balance between two opposing interests of social policy, namely:

- (a) the interest in safeguarding persons from being harassed by unjustifiable litigation; and
- (b) the interest in encouraging citizens to assist in law enforcement by bringing offenders to justice.

The courts have always tended to give more weight to the latter interest, with the result that 'the action for malicious prosecution is more carefully guarded than any other in the law of tort',<sup>1</sup> and the number of successful actions is small.

In addition to the tort of malicious prosecution, there is, as the Privy Council has confirmed, an analogous tort of maliciously procuring the issue and execution of a search warrant.<sup>2</sup> This is an instance of malicious institution of a process short of actual prosecution.<sup>3</sup> It is also established that an action in tort lies for the malicious institution of bankruptcy or winding-up proceedings,<sup>4</sup> though it seems that there is no wider tort encompassing malicious institution of any civil proceedings.<sup>5</sup>

In the Commonwealth Caribbean, actions for malicious prosecution are often combined with actions for false imprisonment. This will occur where P is first arrested on suspicion of having committed an offence, and later charged and prosecuted for the offence. If P is acquitted of the charge, he may sue the police officers who were responsible for the arrest and subsequent prosecution for both false imprisonment and malicious prosecution.

It is important to note the differences between the two causes of action. These differences exist primarily because of the separate origins of the two torts, false imprisonment being derived from the old writ of trespass and malicious prosecution from the action on the case. Thus:

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1 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 597.

2 *Gibbs v Rea* (1998) 52 WIR 102 (PC appeal from the Cayman Islands), where it was held, by a majority, that the police had no reasonable and probable cause to procure the issue of a search warrant to search the plaintiff's home and place of work on suspicion of drug trafficking, in the absence of any evidence of previous investigations or of any 'tip off' incriminating the plaintiff. Further, if the police had no sufficient grounds for suspicion, yet satisfied the judge issuing the warrant that they did, then 'to procure the warrant in that state of mind was to employ the court process for an improper purpose' (such as a 'fishing expedition'), which amounted to malice.

3 Another instance is the malicious procuring of a warrant for the plaintiff's arrest: *Roy v Prior* [1971] AC 470; *Ramsarran v AG* (2001) High Court, Trinidad and Tobago, No S 1597 of 1986 (unreported).

4 *Quartz Hill Gold Mining Co v Eyre* (1883) 11 QBD 674.

5 *Metall und Rohstoff AG v Donaldson Lufkin and Jenrette Inc* [1990] 1 QB 391; *Gregory v Portsmouth City Council* [2000] 1 AC 419.

- (a) false imprisonment is actionable *per se*, that is, without proof of damage, whereas in malicious prosecution damage must always be proved;<sup>6</sup>
- (b) a defendant who is sued for false imprisonment must justify the imprisonment, for example, by establishing the defence of lawful arrest, whereas in malicious prosecution the onus is on the plaintiff to show that the prosecution was unjustified;<sup>7</sup>
- (c) in false imprisonment, a defendant must show that he had reasonable cause to detain the plaintiff, whereas in malicious prosecution it is for the plaintiff to show that he was prosecuted without reasonable cause and with malice;<sup>8</sup>
- (d) a defendant who causes a magistrate or other judicial officer to issue a warrant for the plaintiff's arrest cannot be liable in false imprisonment for the subsequent arrest, but he may be liable for malicious prosecution or, where no prosecution is instituted, for an analogous tort.<sup>9</sup>

A straightforward example of a successful claim for both false imprisonment and malicious prosecution is *Rowe v Port of Spain CC*.

**Rowe v Port of Spain CC (1978) High Court, Trinidad and Tobago,  
No 1413 of 1976 (unreported)**

A stairway leading to the first floor of the Town Hall in Port of Spain was barred by a chain and a crash barrier placed in front of it. The plaintiff, a clerk employed by the council, removed the chain and barrier and began to mount the stairway. As he did so, D, a constable, also in the employ of the council, who was on duty as pay-roll escort, called out to the plaintiff and told him not to use the stairway as the Mayor had given instructions that no one was to pass there. On the plaintiff's refusal to comply with the instruction, D arrested him, dragged him to the police charge room and later took him to the magistrate's court, where he was charged with assaulting D and using obscene language. Both charges were dismissed by the magistrate. The plaintiff sued D and the council for assault, false imprisonment and malicious prosecution, and succeeded in all three torts. Crane J said:

I believe that the defendant, Corporal Dalrymple, was detailed for escort duty in connection with the collection of the pay-roll on the morning of 24 July 1975. I reject the evidence of Inspector Kerr to the effect that he had detailed him the duty of enforcing a directive restricting the use of the staircase on the Knox Street entrance of the Town Hall so as to exclude members of the public and the employees of the City Council from using it... I find...that the unfortunate incident arose out of the officiousness of Corporal Dalrymple, who desisted from his detailed duty as pay-roll escort on that morning in order to scotch the plaintiff's use of the forbidden staircase. In doing so, it was the defendant, Dalrymple, who assaulted the plaintiff, arrested him wrongfully, there being no offence for which he could have been properly arrested, and then falsely imprisoned him for over one hour.

6 See below, p 60.

7 *Ramkisson v Sorias* (1970) High Court, Trinidad and Tobago, No 2170 of 1968 (unreported); *Jangoo v Gomez* (1984) High Court, Trinidad and Tobago, No 2652 of 1978 (unreported).

8 *Wills v Voisin* (1963) 6 WIR 50.

9 *Roy v Prior* [1971] AC 470; *Ramsarran v AG* (2001) High Court, Trinidad and Tobago, No S 1597 of 1986 (unreported).

When it comes to employees' use of a staircase in order to get to work, if the use of a particular staircase is out of bounds to them, they must be so informed through the proper channels. Any breach of any such directive would open them to disciplinary action, again by the proper authorities. It was not challenged by the defence that neither the plaintiff's Departmental Head, Dr Siung, nor the Senior Administrative Officer, Mrs Mahabir, had informed the plaintiff of the directive restricting the use of the staircase so as to exclude employees using it. No primary evidence as to either the circular containing the directive in question or instructions to the police as to its enforcement has been produced. Indeed, it would be as curious an administrative lapse to call in the police without first notifying the employees as it would be to detail an armed plain clothes officer to enforce the directive on the morning in question.

With regard to the action for malicious prosecution, I find all the elements present. The plaintiff has established that he was prosecuted for two offences alleged to have been committed by him and that the charges were dismissed and finally determined in his favour. I find as a fact that when [Dalrymple] brought this prosecution, he had no reasonable or probable cause so to do, and that in so doing he acted maliciously in order to penalise the plaintiff for doing an act which did not in itself constitute a criminal offence and concerning which he had no instructions to bestir himself. It was a gross misuse of his office to drag the plaintiff (who was well known to him and a City Council employee) to the city police charge room and later walk him to the magistrate's court to be charged before a justice of the peace under the guise of assault and obscene language. The City Council, being the employer of [Dalrymple], is vicariously responsible for his tortious acts, which are within the scope of, and connected with, his employment.

## REQUIREMENTS OF THE TORT

In *Wills v Voisin*,<sup>10</sup> Wooding CJ listed the essentials which must be proved by the plaintiff in order to establish a case of malicious prosecution:

- (a) that the law was set in motion against him on a charge of a criminal offence;
- (b) that he was acquitted of the charge or that otherwise it was determined in his favour;
- (c) that the prosecutor set the law in motion without reasonable and probable cause;
- (d) that, in so setting the law in motion, the prosecutor was actuated by malice.

Failure to establish any one or more of these requirements will result in the plaintiff losing his action for malicious prosecution.

Each of the requirements must now be considered in turn.

### Institution of prosecution

The plaintiff must show first of all that the defendant instituted the prosecution against him or, in the words of Lopes J,<sup>11</sup> that the defendant was 'actively instrumental in setting the law in motion' against the plaintiff.

10 (1963) 6 WIR 50, p 57; *Khan v Singh* (1960) 2 WIR 441, p 442, per Fraser J (Ag).

11 *Danby v Beardsley* (1880) 43 LT 603. See Kodilinye, G (1987) 36 ICLQ 157.

The following principles as to what constitutes ‘setting the law in motion’ have been established by the authorities:

- (a) It is not necessary that the defendant should have actually conducted the prosecution. It is sufficient for liability if, for example, he laid an information before a magistrate, on the basis of which the magistrate then issued a summons against the plaintiff or a warrant for the plaintiff’s arrest.<sup>12</sup> In such a case, the defendant could not escape liability by pleading that the subsequent prosecution of the plaintiff was initiated at the discretion of the magistrate, nor that it was technically conducted by the police.<sup>13</sup> On the other hand, a person who fairly and honestly places the facts on which he relies and on which he bases his suspicion before a magistrate who, in reliance thereon, orders the issue of a warrant for the plaintiff’s arrest, is not liable for the exercise of the magistrate’s discretion.<sup>14</sup>
- (b) At one time, it was thought that the defendant would not be liable unless the prosecution could be said to have actually commenced, for example, by the issue of a summons by the magistrate or by the preferring of a bill of indictment.<sup>15</sup> It was held by the Privy Council in *Mohammed Amin v Bannerjee*,<sup>16</sup> however, that it was sufficient for liability if the proceedings reached a point at which it could be said that the plaintiff’s reputation was prejudiced; for instance where, without issuing a summons or a warrant, the magistrate inquired into the merits of the charge in open court and eventually dismissed the complaint;<sup>17</sup> or where the prosecutor himself withdrew the charge before a summons or warrant had been issued.<sup>18</sup> For the same reason, it is no defence that the magistrate, in issuing a warrant, acted without jurisdiction, since the injury to the plaintiff’s reputation is not mitigated by the fact that technically there was no prosecution at all.<sup>19</sup>
- (c) Where the defendant merely informs the police of certain facts which incriminate the plaintiff, and as a result the police decide to prosecute, the defendant will not be regarded as having instituted proceedings,<sup>20</sup> since the decision to prosecute is not his and ‘the stone set rolling [by the defendant is] a stone of suspicion only’.<sup>21</sup> However, it was held by the Privy Council in *Tewari v Singh*<sup>22</sup> that if the defendant knowingly makes a false accusation to the police; if he misleads the

12 *Davis v Noake* (1817) 105 ER 1153; *Casey v Automobiles Renault (Canada) Ltd* (1965) 54 DLR (2d) 600; *Campbell v The Jamaica Telephone Co Ltd* (1991) Supreme Court, Jamaica, No C 087 of 1988 (unreported), where Clarke J held that ‘the police commenced the prosecution by laying an information before a justice of the peace who issued the summons, a copy of which the police served on the plaintiff. Plainly, then, the police set the law in motion by appealing to a justice of the peace, a person clothed with judicial authority’.

13 *Malz v Rosen* [1966] 1 WLR 1008.

14 *Ramsarran v AG* (2001) High Court, Trinidad and Tobago, No S 1597 of 1986 (unreported), *per* Moosai J; *Laird v AG* (1974) 21 WIR 416, p 422, *per* Fox JA (Court of Appeal, Jamaica).

15 *Gregory v Derby* (1839) 173 ER 701.

16 [1947] AC 322.

17 *Ibid.*

18 *Casey v Automobiles Renault (Canada) Ltd* (1965) 54 DLR (2d) 600.

19 *Arnold v Johnson* (1876) 14 SCR (NSW) 429.

20 *Fitzjohn v Mackinder* (1860–61) 141 ER 1094; *Evans v London Hospital Medical College* [1981] 1 All ER 715.

21 *Danby v Beardley* (1880) 43 LT 603, *per* Lindley J; *Campbell v The Jamaica Telephone Co Ltd* (1991) Supreme Court, Jamaica, No C 087 of 1988 (unreported).

22 (1908) 24 TLR 884.

police by bringing suborned witnesses to support it; and if he influences the police to assist him in sending an innocent man for trial, he cannot escape liability by pleading that the prosecution was not technically conducted by him. In *Tewari*, the parties were officials of adjoining agricultural estates, and the case arose out of a dispute as to the ownership of some alluvial land lying between the two estates. The defendant concocted a false story to the police to the effect that the plaintiff had participated in a riot connected with the dispute, and the plaintiff was prosecuted for the alleged offence and acquitted. The Privy Council held the defendant liable as prosecutor.

The facts of the Guyanese case of *Jhaman v Anroop*<sup>23</sup> were similar to those in *Tewari*. In *Jhaman*, the defendant was engaged in a dispute with the plaintiff over the ownership of an area of land. The defendant falsely accused the plaintiff of having stolen wood from the land, and, at the instigation and insistence of the defendant, the police charged the plaintiff with larceny. Stoby J held that the defendant was liable as prosecutor. *Tewari v Singh* was not cited, but the implication of Stoby J's ruling is that the defendant was liable as prosecutor because he had made a deliberately false accusation and had influenced the police to send an innocent man for trial.

The principle in *Tewari* has been applied in a number of Commonwealth jurisdictions, most recently by the House of Lords in *Martin v Watson*.<sup>24</sup> In this case, the parties were neighbours who had been at loggerheads for about 13 years. The defendant made a deliberately false report to the police that the plaintiff had indecently exposed himself to her, and the police brought a prosecution against the plaintiff, which was subsequently dismissed. In the Court of Appeal, Ralph Gibson and Hobhouse LJ held that the defendant was not liable as prosecutor. They took the view that, where D makes a deliberately false allegation against P to the police with the intention that the police should prosecute P, D will not *ipso facto* be liable as prosecutor. In particular, it was not sufficient for P to show that D maliciously provided false evidence or, as in this case, that D held herself out as willing to give untruthful evidence in order to secure the conviction of P.<sup>25</sup> The House of Lords reversed the Court of Appeal, holding that if a person falsely and maliciously gives a police officer information indicating that the plaintiff is guilty of a criminal offence and states that he is willing to give evidence in court of the matters in question, it may be inferred that he desires and intends that the plaintiff should be prosecuted; and where the circumstances are such that the facts relating to the alleged offence are exclusively within the knowledge of the complainant, as in the *Martin* case, then it is virtually impossible for the police to exercise any independent judgment; and if a prosecution is brought by the police, the complainant should be liable for the institution of the prosecution.

### Termination of prosecution in plaintiff's favour

The second requirement for a successful action in malicious prosecution is that the prosecution ended in the plaintiff's favour.

23 [1951] LRBG 172 (see below, pp 57–59). See also *Shiwomangal v Jaikaran and Sons Ltd* [1946] LRBG 308 (Supreme Court, British Guiana).

24 [1996] AC 74.

25 [1994] 2 All ER 606, pp 614–25, 629–40.

It is an inflexible rule that no person who has been convicted on a criminal charge can sue the prosecutor for malicious prosecution, even though he can prove that he was really innocent and that the charge was malicious and unfounded,<sup>26</sup> for if a person were allowed to sue for malicious prosecution after the criminal trial had ended adversely to him, it would entail a re-opening of the issue of his guilt, and this would amount to a challenge to the propriety of the conviction and might lead to the judgment in the criminal court being 'blown off by a sidewind'.<sup>27</sup>

Although the plaintiff cannot sue for malicious prosecution if he was convicted, this does not mean that he can sue only if he was acquitted on the merits, for what is required is not judicial determination of his innocence but merely absence of judicial determination of his guilt.<sup>28</sup> 'The crux is not so much whether he has been proved innocent as that he has not been convicted',<sup>29</sup> the underlying principle being that a man is presumed to be innocent until he is proved guilty. Thus, the requirement will be satisfied where, for instance:

- (a) the plaintiff was convicted in a lower court but his conviction was quashed on appeal on the merits,<sup>30</sup> or because of some irregularity of procedure;<sup>31</sup>
- (b) the plaintiff was acquitted of the charge in question but convicted of a lesser offence;<sup>32</sup>
- (c) the plaintiff was acquitted on a technicality such as a defect in the indictment;<sup>33</sup>
- (d) the prosecution discontinued the proceedings,<sup>34</sup> or withdrew the charge, even if without prejudice to the right to recommence;<sup>35</sup>
- (e) the Attorney General entered a *nolle prosequi*, staying further proceedings on the indictment.<sup>36</sup>

### Absence of reasonable and probable cause

This third requirement is perhaps the hardest to satisfy. In the first place, it involves proof of a negative by the plaintiff, which is a notoriously difficult task.<sup>37</sup> Secondly, although several attempts have been made to define 'reasonable and probable

26 *Basébé v Matthews* (1867) LR 2 CP 684; *Merson v Cartwright* (1994) Supreme Court, The Bahamas, No 1131 of 1987 (unreported).

27 *Vanderbergh v Blake* (1661) 145 ER 447, *per* Hale CJ.

28 Heuston and Buckley, *Salmund and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 398.

29 *Op cit*, Fleming, fn 1, p 581.

30 *Shiwamangal v Jaikaran and Sons Ltd* [1946] LRBG 308 (Supreme Court, British Guiana).

31 *Herniman v Smith* [1938] AC 305; *Romegialli v Marceau* (1963) 42 DLR (2d) 481.

32 *Boaler v Holder* (1887) 51 JP 277.

33 *Wicks v Fentham* (1791) 100 ER 1000.

34 *Watkins v Lee* (1839) 151 ER 115.

35 *Casey v Automobiles Renault (Canada) Ltd* (1965) 54 DLR (2d) 600.

36 *Gilchrist v Gardner* (1891) 12 NSWLR 184; *Khan v Singh* (1960) 2 WIR 441 (Supreme Court, British Guiana), where Fraser J (Ag) said that 'the Attorney General's right to bring subsequent proceedings against the plaintiff on the same facts does not diminish the effect of the termination of that particular indictment'.

37 *Abrath v North Eastern Rly* (1883) 11 QBD 440. In false imprisonment, the defendant has the burden of proving that there was reasonable cause for the detention of the plaintiff. See above, Chapter 2.

cause', the concept still remains vague and difficult to apply in individual cases. The best known definition is that of Hawkins J in *Hicks v Faulkner*:<sup>38</sup>

I should define 'reasonable and probable cause' to be an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Other authorities have established the following principles:

- (a) The overall question is a double one, both objective and subjective, namely: (i) whether a reasonable man, having knowledge of facts which the defendant knew at the time he instituted the prosecution, would have believed that the plaintiff was probably guilty of the crime imputed (an objective test); and (ii) whether the defendant did himself honestly believe that the plaintiff was guilty (a subjective test).<sup>39</sup>
- (b) Where the defendant acts under a mistaken impression as to the true facts, he 'can claim to be judged not on the real facts but on those which he honestly, and however erroneously, believes; if he acts honestly upon fiction, he can claim to be judged on that'.<sup>40</sup>
- (c) The defendant's belief must be based upon facts known to him at the time that he initiated the prosecution. Thus, if incriminating facts which would have constituted reasonable and probable cause for the prosecution only come to light later, the defendant cannot rely on them to justify his action.<sup>41</sup>
- (d) Where reasonable and probable cause exists at the time of the institution of the prosecution, but facts come to light later which show that the prosecution is groundless, the defendant will be liable unless he discloses the new facts to the court.<sup>42</sup>

38 (1878) 8 QBD 167, p 171. This *dictum* has been frequently cited in Commonwealth Caribbean courts.

39 *Glinski v McIver* [1962] AC 726, p 768. In *Hills v AG* (1980) High Court, Trinidad and Tobago, No 1009 of 1974 (unreported), Edoo J pointed out that, in order to establish absence of reasonable and probable cause, the plaintiff 'must show the circumstances in which the prosecution was instituted. It is not enough to prove that the real facts established no criminal liability against him unless it also appears that these facts were within the personal knowledge of the defendant. If they were not, it must be shown what was the information on which the defendant acted'. In *Barbour v AG* (1981) Court of Appeal, Trinidad and Tobago, No 18 of 1979 (unreported), the court found that there was reasonable and probable cause for the police to prosecute B where there was:

- (a) an oral report of larceny provided by L, the complainant, whom the police had no reason to doubt;
- (b) a positive identification by L of B as the person responsible for the theft, very soon after the commission of the offence; and
- (c) a written statement by L in which he verified his report of larceny and confirmed his identification of B as the offender.

40 *Glinski v McIver* [1962] AC 726, p 776, *per* Lord Devlin.

41 *Turner v Ambler* (1847) 116 ER 98.

42 *Tims v John Lewis and Co Ltd* [1951] 2 KB 459, pp 459, 472–74.

- (e) If the defendant, believing in the plaintiff's guilt, lays the facts fully and fairly before counsel<sup>43</sup> or the police,<sup>44</sup> and is advised by either that a prosecution is justified, the defendant will normally be held to have had reasonable and probable cause for the prosecution, though there is no invariable rule to this effect.
- (f) The fact that the plaintiff was committed for trial by a magistrate, or even that he was convicted at first instance and acquitted only on appeal, is not conclusive that there was reasonable and probable cause for the prosecution, for the committal or the original conviction may have been procured by fraud or on evidence of which the defendant was unaware when laying the charge.<sup>45</sup>

Although some of the above propositions are formulated in such a way as to imply that reasonable and probable cause is a defence, this is, of course, a misleading interpretation, since it is for the plaintiff to establish absence of reasonable and probable cause, not for the defendant to establish its presence. In order to establish that the defendant had no belief in the plaintiff's guilt, the plaintiff must adduce sufficient evidence from which an inference may be drawn as to what the defendant actually believed. It may be sufficient for the plaintiff to show, for example, that the facts of which the defendant had knowledge pointed so overwhelmingly to the plaintiff's innocence that no reasonable person could possibly have believed him to be guilty.<sup>46</sup>

### Malice

As in the tort of defamation, 'malice' in the context of this tort has a wider meaning than 'spite', 'ill-will' or a desire for vengeance, for it includes any improper purpose or any 'motive other than that of simply instituting a prosecution for the purpose of bringing a person to justice'.<sup>47</sup>

Anger or indignation aroused by an imaginary crime is clearly not sufficient, since these are emotions upon which the law sometimes relies in order to secure the prosecution of offenders.<sup>48</sup> Nor is it malice to launch a prosecution in order to satisfy the rule in *Smith v Selwyn*,<sup>49</sup> which requires that where a felony, such as an

43 *Abbott v Refuge Assurance Co Ltd* [1962] 1 QB 432; *Toolsie v AG* (1981) High Court, Trinidad and Tobago, No 3749 of 1979 (unreported); *Burroughs v AG* (1990) High Court, Trinidad and Tobago, No 4702 of 1986 (unreported).

44 *Malz v Rosen* [1966] 1 WLR 1008. In *Mohammed v Taylor* (1994) High Court, Trinidad and Tobago, No S 2410 of 1987 (unreported), Ramlogan J held that the defendant police officer who had laid a charge of larceny against the plaintiff (which was later dismissed by the magistrate) not only had good grounds to lay the charge, but did what any conscientious officer would have done. He investigated the allegations, interviewed witnesses and caused statements to be taken. Those statements contained evidence which, if believed by a court, would be enough to convict the plaintiff. All that the defendant was required to do was to ensure that there was a proper case to lay before the court. The defendant had referred the matter to his superior officer, who then referred it to the DPP: 'Where a prosecutor puts all the facts of the case fairly to his superior officer, who obtains the advice of the DPP, it must be only in rare and exceptional circumstances that the plaintiff could prove lack of reasonable and probable cause or malice.' See also *Windsor v AG* (1996) High Court, Trinidad and Tobago, No 1692 of 1990 (unreported), *per* Sealey J, where the DPP advised that there were grounds for prosecution.

45 *Op cit*, Heuston and Buckley, fn 28, p 396.

46 *Op cit*, Fleming, fn 1, p 585.

47 *Stevens v Midland Counties Rly Co* (1854) 156 ER 480, *per* Alderson B.

48 *Brown v Hawkes* [1891] 2 QB 718, p 722.

49 [1914] 3 KB 98. See above, Chapter 1.

aggravated assault, has been committed, no civil action may be brought by the victim until the offender has first been prosecuted. If, on the other hand, the prosecutor had no honest belief in the guilt of the accused, this will be evidence both of lack of reasonable and probable cause and of malice.<sup>50</sup> Examples of an improper purpose amounting to malice are: where a landlord institutes criminal proceedings against his tenant as a device to procure the latter's eviction from the premises;<sup>51</sup> where a prosecution is brought against a man in order to punish him for having given evidence against the police on a previous occasion;<sup>52</sup> where a prosecution is brought in order to extort money from the accused;<sup>53</sup> and where the purpose of the prosecution is to recover a debt from the accused where recourse should properly be had to the civil and not the criminal process.<sup>54</sup>

A definition of malice which has been cited in several Caribbean cases is that of Cave J in *Brown v Hawkes*:<sup>55</sup>

Malice, in its widest and vaguest sense, has been said to mean any wrong or indirect motive; and malice can be proved either by showing what the motive was and that it was wrong, or by showing that the circumstances were such that the prosecution can only be accounted for by imputing some wrong or indirect motive to the prosecutor.

In *Irish v Barry*, Wooding CJ expressed the opinion that:<sup>56</sup>

...the self-same circumstances showing that an arrest was without reasonable and probable cause may be sufficient to establish malice on the part of the prosecutor. But such cases must, I think, be rare in the case of a police prosecutor acting in the ordinary course of his normal duty.

Thus, in *Sibbons v Sandy*,<sup>57</sup> Edo J held that, on the evidence, it appeared that the defendant police constables did believe, though they had no reasonable or probable cause for so believing, that the plaintiff had stolen the oranges; and since neither of them had been shown to have 'acted with any wrong or indirect motive', they were not liable for malicious prosecution. Similarly, in the more recent case of *Paul v AG*,<sup>58</sup> Bharath J held that a constable who had laid a charge of larceny against the plaintiff had acted incautiously and imprudently, but since there was no evidence of a motive to 'pull the plaintiff down', malice had not been established. In *Jangoo v Gomez*, on the other hand,<sup>59</sup> Mustapha Ibrahim J found that the defendant security

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50 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 687. It is a regrettably common practice for police officers who have detained (and, often, assaulted) a person, in circumstances where the officers are well aware that the detention is unjustified, to concoct charges against the person in order to cover up their own wrongdoing. Commonly, an arrestee is charged with using obscene language in a public place and/or assaulting or obstructing a constable in the execution of his duty. See, for example, *Ali v AG* (1982) High Court, Trinidad and Tobago, No 1993 of 1978 (unreported); *Quashie v AG* (1992) High Court, Trinidad and Tobago, No 30 of 1987 (unreported); *Merson v Cartwright* (1994) Supreme Court, The Bahamas, No 1131 of 1987 (unreported).

51 *Turner v Ambler* (1847) 116 ER 98.

52 *Gliniski v McIver* [1962] AC 726.

53 *Op cit*, Fleming, fn 1, p 587.

54 *Op cit*, Fleming, fn 1, p 587.

55 [1891] 2 QB 718, p 722.

56 (1965) 8 WIR 177, p 179.

57 See above, pp 28, 29.

58 (1998) High Court, Trinidad and Tobago, No CV 369 of 1992 (unreported).

59 See above, pp 29, 30.

officer 'did not honestly believe in the case he had put forward, and, having regard to the statement made by him upon his arrival at Sankai's office that the plaintiff was a thief, the prosecution could be accounted for only on the basis of an improper motive. It was both without reasonable and probable cause and malicious.

It has been held in several Caribbean cases that, where legal advice is taken by a police officer from a higher authority, such as the Director of Public Prosecutions,<sup>60</sup> a stipendiary magistrate acting as legal adviser to the Government<sup>61</sup> or a Clerk of the Courts,<sup>62</sup> who advises that charges should be preferred, the officer cannot be said to have been acting maliciously in instituting a prosecution.

Although malice and lack of reasonable and probable cause are two separate elements and both must be proved, there is an overlap between the two, in the sense that proof that the defendant had no genuine belief in the plaintiff's guilt will constitute evidence both of lack of reasonable and probable cause and of malice.<sup>63</sup> However, it is well settled that proof of malice does not necessarily supply evidence of lack of reasonable and probable cause,<sup>64</sup> for however malicious the defendant may have been, he will not be liable for malicious prosecution if he had reasonable cause to believe the plaintiff to be guilty of the crime charged.

A case in which malice was inferred from a finding of lack of reasonable and probable cause is *Rowley v Sylvester*.<sup>65</sup> Here, the plaintiff, an employee of Texaco Trinidad Inc, was leaving the Point-a-Pierre Complex one night in his car, when he was stopped at the gate by Constable H, who made a routine search of the car. In the trunk, H found a bottle of oil wrapped in a newspaper which was positioned to prevent spillage. When asked where he had obtained this oil, the plaintiff told H that he had purchased it from Neal and Massy in Princes Town. H refused to believe the plaintiff and called Sergeant S to the scene. After a search at his house, the plaintiff was unable to produce the receipt for the oil, but W, a mechanic, told the officers that he had changed the engine oil in the plaintiff's car, using just over three quarts, and that the remainder had been poured into a brandy bottle which had been wrapped in a newspaper and placed in the trunk. The plaintiff also told the officers that he was prepared to take them in his car to the laboratory at Point-a-Pierre to have the oil analysed, in order to demonstrate that the oil was not manufactured at Texaco, to which S responded that he had 'no time for that'. The plaintiff was arrested and charged with unlawful possession of the oil. The charges were later dismissed by the magistrate, the plaintiff's wife having in the meantime obtained a duplicate of the receipt from Neal and Massy. Hosein J held, first of all, that there was no reasonable and probable cause for the arrest or the charging of the plaintiff, because S 'ought not to have closed his eyes to the probability that what the plaintiff was saying was true' and, in the circumstances, there was no reasonable cause for S and H to believe that the plaintiff had stolen the oil from Texaco. He continued:

In the local vernacular, when [Constable S] replied that he had no time to take the

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60 *Mohammed v Taylor* (1994) High Court, Trinidad and Tobago, No S 2410 of 1987 (unreported), per Ramlogan J; *Windsor v AG* (1996) High Court, Trinidad and Tobago, No 1692 of 1990 (unreported), per Sealey J.

61 *Panton v Sherwood* (1961) 4 WIR 163.

62 *Henry v Tracey* (1997) Supreme Court, Jamaica, No CL 1992/H-107 (unreported), per Harrison J.

63 *Brown v Hawkes* [1891] 2 QB 718, p 722.

64 *Glinski v McIver* [1962] AC 726, p 744.

65 (1985) High Court, Trinidad and Tobago, No 723 of 1978 (unreported).

plaintiff to have the oil tested, the meaning of that reply was not as much a temporal one as that he could not be bothered, thus giving rise to an implication of malice... There are circumstances from which an implication of malice may be drawn from an absence of reasonable and probable cause...

It is true that on a charge of unlawful possession it is for the accused to establish that he has gained possession of the article lawfully, yet before a charge is preferred by a police officer or, as in this case, an arrest is effected and a charge brought, it seems to me that the explanations given by the plaintiff ought to have been duly investigated by [Constable S], *a fortiori* in the light of what Williams had told him. Thus, even if the belief was an honest belief, where it was founded upon an unreasonable basis, then there may be malice: see *Cruise v Burke*.<sup>66</sup>

If someone is questioned about the origin of an article and he says it was purchased from a well known source, it would appear to be unreasonable to check other explanations which may be quite equivocal and to disregard that which may prove conclusively whether a suspicion concerning its origin is well founded or not. Thus, it is difficult to understand why [Constable S] chose not to be bothered about exploring the possibilities of having the oil tested as requested or to put out of his contemplation a visit to Neal and Massy at Princes Town to make reasonable investigations about the source of the oil. The oil itself was, according to [Constable H], valued at no more than about \$1.50; the plaintiff had been employed by Texaco for a number of years; there was no evidence that there was any risk of his absconding; the oil itself was in [Constable S's] custody, so there was no question of vital evidence being lost; and there was no evidence of violent conduct on the part of the plaintiff, save that an allegation was made that he refused to produce his badge; but he said, and I accept, that no request was made by [Constable H] for the production of the badge. It seems to me, therefore, that the belief in the plaintiff's guilt was premature, precipitate, less than honest, and in any event was founded on an unreasonable basis.

Another example of a case in which the prosecutor was held to have acted both without reasonable and probable cause and with malice is *Jhaman v Anroop*.<sup>67</sup>

### **Jhaman v Anroop [1951] LRBG 172, Supreme Court, British Guiana**

The plaintiffs had occupied certain land for more than 30 years. In 1938, the defendant purchased an interest in the land so occupied and built a dwelling house on it. A dispute arose as to the ownership of the land. Both parties purported to exercise acts of ownership and the land was surveyed at the instance of both. The dispute culminated in the plaintiffs being arrested and charged, at the instigation and by the authority of the defendant, with larceny of wood taken from the land. The charges were dismissed. The plaintiffs sued the defendant for, *inter alia*, malicious prosecution.

*Held*, the defendant was liable. Stoby J (Ag) said:

It is common ground that, in order to succeed [in malicious prosecution], the plaintiffs must prove:

- (1) that the defendant prosecuted them;
- (2) that the prosecution ended in the plaintiffs' favour;

<sup>66</sup> (1919) 2 IR 182, p 189.

<sup>67</sup> See also *Shiwamangal v Jaikaran and Sons Ltd* [1946] LRBG 308 (Supreme Court, British Guiana).

- (3) that the prosecution lacked reasonable and probable cause; and
- (4) that the defendant acted maliciously.

*Did the defendant prosecute the plaintiffs?*

Sergeant Baynes advised the defendant to take proceedings in the Supreme Court in order to determine whose claim to the land was justified. After the arrest of the plaintiffs, it was the defendant who insisted that they should be charged for larceny. That the defendant was the complainant was proved by production of a certified copy of the charge.

All this evidence indicates that the defendant was not content merely to make a report to the police that an offence was being committed and rely on the result of their investigations and their discretion as to whether the facts warranted a prosecution or not, but that he had resolved on the prosecution of the plaintiffs and was not to be deterred by an opinion inconsistent with his resolution.

*Did the prosecution end in the plaintiffs' favour?*

There is no dispute that the charges were dismissed on 5 May 1948, and thereby the prosecution ended in favour of the plaintiffs.

*Did the prosecution lack reasonable and probable cause?*

It was contended on behalf of the defendant that he is entitled to the land, or at least is of an honest opinion that he is entitled to the land and, in addition, he honestly believed in the plaintiffs' guilt and therefore had reasonable and probable cause. *Hicks v Faulkner*,<sup>[68]</sup> cited in support of that proposition, decided that the question of reasonable and probable cause depends in all cases not upon the actual existence but upon the reasonable *bona fide* belief in the existence of such a state of things as would amount to a justification of the course pursued in making the accusation complained of. I accordingly agree that if there is an honest belief that a person is stealing property, even though the belief is mistaken, the charge may still be reasonable and probable. But there can be no honest belief that a person is stealing property when the accuser is aware that the accused, too, is equally sincere in laying claim to the property. Assuming without deciding that the defendant's wife and her relatives are the true owners of the land, and assuming without deciding that the plaintiff, Bennie Jhaman, has acquired no possessory title, I am convinced that the defendant is fully aware of Bennie Jhaman's contention that he was entitled to a declaration of ownership on account of his sole and undisturbed possession of upwards of thirty years. I can well conceive of a thief caught in the act of stealing property making some groundless claim to ownership in the vain hope of escaping conviction. A situation may well occur where such a defence is successful and yet there was reasonable and probable cause, as in subsequent proceedings it might be established that the claim of right was suddenly raised and always groundless. But where for years the parties have been at enmity, where the alleged theft is committed openly, where the alleged thief has for years exercised acts of ownership, and where the accuser has been advised to seek redress in a civil court but refrains from doing so because of expense, he can hardly be heard to say that he has an honest belief in the other party's guilt. The defendant, no doubt, ignorant of the law, could not understand why he, armed with all his documents of title, should be helpless against an adversary devoid of any document; but he was advised more than once by the sergeant and he was warned by the ranger. Yet he was not prudent enough to avail himself of legal advice. In addition to all of this, he knew that the plaintiff, Bennie Jhaman, had caused a sworn land surveyor to survey portions of the land and was asserting his claim to the land.

In *Herniman v Smith*,<sup>69</sup> the House of Lords approved of the definition of reasonable and probable cause by Hawkins J in *Hicks v Faulkner*<sup>70</sup> as:

...an honest belief in the guilt of the accused based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.

Applying this test... I have come to the conclusion that there was an absence of reasonable and probable cause.

*Did the defendant act maliciously?*

In *Koodratali v Chin*,<sup>71</sup> Camacho CJ said:

If, as must be taken to be the fact, the accusation was false to the defendant's knowledge, there can be no reasonable and probable cause for it, and if a false charge was made by the defendant and false to his knowledge, malice is made out.

In the present case, the defendant did not institute the proceedings because of information received; he instituted the charges and relied on facts known to him. The allegation that he is representing the legal owners of the land may or may not be true, but he knew that the plaintiffs were not thieves because, when their cows were impounded in 1947 and 1949, charges for illegal impounding were brought. He was, therefore, aware that the plaintiff, Bennie Jhaman, was asserting a right to the land... He had decided... to have recourse to the criminal law, not to vindicate the law but to terrorise an opponent and force him to leave the land.

On account of the defendant's conduct, malice has, in my opinion, been established, not only because of an absence of reasonable and probable cause, but also because the sole cause of the prosecution was a feud and [there was] no other motive.

### Section 33 of the Constabulary Force Act (Jamaica)

As has been seen,<sup>72</sup> the effect of this section is that, in Jamaica, an action for trespass to the person against a police constable will fail unless the plaintiff shows that the constable acted either maliciously or without reasonable and probable cause. In *Flemming v Myers*,<sup>73</sup> the majority of their Lordships in the Jamaican Court of Appeal were of the view that, under the statute, in an action for malicious prosecution brought against a police constable, there was no need for both lack of reasonable and probable cause and malice to be proved against the officer. It was sufficient to prove either. As Forte JA explained:<sup>74</sup>

In *Glinski v McIver*,<sup>75</sup> Lord Devlin affirmed that, at common law, in order to succeed in an action for malicious prosecution, the plaintiff must prove both that the defendant was actuated by malice and that he had no reasonable and probable cause for prosecuting. However, by virtue of s 33 of the Constabulary Force Act in Jamaica, a plaintiff suing a police officer for malicious prosecution as a result of an act done in

69 [1938] AC 305.

70 (1878) 8 QBD 167, p 171.

71 [1939] LRBG 218, p 220.

72 See above, pp 36–38.

73 (1989) 26 JLR 525.

74 *Ibid*, p 535.

75 [1962] AC 726.

the execution of his duty is required to prove that the defendant acted either maliciously or without reasonable and probable cause.

This view was later followed by Harrison J in *Henry v Tracey*,<sup>76</sup> but it is submitted with respect that it is hard to justify, in that it gives police officers less protection under the Act than they would have at common law, which, bearing in mind that the purpose of the Act is to give additional protection to constables, is clearly the opposite of what the legislature had intended. It is submitted, therefore, that in actions for malicious prosecution against police officers, the latter should be in no worse a position than ordinary citizens, and should be entitled to depend on the common law position, which is that both malice and lack of reasonable and probable cause must be proved against them. This would mean that s 33 would be applicable only to actions for trespass to the person against police officers.

### Damage

The plaintiff must in all cases show that the prosecution brought against him has caused damage to his:

- (a) fame; or
- (b) person; or
- (c) property.<sup>77</sup>

In order to show damage to his fame, the plaintiff must satisfy the court that the charge brought against him was 'necessarily and naturally'<sup>78</sup> defamatory. Thus, damage to fame was established where the plaintiff was wrongfully accused of having travelled on a bus without paying the fare,<sup>79</sup> since the accusation implied that he was a dishonest person and a cheat. But there will be no such damage where a landlord is prosecuted for having failed to carry out a statutory duty to cleanse his tenants' rooms,<sup>80</sup> since the charge does not necessarily carry a defamatory imputation. Nor, for the same reason, will there be damage to fame where, for example, the plaintiff is prosecuted for riding a bicycle without a rear light, or for pulling the alarm lever in a train without lawful excuse.<sup>81</sup>

Damage to the person will be established where the prosecution causes the plaintiff to be imprisoned or otherwise corporally punished, or where it puts him in jeopardy of such punishment.<sup>82</sup> As in the case of slander actionable *per se*,<sup>83</sup> the crime for which the plaintiff was charged must have been one punishable by imprisonment in the first instance, and not one punishable by imprisonment only in default of payment of a fine or other penalty.<sup>84</sup>

76 (1997) Supreme Court, Jamaica, No CL 1992/H-107 (unreported).

77 *Savile v Roberts* [1558–1774] All ER Rep 456, *per* Holt CJ.

78 *Wiffen v Bailey* [1915] 1 KB 600.

79 *Rayson v South London Tramways Co* [1893] 2 QB 304.

80 *Wiffen v Bailey* [1915] 1 KB 600.

81 *Berry v British Transport Commission* [1961] 1 QB 149.

82 *Wiffen v Bailey* [1915] 1 KB 600.

83 See below, p 229.

84 *Wiffen v Bailey* [1915] 1 KB 600.

As regards damage to property, the costs incurred by the plaintiff in defending the charge will be sufficient to ground the action for malicious prosecution, unless the court trying the offence awarded him an allowance equivalent to the costs he actually incurred.<sup>85</sup> It seems, therefore, that damage will be most easily established under this head, and in most cases it will be unnecessary to prove damage to fame or to the person.

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<sup>85</sup> *Berry v British Transport Commission* [1961] 1 QB 149.



# CHAPTER 4

## NEGLIGENCE

### INTRODUCTION

From a practical point of view, negligence is the most important and dynamic of all torts. Its emergence as a separate tort in the early part of the 19th century coincided with the industrial revolution in Britain and the advent of machinery, railways and motor vehicles. To this day, it has retained its function as the principal means of compensating the victims of accidents, particularly those occurring on the roads. More recently, the tort of negligence has been extended to include certain types of economic loss, particularly loss caused by careless words. In the Caribbean, the vast majority of negligence actions are concerned with road accidents, and in many of these the main issue is the assessment of damages. The courts in the Commonwealth Caribbean have, in general, adopted a practical approach to negligence claims and have eschewed the more theoretical discussions relating to the concept of the duty of care which have so preoccupied the English courts.

### DEFINITION

Not every act of carelessness or negligence is actionable under the tort of negligence, for, as Lord Wright explained in *Lochgelly Iron and Coal Co Ltd v McMullan*:<sup>1</sup>

...in strict legal analysis, 'negligence' means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

The tort of negligence may, therefore, be defined broadly as the breach of a legal duty to take care which results in damage, undesired by the defendant, to the plaintiff. There are three elements to the tort:

- (a) a duty of care owed by the defendant to the plaintiff;
- (b) breach of that duty by the defendant; and
- (c) damage to the plaintiff resulting from the breach.

### DUTY OF CARE

The first question to be determined in any action for negligence is whether the defendant owed a duty of care to the plaintiff. In general, a duty of care will be owed wherever in the circumstances it is foreseeable that, if the defendant does not exercise due care, the plaintiff will be harmed. This foreseeability test was laid down by Lord Atkin in the celebrated case of *Donoghue v Stevenson*<sup>2</sup> and is known as the 'neighbour principle':

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1 [1934] AC 1, p 25.

2 [1932] AC 562, p 579.

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.

There are a number of common situations in which it is well established that a duty of care exists, for example:

- (a) the driver of a vehicle on the road owes a duty of care to other road users, pedestrians and occupiers of premises abutting the highway to drive carefully;
- (b) the occupier of premises owes a duty of care to lawful visitors to ensure that the premises are reasonably safe;
- (c) the employer of a workman in a factory owes a duty of care to provide adequate equipment and a safe system of working;
- (d) a bailee of goods owes a duty to the bailor to take care of the goods entrusted to him;
- (e) a manufacturer of goods owes a duty of care to consumers to ensure that the goods are free from harmful defects.

There is no closed list of duty situations, and those listed above are merely examples, albeit those most commonly encountered, of circumstances in which a duty of care will be held to arise. As Lord Macmillan emphasised, 'the categories of negligence are never closed'.<sup>3</sup>

By recognising new 'duty situations', the courts are able to expand the scope of the tort of negligence, but at the same time it is accepted that public policy requires some limits to be set to the range of liability, and when, in a particular case, the court denies that a duty of care is owed, it is really coming to a decision that, on policy grounds, the defendant ought not to be made liable. As Lord Denning put it:<sup>4</sup> 'It is, I think, at bottom a matter of public policy which we, as judges, must resolve. This talk of "duty" or "no duty" is simply a way of limiting the range of liability for negligence.'

The need to take into account the dictates of public policy was expressed by Lord Wilberforce in *Anns v Merton LBC*, where his Lordship laid down a two stage test for the existence of a duty of care:<sup>5</sup>

In order to establish that a duty of care arises in a particular situation, the question has to be approached in two stages. First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage, there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises. Secondly, if the question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit, the scope of the duty or the class of person to whom it is owed, or the damages to which a breach of it may give rise.

3 *Donoghue v Stevenson* [1932] AC 562, p 619.

4 *Dorset Yacht Ltd v Home Office* [1969] 2 QB 412, p 426.

5 [1977] 2 All ER 492, pp 498–99.

Lord Wilberforce's test was applied in *Austin v AG*.

**Austin v AG (1986) High Court, Barbados,  
No 1209 of 1985 (unreported)**

H, a convicted prisoner, escaped from the Glendairy Prison and entered the plaintiff's dwelling house, where he attacked and seriously injured her with a knife. On the day of his escape, H was one of a number of prisoners being instructed in woodwork in the carpenter's shop at the prison. Two prison officers were in supervision. One of them left for a short period and, during his absence, H escaped.

The plaintiff alleged that the escape of H was caused by the negligence of the Superintendent of Prisons, whose duty it was to supervise, control and be responsible for the conduct of prisoners, and that the defendant was vicariously liable for the consequences of such negligence.

*Held*, there was no sufficient relationship of proximity between the Superintendent of Prisons and the plaintiff such as to give rise to a duty of care towards the plaintiff. In the alternative, the damage suffered by the plaintiff was too remote. Husbands J said:

The plaintiff's contention is not only that the Superintendent of Prisons and his officers could have, by the exercise of reasonable care, prevented Hunte's escape, but that it was reasonably foreseeable by them that if Hunte escaped he would be likely to do the damage which he did, that is to say, commit serious personal injury to the plaintiff.

The first question that arises is whether any duty of care to prevent the escape of a prisoner is owed by the Superintendent of Prisons to persons likely to be injured by the escaped prisoner's tortious acts. In the consideration of this question, much learning is to be found in the landmark authorities of *Rylands v Fletcher*<sup>[6]</sup> and *Donoghue v Stevenson*<sup>[7]</sup> as to the characteristics of conduct and relationships which gave rise to legal liability. Lord Atkin's celebrated guidelines in *Donoghue v Stevenson* are as follows:<sup>[8]</sup>

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.

Before making use of these guidelines, one has to bear in mind that, in the present case, the plaintiff's injury was caused by a third person, the prisoner, responsible in law for his own tortious acts; also that the prisoner's tortious acts were not the natural consequence of his escape.

In the arguments before this court, the cases of *Ellis v Home Office*<sup>[9]</sup> and *D'Arcy v Prison Comr*<sup>[10]</sup> were cited. In these cases, the prisoner, at the time of his tortious act, was in the actual custody of the defendant; also, the defendant, in the exercise of his legal right to physical custody of the plaintiff, had required the plaintiff to be so

6 (1868) LR 3 HL 330.

7 [1932] AC 562.

8 *Ibid*, p 579.

9 [1953] 2 All ER 140.

10 (1955) *The Times*, 17 November.

placed that the defendant ought reasonably to have foreseen that he was likely to be injured by his fellow prisoner. In reviewing these cases in *Home Office v Dorset Yacht Co*, Lord Diplock said:<sup>[11]</sup>

... I do not think that, save as a deliberate policy decision, any proposition of law based on the decisions in these two cases would be wide enough to extend to a duty to take reasonable care to prevent the escape of a prisoner from actual physical custody and control, owed to a person whose property is situated outside the prison premises and is damaged by the tortious act of the prisoner after his escape.

In urging his claim in negligence... counsel for the plaintiff submits that the prisoner's background of violence was such that he should not have been selected for inclusion in the carpentry class with its less than stringent security procedures. It was this circumstance, counsel claims, that led to the prisoner's escape from the workshop. Now, the Prisons Act (Cap 168) and Rules made thereunder authorise the prison authorities to exercise a discretion in the classification of prisoners for the purposes of their training. However, according to the cases, it is only if the prison authorities purport to act *ultra vires* the statutory power conferred on them that a cause of action will arise for the private citizen...

In the instant case, the selection of the convicted prisoner for training in carpentry in the workshop was well within the proper exercise of the statutory powers conferred upon the prison authorities. And it has not been shown that these powers were so carelessly and unreasonably exercised as to amount to the non-exercise or abuse of the discretion conferred by Parliament. In any event, it has not been shown that the prison authorities were in any way negligent in their selection. The question, then, that arises is—has it been shown that a duty of care was owed by the defendant to the plaintiff?

There can be no doubt that, on a review of the authorities, a Superintendent of Prisons has a common law duty to be careful and in general must owe a *prima facie* duty of care to members of the public with whom he is in a sufficient relationship of neighbourhood that, within reasonable contemplation, carelessness on his part is likely to cause them damage. But it is necessary to consider whether there are any considerations which would negative or limit the scope of that duty. In this context, the nature of the relationship, the nature of the damage suffered and its remoteness fall to be considered. In *Home Office v Dorset Yacht Co*, Lord Diplock had this to say:<sup>[12]</sup>

The risk of sustaining damage from the tortious acts of criminals is shared by the public at large. It has never been recognised at common law as giving rise to any cause of action against anyone but the criminal himself. It would seem arbitrary and, therefore, unjust, to single out for the special privilege of being able to recover compensation from the authorities responsible for the prevention of crime a person whose property was damaged by the tortious act of a criminal merely because the damage to him happened to be caused by a criminal who had escaped from custody before completion of his sentence, instead of by one who had been lawfully released, or who had been put on probation, or given a suspended sentence, or who had never been previously apprehended at all. To give rise to a duty on the part of the custodian, owed to a member of the public, to take reasonable care to prevent a Borstal trainee from escaping from his custody before completion of the trainee's sentence, there should be some relationship between the custodian and the person to whom the duty is owed

11 [1970] AC 1004, p 1062.

12 *Ibid*, p 1070.

which exposes that person to a particular risk of damage in consequence of that escape, which is different in its incidence from the general risk of damage from criminal acts of others which he shares with all members of the public.

This is indeed beautiful language, prescribing with clarity the parameters of the duty of care in cases such as this.

On the question of remoteness, in *Lamb v Camden LBC*, Watkins LJ said this:<sup>[13]</sup> It seems to me that, if the sole and exclusive test of remoteness is whether the fresh damage has arisen from an event or act which is reasonably foreseeable, or reasonably foreseeable as a possibility, or likely or quite likely to occur, absurd, even bizarre, results might ensue in actions for damages for negligence. Why, if this test were to be rigidly applied to the facts in the *Dorset Yacht* case, one can envisage the Home Office being found liable for the damage caused by an escaped Borstal boy committing a burglary in John O'Groats. This would plainly be a ludicrous conclusion...

In my view, the *Wagon Mound* test<sup>[14]</sup> should always be applied without any of the gloss which is from time to time applied to it. But, when so applied, it cannot in all circumstances in which it arises conclude consideration of the question of remoteness, although in the vast majority of cases it will be adequate for this purpose. In other cases—the present one being an example of these, in my opinion—further consideration is necessary, always providing, of course, that a plaintiff survives the test of reasonable foreseeability.

This is because the very features of an event or act for which damages are claimed themselves suggest that the event or act is not upon any practical view of it remotely in any way connected with the original act of negligence. These features will include such matters as the nature of the event or act, the time it occurred, the place where it occurred, the identity of the perpetrator and his intentions and responsibility, if any, for taking measures to avoid the occurrence, and matters of public policy.

A robust and sensible approach to this very important area of the study of remoteness will more often than not produce, I think, an instinctive feeling that the event or act being weighed in the balance is too remote to sound in damages for the plaintiff. I do not pretend that in all cases the answer will come easily to the inquirer. But that the question must be asked and answered in all these cases I have no doubt.

On the peculiar facts of this case, and applying the language of Lord Wilberforce in *Anns v Merton LBC*, I do not think that there was a sufficient relationship of proximity or neighbourhood between the Superintendent of Prisons and the plaintiff such that, in the reasonable contemplation of the former, carelessness on his part might be likely to cause damage to the latter of the type complained of, so that a *prima facie* duty of care arose. However, if I am wrong in this, I am of the view that there are considerations which would negative or limit the scope of the duty or the damages to which a breach of it might give rise. Adopting the 'robust and sensible approach' suggested by Watkins LJ in *Lamb v Camden LBC*,<sup>[15]</sup> I have the instinctive feeling that the plaintiff's damage here is too remote. While it is true that prisoners in the act of escaping from custody will almost inevitably cause damage to persons or property that may hinder them, no such inevitability may be ascribed to the outlandish act of one who, being responsible for his own acts and having successfully escaped from custody, subsequently waylays and commits the criminal act of causing grievous bodily harm to a plaintiff in her own home.

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13 [1981] 2 All ER 408, p 421.

14 [1961] AC 388, p 424.

15 [1981] 2 All ER 408. Cf *Hill v Chief Constable of West Yorkshire* [1989] AC 53.

For these reasons, I would hold that the damage caused by the prisoner is too remote to be recovered from the Superintendent of Prisons or the Attorney General as vicariously liable for the negligence of the Superintendent.

### More recent trends

Lord Wilberforce's test in *Anns* led to a significant expansion of liability in negligence and, in the mid-1980s, the appellate courts in England sought to pull in the reins and check the expansion. Two factors which influenced this new approach were:

- (a) the incursion of tort into traditionally contractual areas;<sup>16</sup> and
- (b) the difficulties in obtaining adequate insurance to cover the new areas of liability.

It was feared that the first tier of the *Anns* test was so easily satisfied that it left too much to the second tier, namely, 'policy'; and the courts have always been reluctant to admit any dependence on policy considerations as a basis for developing the law. Lord Wilberforce's two stage test has thus fallen out of favour with the English courts, which have criticised the tendency to treat it as being of a definitive character.

In *Governors of the Peabody Donation fund v Sir Lindsay Parkinson Ltd*,<sup>17</sup> Lord Keith said that, 'in determining whether or not a duty of care of particular scope was incumbent on a defendant, it is material to take into account *whether it is just and reasonable that it should be so*'. However, in *Caparo Industries plc v Dickman*,<sup>18</sup> Lord Bridge referred to the inability of any single general principle to provide a practical test to determine whether a duty of care was owed or not in a particular situation, and he suggested that the law should revert to 'the traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes'. In his view, the approach of Brennan J in *Sutherland Shire Council v Heyman*<sup>19</sup> should be adopted, viz, that it was preferable that:

...the law should develop novel categories of negligence incrementally and by analogy with established categories, rather than by a massive extension of a *prima facie* duty of care restrained only by indefinable considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed.

The 'incremental' approach entails looking at the particular category that a case falls into and developing specific rules within that category. Thus, for example, an economic loss case would be subject to different rules from a physical damage case, as it is inappropriate to base liability for economic loss on reasonable foreseeability alone.

To date, there appear to be few judicial pronouncements in Commonwealth Caribbean courts as to whether the new approach seen in the English courts will

16 As in *Junior Books Ltd v Veitchi* [1983] 1 AC 520.

17 [1984] 3 All ER 529, p 534.

18 [1990] 2 WLR 358, pp 364, 365. See, also, *Murphy v Brentwood DC* [1990] 3 WLR 414. In *Bodoosingh v AG* (1999) High Court, Trinidad and Tobago, No 733 of 1993 (unreported), Mendonca J relied heavily on *dicta* in *Caparo* in holding that no duty of care was owed by the vehicle licensing authority to the purchaser of a vehicle who was misled by an erroneous certificate of ownership issued by the authority.

19 (1985) 60 ALR 1, pp 43, 44.

be adopted.<sup>20</sup> Subsequent attempts to formulate another test for the existence of a duty of care have hardly introduced coherence, and the emphasis on policy considerations in *Anns* would appear to be appropriate for the developing jurisprudence of Caribbean jurisdictions. In any event, as one distinguished author has pointed out,<sup>21</sup> despite the frequent discrediting of the *Anns* formula in the English courts, 'other judicial formulations at the highest level do not, upon close examination, seem to differ very much in substance from it', in that in these later cases 'policy' and 'fairness' have been treated as the central issues.

## BREACH OF DUTY

Having decided that a duty of care was owed to the plaintiff in the particular circumstances, the court's next task is to determine whether the defendant was in breach of that duty. In the Caribbean, this question is the one which, in practice, is likely to occupy most of the court's time. In deciding the question, the court considers whether or not a reasonable man, placed in the defendant's position, would have acted as the defendant did. In the frequently cited words of Alderson B in *Blyth v Birmingham Waterworks Co*:<sup>22</sup>

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

In deciding what a reasonable man would have done in the circumstances, and in assessing the standard of care expected of the defendant, the court may take into account what may be called the 'risk factor'. This has four elements:

- (a) the likelihood of harm;
- (b) the seriousness of the injury that is risked;
- (c) the importance or utility of the defendant's conduct;
- (d) the cost and practicability of measures to avoid the harm.

### The likelihood of harm

The greater the likelihood that the defendant's conduct will cause harm, the greater the amount of caution required of him. In Lord Wright's words:<sup>23</sup> 'The degree of care which the duty involves must be proportioned to the degree of risk involved if the duty of care should not be fulfilled.'

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20 In *Gonzales v Trinidad Co-operative Bank Trust Co Ltd* (1999) High Court, Trinidad and Tobago, No 1595 of 1988 (unreported), Lucky J appeared to discount the *Anns* test, commenting that 'the floodgates which were apparently left ajar after *Anns* have been closed to a reasonable flow'; but in *Ramdeen and Singh v AG* (1999) High Court, Trinidad and Tobago, No CV 807 of 1995 (unreported), Jamadar J held that the test as to whether a duty of care was owed was that set out by Lord Wilberforce in *Anns*.

21 Rogers, WHV, *Winfield and Jolowicz on Tort*, 16th edn, London: Sweet & Maxwell, para 5.15.

22 [1843–60] All ER Rep 478, p 479.

23 *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108, p 126.

This may be illustrated by comparing the following cases. In *Bolton v Stone*,<sup>24</sup> the plaintiff was struck and injured by a cricket ball as she was walking along a public road adjacent to a cricket ground. The plaintiff contended that the defendant, who was in charge of the ground, had been negligent in failing to take precautions to ensure that cricket balls did not escape from the ground and injure passers-by; but the court held that, taking into account such factors as the distance of the pitch from the road, the presence of a seven foot high fence and the infrequency with which balls had escaped previously, the likelihood of harm to passers-by was so slight that the defendant had not been negligent in allowing cricket to be played without having taken further precautions such as raising the height of the fence.

*Bolton* was followed in the Jamaican case of *Hartley v Gray's Inn Sugar Factory Ltd*,<sup>25</sup> where it was held that the likelihood of untrimmed cane leaves blowing into the face of a cane cutter and causing blindness was so slight that the employer was not liable in negligence for his failure to have the leaves trimmed. In *Hilder v Associated Portland Cement Manufacturers Ltd*,<sup>26</sup> on the other hand, where the plaintiff, whilst riding his motorcycle along a road, crashed and sustained injuries after being struck by a football kicked from the defendant's adjacent land where children were in the habit of playing, the defendant was held negligent in having failed to take precautions to prevent footballs from being kicked onto the road since, in the circumstances, the likelihood of injury to passers-by was considerable.

The application of this test is also illustrated by the Trinidadian case of *Mowser v De Nobriga*.

### **Mowser v De Nobriga (1969) 15 WIR 147, High Court, Trinidad and Tobago**

The plaintiff was a spectator at a race meeting. A riderless horse (Vileb) left the race track at a point where there was no outer rail or fence, and struck and injured the plaintiff. She brought an action in negligence against the defendants, the organisers of the race meeting.

*Held*, the plaintiff was a person to whom a duty of care was owed. There was a real risk of injury to spectators in the event of a horse galloping off the track, and the defendants were negligent in having failed to take sufficient precautions to protect the plaintiff and other spectators. Rees J said:

There is no evidence in the present case that there was any act constituting negligence on the part of Vileb's jockey, and therefore, the plaintiff, in order to succeed, must prove that the defendants themselves, as officers of the club, were negligent. There are many definitions of negligence. Alderson B in *Blyth v Birmingham Waterworks Co*<sup>[27]</sup> said that negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do. Willes J in *Vaughan v Taff Vale Rly Co*<sup>[28]</sup> says that the definition of negligence is the absence of care; but, whatever may be its general description, negligence is now judicially recognised as an independent tort, the essential ingredients of which are: (a) the existence of a duty to take care owing to the plaintiff by the defendant;

24 [1951] AC 850.

25 (1995) Supreme Court, Jamaica, No H 011 of 1987 (unreported).

26 [1961] 1WLR 1434.

27 [1843–60] All ER Rep 478, p 479.

28 (1860) 157 ER 1351, p 1355.

(b) a breach of that duty; and (c) damage suffered by the plaintiff which is legally deemed to be the consequence of that breach of duty...

In the present case, the defendants were promoters of the race meeting and were undoubtedly well experienced in this form of sport. De Verteuil, the second defendant, said he knows of cases where horses have become riderless in the course of a race and have run from the race track into a crowd, but quite apart from that, he remembers a case where during the course of a race the horse bolted with its jockey. His view is that, when this occurs, persons in the vicinity are likely to be injured. Arthur Ince, the trainer of Vileb, who has had an interest in horse racing for the past 35 to 40 years, said that a jockey falling and leaving a riderless horse which runs off the race track is a regular feature of horse racing. The defendants were fully aware that on race days there are large crowds in the savannah and that some of these persons usually congregated about 400 ft from the race track in the vicinity of the Casuals Club. In my view, these persons fell within that class of persons which Lord Atkin described as 'neighbours' in *Donoghue v Stevenson*,<sup>[29]</sup> and it was therefore the duty of the defendants to see that those persons were, so far as reasonably practicable, protected from being injured by a horse escaping from the race track during the course of a race. To my mind, there was clearly a risk of injury to these persons.

However, there were no safety precautions in the form of a fence or outer rail erected at the point where Vileb ran off from the race track. Counsel for the defendants argued that the risk of injury to persons in that crowd, if any, was so small that there was no necessity for erecting any form of protection. He pointed out that the degree of care to be taken depends on the magnitude of the risk and placed reliance on *Bolton v Stone*,<sup>[30]</sup> where a member of a cricket team drove a ball out of the ground to an unfrequented adjacent public road and it struck and injured the plaintiff, who was standing on the highway outside her house. This had happened about six times before. It was held that, although the occupier of a cricket ground owes a duty of care to persons on an adjacent highway or on neighbouring property, yet for an act to be negligent there must be not only a reasonable possibility of its happening but also of injury caused thereby. On the facts of that case, the risk of injury to a person resulting from the hitting of a ball out of the ground was so small that the probability of such an injury could not be anticipated—as a result, the plaintiff failed. Lord Normand said:<sup>[31]</sup>

It is not enough for the respondent to say that the occupiers of the cricket ground could have foreseen the possibility that a ball might be hit out of the ground by a batsman and might injure people on the road. She must go further and say that they ought, as reasonable men, to have foreseen the probability of such an occurrence.

In the same case, Lord Porter put it this way:<sup>[32]</sup>

It is not enough that the event should be such as can reasonably be foreseen; the further result, that injury is likely to follow, must also be such as a reasonable man would contemplate before he can be convicted of actionable negligence.

In the light of these observations, it would seem that it is not enough to say in the present case that the defendants could have foreseen the possibility of a riderless horse running off the race track and knocking someone down. The further question in determining liability is whether it can be said that the accident was of such a kind that the defendants as reasonable men ought to have foreseen the probability of its

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29 [1932] AC 562. See above, pp 63, 64.

30 [1951] AC 850.

31 *Ibid*, p 861.

32 *Ibid*, p 858.

occurrence. As to who are reasonable men must depend on the particular circumstances of the case, the test being what would be foreseen by a reasonable observer of the class whose conduct is in question, and if the accident is of a different type and kind from anything that the defendants could have foreseen, they are not liable for it. Let me then examine the facts of the present case to see if the defendants, as race promoters of experience, were able to realise or foresee the consequences of their neglect to fence or erect an outer rail at the point where Vileb ran off the race track.

The second defendant, de Verteuil, says that he has been associated with horse racing for about 45 years, both locally and abroad, and remembers on one occasion a horse becoming riderless in a race and running all the way from the race track on to the savannah and then down Cipriani Boulevard. On another occasion he witnessed a horse named 'Penny Co-Ed' losing its jockey during a race and running around the race track until it collapsed in a complete state of exhaustion. Mr Ince says that he has seen riderless horses running off the track into the savannah on many occasions. That being so, it would seem that it is possible for a riderless horse on leaving the race track to travel for some considerable distance, and consequently, it must quite obviously be contemplated by persons of the experience in horse racing as the defendants, that members of the public who congregate approximately 400 ft from the race track would be likely to be knocked down and injured if a riderless horse left the race track. The evidence discloses that the plaintiff wife was injured while attempting to rescue her son who was in danger; but if a horse runs away, it must not only be contemplated that people in a crowd nearby are likely to be knocked down, but also that persons will attempt to stop the horse and prevent injury to life or limb, particularly where the rescue is that of a mother trying to avert injury to her infant son. I should think that reasonable men in the position of the defendants would have foreseen the risk and done something to prevent it.

But it was contended that the ordinary careful man does not have to take precautions against every foreseeable risk. I agree with this contention because if we were all to attempt to take precautions against every risk, life would be well nigh impossible. However, there is warrant for saying that, if there is a real and substantial risk which is foreseeable and reasonably likely to happen, the ordinary careful man must not neglect to reduce or eliminate it. In spite of the reliance placed by counsel for the defendants on the observations made in *Bolton v Stone*,<sup>[33]</sup> there is in my view an essential difference between that case and the present one, because, whereas in *Bolton's* case there was no real and substantial risk of injury, seeing that there was only a remote likelihood of injury or damage being caused to anyone by a cricket ball on an unfrequented highway, in the present case there was a strong probability that if a riderless horse escaped from the race track in the vicinity of the Casuals Club and ran into the group of persons who were about 400 ft from the race track, one or more of those persons would be knocked down and injured. In my view, the risk of injury to those persons was a real and substantial one which would have occurred to the mind of any reasonable promoter of horse racing, and no such person would have neglected to afford some measure of protection to those persons. But if I am wrong and the risk was merely one of small magnitude, as counsel for the defendants so vigorously urged, then it is important to observe the remarks of Lord Reid in *The Wagon Mound (No 2)*, where he said:<sup>[34]</sup>

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33 *Ibid.*

34 [1966] 2 All ER 709, p 718.

It does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, for example, that it would involve considerable expense to eliminate the risk.

Later, he said:<sup>35]</sup>

If a real risk is one which would occur to the mind of a reasonable man in the position of the defendant's servant and which he would not brush aside as far-fetched, if the criterion is to be what that reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense...

Counsel submitted that, having regard to the elaborate nature of the remedial measures required, the risk of injury was not so great as to require the defendants to go to the lengths of erecting a fence sufficiently high to ensure that no horse would jump over it. In support of his contention, he referred me to *Latimer v AEC Ltd*,<sup>[36]</sup> where Lord Denning remarked that in every case of foreseeable risk it is a matter of balancing the risk against the measures necessary to eliminate it. In that case, a heavy rainstorm caused the floor of a factory to be flooded with water. The water eventually drained away but it left an oily film on the surface of the floor which was slippery. The defendants did their best to reduce the danger by spreading sawdust on the floor, but, owing to the large area, there was insufficient sawdust to cover the floor. In the course of his duty, the plaintiff slipped and fell. Pilcher J, the judge of first instance, held that the defendants had been negligent at common law in permitting the workmen to work in the factory when they knew it to be in a potentially dangerous condition. The Court of Appeal reversed his decision and the matter went to the House of Lords, where it was held that the company had taken every step which an ordinary prudent employer would have taken in the circumstances to secure the safety of the workmen, and so they were not liable to the workman for negligence at common law. Every case must depend upon its particular facts, and, in complete contrast to that case, where the judge had found that the defendants had taken every step which could reasonably have been taken to deal with the conditions which prevailed before the plaintiff came on duty, in the present case no steps of any kind were taken to secure the safety of the persons who had gathered in the savannah near the Casuals Club, although, as I find, there was a substantial risk of injury to them which any ordinary prudent person in the position of the defendants would at least have attempted to eliminate or reduce. As I see it, the remedial measures necessary in the instant case were merely to erect an outer rail 3 ft 6 in high, and taking these steps would have been adequate to prevent a race-horse from escaping...

In the circumstances, it cannot be said that the erection of an outer rail 3 ft 6 in high at the point where Vileb escaped would have involved considerable expense to eliminate the risk which existed or that overcoming the risk was impracticable.

Counsel for the defendants submitted that the defendants had acted within a well recognised practice, and common practice is *prima facie* evidence that they were not negligent. I was referred to *Wright v Cheshire CC*,<sup>[37]</sup> where it was held that the test of what was reasonable care in ordinary everyday affairs might well be answered by experience arising from practices adopted generally and followed successfully for many years. The evidence in that case was that the defendants had adopted a generally approved practice. Taking into account the nature of the activity in question, it was held that they had not been shown to have been negligent and accordingly they were not liable in damages. Although compliance with common practice is evidence that

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35 *Ibid*, p 719.

36 [1953] AC 643.

37 [1952] 2 All ER 789.

reasonable care has been used, it is not conclusive and it is always a matter for the court in any given case to determine whether adequate precautions have been taken to comply with the legal standard of care. In this case, the question for consideration as to what is the common practice adopted and followed must be not whether there is an outer rail erected all the way around race tracks, but whether there is an outer rail in the vicinity of that portion of race tracks where spectators are in the habit of congregating.

The evidence of common practice as related to local conditions does not, however, support the defendants, because it is in substance that the outer rails of the race tracks in Arima and Union Park go around that portion of the track where spectators assemble. In any case, I am not satisfied that there is evidence to convince me that it is common practice not to have a fence or outer rail on race tracks to afford some measure of protection to spectators from racehorses escaping from a race track. If that is the common practice, speaking for myself, I would venture to suggest that it is about time that such a practice came to an end.

### **The seriousness of the injury that is risked**

The gravity of the consequences if an accident were to occur must also be taken into account. The classic example is *Paris v Stepney BC*.<sup>38</sup> There, the defendants employed the plaintiff as a mechanic in their maintenance department. Although they knew that he had only one good eye, they did not provide him with goggles for his work. While he was attempting to remove a part from underneath a vehicle, a piece of metal flew into his good eye and he was blinded. It was held that the defendants had been negligent in not providing this particular workman with goggles, since they must have been aware of the gravity of the consequences if he were to suffer an injury to his one good eye; though it was pointed out that the likelihood of injury would not have been sufficient to require the provision of goggles in the case of a two-eyed workman.

The principle in *Paris* was applied by the Court of Appeal of Guyana in *Rhyna v Transport and Harbours Department*.

#### **Rhyna v Transport and Harbours Department (1985) Court of Appeal, Guyana, No 56 of 1982 (unreported)**

The plaintiff/appellant was employed by the defendant/respondent as a casual watchman. The appellant had lost the sight in his left eye as a result of a previous accident. The appellant was instructed to catch the line from a vessel about to moor at the wharf, which was contrary to the established system for the mooring of vessels and took no account of the appellant's disability. The rope struck the appellant in his right eye and he was blinded.

*Held*, the respondent was in breach of its duty as employer to provide a safe system of work and effective supervision. (As to the plea of *volenti non fit injuria*, see below, p 372.)

On the matter of the appellant's disability, Ganpatsingh J said:

The appellant's peculiar disability enhanced the risk of injury if the rope was not thrown accurately. This risk, in my view, was not so remote or so small as to be unforeseeable, notwithstanding that an accident of this nature involving personal

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38 [1951] AC 367.

injury had not occurred before, for we do not know whether a one-eyed man was ever instructed or attempted to catch the rope before.

It may not be necessary in the circumstances to provide supervision for a two-eyed man. But that is not the criterion. The test is, what precautions would the ordinary reasonable and prudent employer take in the circumstances? The relevant considerations would include all those facts, including disability, which would affect the conduct of a reasonable and prudent employer. In my view, the reasonable and prudent employer would not be influenced merely by the greater or lesser probability of an accident of this nature occurring, but also by the gravity of the consequences if it did occur. In effect, there was no safe system in place for the receiving of lines by a one-eyed man.

The normal system, which operated very safely for a two-eyed man, was wholly inadequate. In *Paris v Stepney BC*,<sup>39]</sup> Lord Simonds outlined the duty of care of a master as follows:

His liability in tort arises from his failure to take reasonable care in regard to the particular employee and...all the circumstances relevant to that employee must be taken into consideration.

It was held in that case that where a workman, known by his employer to be one-eyed, was employed in a garage, it was the duty of the employer to provide him with goggles when he was employed on work involving the risk of a chip of metal entering his remaining eye, although they might well be under no such duty towards a man with two eyes, and notwithstanding that an accident of that nature had never happened before.

### The importance or utility of the defendant's activity

The seriousness of the risk created by the defendant's activity must be weighed against the importance or utility of such activity, and, where the defendant's conduct has great social value, he may be justified in exposing others to risks which would not otherwise be justifiable. For instance, 'if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk'.<sup>40</sup> Thus, the driver of an ambulance or fire engine answering an emergency is entitled to proceed at a speed and take some traffic risks which would be unjustifiable for an ordinary motorist (such as going through a red light on the way to a fire),<sup>41</sup> and a policeman, in carrying out his duty to apprehend criminals, may be justified in resorting to the use of firearms, thereby exposing innocent bystanders to some risk.<sup>42</sup> In all cases, 'one must balance the risk against the end to be achieved', and 'the commercial end to make a profit is very different from the human end to save life or limb'.<sup>43</sup>

39 [1951] AC 367, p 375.

40 *Daborn v Bath Tramways Motor Co Ltd* [1946] 2 All ER 333, p 336, *per* Asquith J.

41 *Ward v London CC* [1938] 2 All ER 341. But see below, p 78.

42 *Beim v Goyer* [1965] SCR 638; *Robley v Placide* (1966) 11 WIR 58; *Byfield v AG* (1980) Supreme Court, Jamaica, No CL B-344 of 1977 (unreported). But a police officer is not entitled to ignore entirely the safety of bystanders, and he must confine himself to measures which are reasonably necessary to effect his purpose. Thus, in *Andrews v AG* (1981) Supreme Court, Jamaica, No CL A-42 of 1979 (unreported), it was held that police officers had exhibited 'a remarkable degree of negligence for the welfare of the public' in firing at a moving car in which they believed certain fugitives to be present, and hitting the plaintiff, an innocent bystander.

43 *Watt v Hertfordshire CC* [1954] 2 All ER 368, p 371.

The cases of *Robley v Placide* and *Byfield v AG*, from Trinidad and Tobago and Jamaica respectively, illustrate the application of this principle in the context of the maintenance of law and order.

### **Robley v Placide (1966) 11 WIR 58, Court of Appeal, Trinidad and Tobago**

The appellant was the leader of a party of police constables who went to the compound of the General Hospital, Port of Spain, to investigate a report of violence. There, they saw a number of men, armed with cutlasses, come out from one of the buildings. They gave chase and the appellant and another constable eventually caught up with the men, who turned round and started to advance menacingly towards the appellant. When they were at a distance of 20–25 ft from the appellant, he aimed his pistol at one of the men and fired a shot. The shot missed the man, but struck the respondent, a pedestrian, in her leg. The trial judge held the appellant liable to the respondent in negligence.

*Held*, on appeal, that no legal duty to retreat could arise in circumstances where a police officer acted in the execution of his statutory duty to arrest persons who were *prima facie* committing, within his view, the offence of being armed with offensive weapons; and the necessity of saving life and limb justified the appellant in taking the risk of possible injury to the respondent. The appellant was, therefore, not liable in negligence. Phillips JA said:

There was no suggestion made either in this court or in the court below that the appellant, even though purporting to exercise a right of defending himself against his attackers, did not owe a duty of care to the respondent in relation to his discharging the firearm, and the sole question for determination is whether such discharge was negligent having regard to all the relevant circumstances. In this connection, it is appropriate to quote the classic definition of negligence given by Alderson B in *Blyth v Birmingham Waterworks Co*:<sup>[44]</sup>

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

The foundation of the trial judge's reasoning in relation to this matter seems to us to have been that a distance of 20–25 ft separating the appellant from his would-be assailants was so considerable as to afford the appellant ample opportunity of taking other measures reasonably sufficient for his own protection, for example, retreating or firing a warning shot, and that the exigencies of the situation did not necessitate his taking the action which he did. In forming this opinion, the judge was influenced by the consideration that, to use his own words, 'the assailants were armed with cutlasses only', the implication being that, as cutlasses are not normally used as missiles, in order to use them on the appellant the attackers would have had to traverse a distance of 20–25 ft.

In so far as the judge appears to have held that there was a duty on the appellant to retreat, we think that he must have lost sight of the fact that the appellant was a police officer acting in execution of his statutory duty to arrest persons who were *prima facie* committing within his view the offence of being armed with offensive weapons, and that no legal duty to retreat could arise in such circumstances. The situation, in our judgment, remained unaffected (rather, the contrary) by the fact that the holders of those weapons clearly displayed their intention of attacking the appellant and thus to embark upon the commission of a more serious crime. To

44 [1843–60] All ER Rep 478, p 479.

impose upon a police officer a duty to retreat in such circumstances would clearly be acting contrary to the express provisions of ss 19 and 20 of the Police Ordinance, Ch 11, No 1.

This is not to say that the appellant, being a police officer, was *ipso facto* entitled to act in a rash, reckless or unreasonable manner, or to take such steps for his protection as were not warranted by the necessity of the occasion. In considering this question, unlike the trial judge, who accentuated the fact that cutlasses are not normally (though they can be) used as missiles, we think it important to stress the fact that the appellant was suddenly called upon to deal with a situation involving not one man, but six men armed with lethal weapons, who by their whole conduct had made it clear that they were determined to make a concerted attack upon the police, for which purpose they had deliberately sharpened their weapons. Undeterred by the request to drop the cutlasses, they riotously proceeded to effect their object, which the appellant sought to foil by the discharge of a single bullet fired at one of the men at knee level at a moment when he was only 20–25 ft away. We fail to see that the time it would take the men to traverse this distance would be such as either to permit calm reflection or to allow ample opportunity to the appellant of escaping from the attack, for example, by taking cover (as was suggested by counsel for the respondent) behind two motor cars that were on the scene.

We have accordingly come to the conclusion that the firing of his pistol by the appellant was in the circumstances a legally justifiable act vis à vis the six men, and it is interesting to note that counsel for the respondent conceded this. We agree with him, however, that this finding does not determine the question of the appellant's liability for wounding the respondent. Remembering the above quoted words of Alderson B in *Blyth v Birmingham Waterworks Co*, that the problem involves 'those considerations which ordinarily regulate the conduct of human affairs', we pose to ourselves the question: is there anything in the evidence that shows any act or omission on the part of the appellant which a reasonable and prudent man would have done or not have done, having regard to the fact that the appellant was actually aware of the presence of the respondent on the road at the time of the accident?

It may be appropriate to state here, in parenthesis, that the evidence disclosed that the respondent was about 10 ft behind the men when they advanced towards the appellant, and that at the moment when he pulled the trigger he was not aware of the actual position of the respondent, because, as he stated, 'I was not concentrating on the plaintiff. When I fired the shot the plaintiff was not in my view'. In our opinion, the suggestion of the trial judge that the appellant should have been 'fully aware of the presence of the respondent in the direct line of fire' is not justified by the evidence.

Enough has been said to illustrate the urgency of the circumstances which impelled the appellant to discharge his pistol, and we think that, *mutatis mutandis*, the words of Holmes J of the US Supreme Court are eminently applicable to the facts of the present case, namely, 'detached reflection cannot be demanded in the presence of an uplifted knife'. Having regard to the springs of human conduct, which are undoubtedly what Alderson B had in mind when, in *Blyth v Birmingham Waterworks Co*, he referred to 'those considerations which ordinarily regulate the conduct of human affairs', we do not consider it to be a breach of his duty of care on the part of the appellant to have failed to ascertain the precise whereabouts of the respondent with a view to making sure that she was not within range at the moment of firing, nor has it been suggested that the mere fact that the appellant missed his target can be regarded as any evidence of negligence. We reiterate that this was a single pistol shot fired at knee level and not, for example, the discharge of several rounds of ammunition from a machine gun—a situation to which other considerations would no doubt be applicable.

In considering the question we have posed above, we derive assistance from *Daborn v Bath Tramways Ltd*, in which Asquith LJ said:<sup>45</sup>

In determining whether a party is negligent, the standard of reasonable care is that which is reasonably demanded in the circumstances. A relevant circumstance to be taken into account may be the importance of the end to be served by behaving in this way or that. As has often been pointed out, if all the trains in this country were restricted to a speed of five miles an hour, there would be fewer accidents, but our national life would be intolerably slowed down. The purpose to be served, if sufficiently important, justifies the assumption of abnormal risk.

This passage was quoted with approval by Singleton LJ in *Watt v Hertfordshire CC*,<sup>46</sup> where a fireman, going to a fire in an emergency in a lorry which contained a heavy jack which could not be lashed to anything, was injured when the driver applied the brakes suddenly and the jack moved forward and struck him. The fire authority were held not liable, although they were held to be under a duty to take reasonable care to avoid exposing the fireman to unnecessary risks, on the ground that in saving life they were justified in taking greater risks than if they had been concerned in a commercial enterprise.

Delivering a concurring judgment in *Watt v Hertfordshire CC*, Denning LJ said:<sup>47</sup> It is well settled that, in measuring due care, one must balance the risk against the measures necessary to eliminate the risk. To that proposition there ought to be added this: one must balance the risk against the end to be achieved. If this accident had occurred in a commercial enterprise without any emergency, there could be no doubt that the servant would succeed. But the commercial end to make profit is very different from the human end to save life or limb. The saving of life or limb justifies taking considerable risk, and I am glad to say there have never been wanting in this country men of courage ready to take those risks, notably in the fire service.

In this case, the risk involved in sending out the lorry was not so great as to prohibit the attempt to save life. I quite agree that the fire engines, ambulances and doctors' cars should not shoot past the traffic lights when they show a red light. That is because the risk is too great to warrant the incurring of the danger. It is always a question of balancing the risk against the end.

Applying this principle, *mutatis mutandis*, to the facts of the present case, which was clearly one of an emergency for which the appellant was in no way to blame, we would adopt the words of Denning LJ by stating that, in our judgment, the necessity of saving life or limb justified the appellant in taking the risk of the possibility of injury to the respondent, and we consider that there was absolutely no warrant in the evidence for the judge's finding that 'the discharge of the firearm in all these circumstances amounted to an act of a man in panic rather than the act of a police officer exercising skill and caution in the performance of his duty'. We are of opinion that the trial judge was wrong in holding that the appellant was guilty of negligence in discharging his pistol in the circumstances we have described.

**Byfield v AG (1980) Supreme Court, Jamaica,  
No CL B-344 of 1977 (unreported)**

Two constables were chasing an armed man who was wanted for various offences, including robbery and possession of firearms. The man ran into the yard of the

45 [1946] 2 All ER 333, p 336.

46 [1954] 2 All ER 368, p 370.

47 *Ibid*, p 371.

plaintiff's house, from where he fired a shot at the pursuing constables. The constables returned fire but accidentally shot the plaintiff, who was also in the yard but had not been noticed by the constables.

*Held*, the constables were not liable in negligence, since they were acting in the execution of their duty in 'hot pursuit' of a gunman. They were entitled to defend themselves and were under no duty to retreat. Gordon J (Ag) said:

It must be recognised that the gunman was in 1976 an entity in the society and a force to be reckoned with. The police in execution of their duty often come under fire from this force, yet, despite the fearful odds, the police have continued to do their duty, even at great personal risk.

The plaintiff was in his home, and a man's home is his castle. He is entitled to be secure in the safety of his home and to the protection of the law. Were the constables negligent, having regard to all the relevant circumstances?

In considering this question, it is desirable to refer to the definition of negligence given by Alderson B in *Blyth v Birmingham Waterworks Co*.<sup>[48]</sup>

Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.

There is no duty on the police to retreat. These constables were acting in the execution of their duty in 'hot pursuit' to arrest a gunman who was *prima facie* in their view committing other offences, viz, illegal possession of a firearm and shooting with intent. They were, at the time they fired their guns, the target of the gunman about to shoot again. They were entitled to defend themselves. Section 33 of the Jamaica Constabulary Force Act requires the plaintiff to allege and prove that the defendant acted maliciously, or without reasonable or probable cause<sup>[49]</sup>... In my view, the decision in *Robley v Placide*<sup>[50]</sup> is applicable to this case. The plaintiff has failed to establish negligence in the defendants.

### The cost and practicability of measures to avoid the harm

Another relevant question is how costly and practicable it would have been for the defendant to have taken precautions to eliminate or minimise the risk, for 'in every case of foreseeable risk, it is a matter of balancing the risk against the measures necessary to eliminate it',<sup>51</sup> and 'a reasonable man would only neglect...a risk [of small magnitude] if he had some valid reason for doing so, for example, that it

48 [1843–60] All ER Rep 478, p 479.

49 However, the Jamaican Court of Appeal held by a majority in *Ebanks v Crooks* (1996) 52 WIR 315 that s 33 of the Constabulary Force Act does not apply to actions in negligence against police officers, so that a person who is injured by the negligence of a constable does not need to prove malice or lack of reasonable or probable cause. According to Carey JA (p 318), the object of the section is 'to protect police officers from frivolous and vexatious actions'; according to Forte JA (p 324), the section 'refers to direct acts done by a constable in the execution of his office, and not to personal injuries which are the consequential effect of his acts; or, put in another way, it does not apply to unintentional acts of the constable which amount to negligence'. Patterson JA, dissenting, took the view (p 332) that a constable 'is liable only for acts done maliciously or without reasonable or probable cause whenever he is acting in the execution of his office. If he acts fairly within the confines of his statutory powers, mere negligence, even if established, would not alone create any liability'. The Privy Council has subsequently dismissed an appeal against the decision of the Jamaican Court of Appeal: (1999) PC App No 32 of 1997.

50 (1966) 11 WIR 58. See above, pp 76–78.

51 *Latimer v AEC Ltd* [1952] 2 QB 701, p 711, *per* Denning LJ.

would involve considerable expense to eliminate the risk'.<sup>52</sup> Thus, where a factory floor had become slippery after a flood and the occupiers did everything possible to make the floor safe, but nevertheless a workman slipped on it and sustained injuries, the court held that the occupiers had not been negligent. The only other possible step they could have taken would have been to close the factory, and the risk of harm created by the slippery floor was not, in the opinion of the court, so great as to require such a costly and drastic step.<sup>53</sup>

On the other hand, in *Mowser v De Nobriga*,<sup>54</sup> as we have seen, Rees J considered that the erection of a 3 ft 6 in high rail to prevent the escape of riderless horses into the spectators' area would not have been impracticable or have involved considerable expense in eliminating the obvious danger to spectators.

## INTELLIGENCE, KNOWLEDGE AND SKILL OF THE REASONABLE MAN

### Intelligence

In determining whether the defendant's actions satisfied the standard of a reasonable man, the court will measure those actions against the conduct expected of a person of normal intelligence, and the defendant will not be excused for having acted 'to the best of his own judgment' if his 'best' is below that to be expected of a man of ordinary intelligence.<sup>55</sup> Thus, it is no defence that the particular defendant had unusually slow reactions or a lower than average intelligence quotient. On the other hand, a person of higher than average intelligence or possessing unusually quick reactions will not be judged by his own high standards, and will not be liable for having failed to use those exceptional qualities.<sup>56</sup>

### Knowledge

In the first place, a man is expected to have that degree of common sense or knowledge of everyday things which a normal adult would possess.<sup>57</sup> For instance, a reasonable person knows that gasoline is highly inflammable; that solid objects sink in water; and that gas is poisonous when inhaled. Furthermore; where the defendant holds a particular position, he will be expected to show the degree of knowledge normally expected of a person in that position. Thus, for example, in *The Wagon Mound (No 2)*,<sup>58</sup> the Privy Council took the view that shipowners were liable for a fire caused by discharging oil from their ship into Sydney Harbour, because their chief engineer ought to have known that there was a real risk of the oil catching fire.

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52 *The Wagon Mound (No 2)* [1966] 2 All ER 709, p 718, per Lord Reid.

53 *Latimer v AEC Ltd* [1952] 2 QB 701.

54 (1969) 15 WIR 147. See above, pp 70–74.

55 *Vaughan v Menlove* (1837) 132 ER 490.

56 *Woodridge v Sumner* [1962] 2 All ER 978.

57 *Caminer v Northern and London Investment Trust* [1951] AC 88.

58 [1966] 2 All ER 709.

Similarly, it is clear that an employer is required to know more about the dangers of unfenced machinery than his workmen.<sup>59</sup>

Secondly, with regard to the facts and circumstances surrounding him, the defendant is expected to observe what a reasonable man would notice.<sup>60</sup> The occupier of premises, for example, will be negligent if he fails to notice that the stairs are in a dangerous state of disrepair or that a septic tank in the garden has become dangerously exposed, so that lawful visitors to his property are put at risk. Moreover, a reasonable occupier is expected to employ experts to check those installations which he cannot, through his lack of technical knowledge, check himself, such as electrical wiring or a lift.<sup>61</sup>

Lastly, a related point is this: where the defendant has actual knowledge of particular circumstances, the standard of care required of him may be increased. An example is *Paris v Stepney BC*,<sup>62</sup> where, as we have seen, a higher measure of care was owed by an employer towards a workman who, to the knowledge of the employer, had only one good eye. Similarly, a higher standard of care will be owed towards, for example, young children, elderly persons and pregnant women, because of their special susceptibility to injury. In Lord Sumner's words:<sup>63</sup>

A measure of care appropriate to the inability or disability of those who are immature or feeble in mind or body is due from others, who know or ought to anticipate the presence of such persons within the scope and hazard of their own operations.

## Skill

A person who holds himself out as having a particular skill, either in relation to the public generally (for example, a car driver) or in relation to a person for whom he is performing a service (for example, a doctor), will be expected to show the average amount of competence normally possessed by persons doing that kind of work, and he will be liable in negligence if he falls short of such standard. Thus, for example, a surgeon performing an operation is expected to display the amount of care and skill usually expected of a normal, competent member of his profession;<sup>64</sup> whereas a jeweller who pierces ears is only expected to show the skill of a normal jeweller doing such work, and not that of a surgeon.<sup>65</sup> Somewhat surprisingly, however, it has been held that a learner driver must comply with the same objective and impersonal standard as any other driver.<sup>66</sup> This decision may, perhaps, be explained on the ground that a car is a potentially lethal weapon, and public policy requires that the strictest possible standards of care be maintained, even by learners.

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59 *Clarke v Holmes* (1862) 158 ER 751.

60 *Mersey Docks Trustees v Gibbs* (1866) 11 ER 1500.

61 *Haseldine v Daw* [1941] 2 KB 343.

62 [1951] AC 367. See also *Rhyna v Transport and Harbours Department* (1985) Court of Appeal, Guyana, No 56 of 1982 (unreported) (above, pp 74, 75).

63 *Glasgow Corp v Taylor* [1922] 1 AC 44, p 67.

64 *Whiteford v Hunter* [1950] WN 553; *Rojannenisha v Guyana Sugar Producers Association Ltd* (1973) High Court, Guyana, No 1713 of 1971 (unreported). See below, p 83.

65 *Philips v Whiteley* [1938] 1 All ER 566.

66 *Nettleship v Weston* [1971] 3 All ER 581.

### *Medical negligence*

In the Jamaican case of *Millen v University of the West Indies Hospital Board of Management*,<sup>67</sup> a surgeon employed by the defendant carelessly failed to remove part of a suture which had been previously inserted into the plaintiff in an operation called 'cervical encirclement', thereby exposing the plaintiff to considerable danger in her subsequent pregnancy and labour. Vanderpump J said:

Here, there was a situation involving the use of some special skill, and the test is the standard of the ordinary skilled man exercising and professing to have that special skill. If a surgeon fails to measure up to that standard in any respect [clinical judgment or otherwise], he has been negligent and should be so adjudged. If [the surgeon in this case] had used proper care in what he was about, he would not have left part of the suture in the plaintiff. I find him negligent.

On the other hand, in *Hind v Craig*<sup>68</sup> it was emphasised, following the principle established in *Bolan v Friern Hospital Management Committee*,<sup>69</sup> that a medical man is not guilty of negligence if he has acted 'in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art...merely because there was a body of opinion which would take a contrary view'. Thus, the fact that preparations for surgery by the defendant surgeon at the University Hospital in Jamaica differed from those which were made in the US, was not evidence of negligence on the defendant's part, it being found that the defendant had followed a general and approved practice for such surgery.

It was established in *Roe v Minister of Health*<sup>70</sup> that the defendant is to be judged according to the current state of medical knowledge and the prevailing standard at the time of the act complained of, and not according to knowledge subsequently gained by the profession. In that case, the plaintiff went into hospital in 1947 for a minor operation. He was paralysed because a spinal anaesthetic which was given to him became tainted with phenol whilst it was in a syringe which was stored in a phenol solution. In 1947, it was not known by the medical profession that phenol could seep into a syringe through invisible cracks in the syringe (though the risk was known by 1954, the time of the action). It was held that the hospital authority was not negligent, Denning LJ saying that the court should not look at a 1947 accident 'with 1954 spectacles'.

A similar situation arose in the Bermudian case of *Van de Weg v Minister of Health and Social Services*.<sup>71</sup> There, the defendant, acting through the Chief Medical Officer, introduced a programme of vaccination against influenza in Bermuda in 1976, which was confined initially to members of the essential services, including the police. The programme was introduced shortly after a mass immunisation programme against influenza in the US had been announced by the US President, following an outbreak of swine flu at an army camp in New Jersey. At the time, there was little evidence of serious side effects associated with influenza vaccines.

67 (1984) Supreme Court, Jamaica, No CL M-066 of 1980 (unreported); upheld by the Court of Appeal (1986) 44 WIR 274.

68 (1983) Supreme Court, Jamaica, No CL M-064 of 1976 (unreported).

69 [1958] 1 WLR 582, p 587.

70 [1954] 2 All ER 131.

71 (1981) 32 WIR 161 (Supreme Court, Bermuda).

The plaintiff, a police sergeant, was vaccinated and subsequently developed a disease called Guillain Barre Syndrome (GBS). The US vaccination programme was halted in December 1976 after a substantial number of persons vaccinated had developed GBS. It was held that the defendant was not liable to the plaintiff in negligence, since, at the time the plaintiff was vaccinated, 'no association of GBS with influenza vaccination was recognised' by the medical profession and damage to the plaintiff could not have been foreseen. Melville J continued:<sup>72</sup>

Tourism is the backbone of the economy of these islands, with the majority of the tourists coming from the US. A massive immunisation programme is announced by none other than the President of that country; a vaccine is to be used which almost everyone in the medical profession thought, at that time, to be perfectly safe... On the question of benefits as against the risk of immunisation, it appears to me that the benefits of the vaccination far outweigh any remote risk that may have been associated with the vaccination. Can it then be said that it was negligence for a medical officer of health, in an area of 21 square miles and a population of approximately 56,000 people, to inaugurate an immunisation programme in those circumstances, even if it had been no more than the announcement of the President? Would it be unreasonable for him to try to protect not only his own people, but visitors on whom the economy of the country depended so much? The answer must unquestionably be 'No'.

The *Bolam* and *Roe* principles were also applied in the Guyanese case of *Rojannenisha v Guyana Sugar Producers Association Ltd.*<sup>73</sup> In this case, while W was working as a labourer in a field on V's estate, a piece of greenheart wood stuck in her foot. W died five weeks later from tetanus and, in an action for negligence, it was alleged that A, the doctor who had attended W after the accident, had been negligent in failing to give W an anti-tetanus injection immediately after the injury. Collins J pointed out that:

...(a) the deceased was treated in 1968 and [the matter] must be judged in the light of medical knowledge then and not in 1973 [the time of the action]; and (b) with respect to the skill expected of a doctor, the test is the standard of the ordinary, competent practitioner exercising ordinary professional skill.

It was a controversial issue in medical circles as to whether anti-tetanus serum should be given at the time of injury. Dr A had taken the view that the serum was a dangerous drug and should be administered only if tetanus symptoms appeared. Collins J concluded that, 'in view of the fact that there is a difference of medical opinion as to the proper time to use anti-tetanus serum, I do not think that Dr Abensetts can be considered negligent when he adopted one opinion rather than the other'.

#### *Other skills*

Another example of the application of the principles relating to the standard of care in cases where the defendant holds himself out as possessing a particular skill is *Sabga v Llanos*.

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<sup>72</sup> *Ibid.*, p 169.

<sup>73</sup> (1973) High Court, Guyana, No 1713 of 1971 (unreported).

**Sabga v Llanos (1988) High Court, Trinidad and Tobago,  
No HCA 146 of 1979 (unreported)**

The plaintiff, who operated a pizza business, wanted to have a water tank installed. The defendant, a supplier of water tanks and fittings, sent his plumber to install a tank at the plaintiff's premises. The plaintiff ordered the plumber to place the tank on a wooden stand, which he did. The plumber had warned the plaintiff that the wood would eventually rot. Eighteen months later, the stand collapsed and the tank fell down.

*Held*, the defendant was not liable in negligence. The warning given by his plumber to the plaintiff was sufficient to discharge his duty of care. Hamel-Smith J said:

The plaintiff relied on the skill and expertise of the defendant. To simply install the tank on the wooden stand because the plaintiff had so directed could not be sufficient to discharge the defendant's duty to the plaintiff.

What, then, was the defendant's duty in circumstances such as these?

In *Bolam v Friern Hospital Management Committee*,<sup>[74]</sup> McNair J said:

Where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill... A man need not possess the highest expert skill; it is well established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art.

It follows that, where a person holds himself out to be competent to do some special kind of job, an action will lie in negligence for any damage which may be caused by the failure to exercise due care and skill, either by proving that the defendant did not possess the skill or by showing that, although he possessed it, he did not exercise it in the particular case.

What, then, was the defendant's duty to the plaintiff when the plaintiff instructed the plumber to place the tank on the wooden platform? Could the plumber have simply followed the instructions and so placed the tank or did he have to do more than that? In my view, he had to do more. He had to warn the plaintiff that such an action was inherently dangerous and unsafe.

In *Charlesworth and Percy on Negligence*, 7th edn, the learned authors were of the view that:

...a retailer owes a duty to the person to whom he supplies products to warn him of any danger in them of which he knows and of which he could not reasonably expect the recipient to know. Likewise, he must warn him of any defect in the products which renders them unfit for the purpose for which he contemplates they will be used, provided that he knows of the defect.

No authorities were put to me, but I...came across the case of *Clarke v Army and Navy Co-operative Society Ltd.*<sup>[75]</sup> In that case, the plaintiff was supplied by the sellers with a tin of disinfectant powder which, owing to previous complaints they had received, the sellers knew would be likely to cause injury, unless the tins were opened with special care. The sellers gave the plaintiff no warning of the danger and the plaintiff was held entitled to recover damages for the injuries sustained. The defendants knew

74 [1958] 1 WLR 582, p 586.

75 [1903] 1 KB 155.

the tins to be potentially dangerous and failed to warn the plaintiff. Collins MR was of the view that:

...independently of any warranty, a relation arises out of the contract...which imposes on the defendant a duty towards the plaintiff: namely a duty, if there is some dangerous quality in the goods sold, of which he knows, but of which the plaintiff cannot be expected to be aware, of taking reasonable precautions in the way of warning the plaintiff that special care will be requisite.

Much argument turned on the extent of the duty of the defendant to advise the plaintiff on the danger of using a wooden stand. Should the defendant have refused to install the tank on the stand or should he have reduced his views into writing?

I am of the view that, since the plaintiff relied on the skill of the defendant, the defendant was under a duty, when the plaintiff directed that the tank be placed on the wooden stand, to warn the plaintiff in the clearest of terms of the inherent danger. A defendant cannot be heard to say, 'I don't agree with you but I shall follow your instructions'. The defendant was the person with the skill; he was the person with the experience. He was the one who knew, or should know, that it was simply a matter of time before the tank came tumbling down. The defendant knew from the moment the tank was placed on the wooden stand that the plaintiff had blundered in his instructions. He was therefore under a strict duty to warn him of what was bound to occur. If the plaintiff persisted after such a warning, then he acted at his peril and cannot today attempt to attach blame to the defendant.

Did the plumber so warn the plaintiff? I have only the evidence of the plumber. He said that: 'I told him (Joe Pizza) that if he built a wooden stand it would rot. He (Joe) said that he was paying the company for the installation and he wanted it so.' To the court, when asked if he told Joe that he could get a steel frame for the tank, he said that he did not. The plumber said that Joe 'wanted the tank on the stand his carpenter had built'.

I can only come to one conclusion. The plumber warned Joe of the inherent danger and Joe failed to appreciate the danger or, if he did, he opted for the cheaper and quicker construction. If the inherent danger were something out of the ordinary, if it were something that required some form of technical or scientific knowledge, I would have concluded otherwise. But wood rots. Rot takes hold from the day the forester fells the tree from which the planks are formed. Sometimes before. But rot it will. No one can suggest otherwise. The warning in this case was a simple one and I find that it was given.

The claim is therefore dismissed.

## OMISSIONS

Although Lord Atkin in *Donoghue v Stevenson*<sup>76</sup> spoke of a duty to take care to avoid acts or omissions which were foreseeably likely to injure one's neighbour, it is established principle that there is no general duty to act positively for the benefit of others<sup>77</sup> and 'there is no liability for a mere omission to act'.<sup>78</sup>

It seems that the 'omission' referred to by Lord Atkin is an omission in the course of positive conduct, for example, where the driver of a car omits to apply

76 [1932] AC 562, p 579. See above, p 64.

77 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 117.

78 Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 219.

the brakes, or where he omits to keep a lookout when overtaking another vehicle. In such cases, the omission will amount to negligence. But there is no liability for a mere omission to do something for another person where there is no positive duty to act.<sup>79</sup> For instance, a passer-by who sees a person lying injured by the side of the road is under no duty to stop and render assistance. The law does not demand that a person be a 'good Samaritan' (cf Luke 10:29–37). Another example of the principle is *Campbell v Clarendon PC*, which shows that a public authority will not be liable in negligence for a failure to act or to provide a service (that is, for 'nonfeasance') where there is no positive duty to act or provide the service, even though it is foreseeable that failure to act may cause damage.

**Campbell v Clarendon PC (1982) 19 JLR 13,  
Supreme Court, Jamaica**

The plaintiff's place of business in a small town called Frankfield was gutted by a fire of unknown origin and its contents destroyed. The town's fire brigade was unable to save the building because the flow of water in the water mains and fire hydrants was insufficient. The town was supplied with water from a public supply scheme under statutory provisions. The plaintiff brought an action against the local parish council for, *inter alia*, negligence in respect of its failure to provide a sufficient water supply for use by the fire brigade.

*Held*, the defendant was not liable for its failure to supply water in sufficient quantity at the material time. An omission to act, otherwise than in the performance of a duty to take care, does not amount to a breach of duty, even though it can be reasonably foreseen that such omission is likely to cause damage. Patterson J said:

As to [the plaintiff's] common law claim in negligence, one of the necessary factors is to show the particular duty owed by the defendant to the plaintiff. Lord Wright expressed it succinctly when, in *Lochgelly Iron and Coal Co Ltd v McMullan*,<sup>[80]</sup> he had this to say:

In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission; it properly connotes the complex concept of duty, breach and damage thereby suffered by the person to whom the duty was owing.

One must not lose sight of the distinction between acts that create injury or a positive risk of injury and a failure to act or to efficiently act to prevent a threatened or obvious harm. Where a person who is not under a duty to act does nothing but fails to act, he cannot incur liability. Even if he undertakes a task which he is not obliged to perform, he owes no duty to take care in its performance as long as he does not thereby add to the damage which would have been caused had he done nothing. The duty of care required of all men is not to injure the property or person of another. I share the view that a person owes a duty to take care when he should foresee as a reasonable man that his acts and conduct are likely to cause physical damage to the person or property of another or others in the ordinary course of things, or in the circumstances actually known by him to exist at the time. If he can foresee consequences not intended by him which, though possible, are not probable, such consequences are regarded as too remote and he is under no duty to take care in respect of them. An omission to act,

<sup>79</sup> The rule was regarded as justifiable by the House of Lords in *Stovin v Wise* [1996] AC 923.

<sup>80</sup> [1934] AC 1, p 25.

otherwise than in the performance of a duty to take care, is not a breach of duty to take care, even though it can reasonably be foreseen that such omission is likely to cause physical damage to person or property... It is a question of law whether a duty to take care arises in any given case.

It is interesting to note that similar principles to those mentioned above obtain in other jurisdictions. The Appellate Division of the Supreme Court of Ontario seems to have decided the case of *Vanvalkenburg v Northern Navigation Co*<sup>[81]</sup> on similar principles. Charles Vanvalkenburg was a seaman employed on the defendant's steamer, *Hamonic*. While off duty, he and the rest of his watch were amusing themselves running around the decks, and he slipped and fell backwards into the sea. One of his companions immediately pressed the electric bell button which was the signal for 'man overboard'. After waiting a minute or two, his companion again signalled but the ship continued on its way. Vanvalkenburg at this time could still be seen swimming. Not until after an oral report was made to the captain some five minutes later was the ship turned around, and Vanvalkenburg was then one to two miles astern. He was not rescued. The parents of Vanvalkenburg brought an action for damages resulting from the death of their son. At the trial, the plaintiffs were non-suited and they appealed. Mallock CJ, in delivering the judgment of the court, said this:<sup>[82]</sup>

The evidence shows that the deceased was not on duty at the time of the accident, and had recklessly put himself in a position of great peril, and that his own want of care caused the accident. Thus, the defendant company are not responsible for his having fallen into the water. The question then arises whether the defendants were guilty of any actionable negligence in not using all reasonable means in order to rescue the drowning man...

It is further argued that the vessel was unseaworthy, in that the electric bell system was out of order, thereby causing a fatal loss of time in attempting to rescue.

The evidence, I think, warrants the finding that the bells were out of order, and in this respect the vessel was unseaworthy, contrary to the provisions of s 342 of the Canada Shipping Act, RSC 1906, c 113. The evidence also shows that the seamen were instructed in regard to the use of lifebuoys, and it may be inferred from Ray Dale's failure to throw the lifebuoy overboard at once that he was an incompetent and inefficient seaman, and that such inefficiency also constituted unseaworthiness...

There was evidence, further, upon which the jury might have found that, if Dale had promptly thrown the lifebuoy to the deceased on his falling into the water, and if the vessel had reversed immediately on Dale touching the electric button, the deceased could, in all reasonable probability, have been saved, and, if the defendants owed to the deceased the legal duty of using all reasonable means to rescue him, then they were guilty of negligence in not having done so; but... I am unable to see wherein they owed such legal duty to the deceased. He fell overboard solely because of his own negligence. His voluntary act in thus putting himself in a position of danger, from the fatal consequence of which, unfortunately, there was no escape except through the defendants' intervention, could not create a legal obligation on the defendants' part to stop the ship or adopt any other means to save the deceased...

There is no evidence before the court to say what caused the fire on the plaintiff's premises; whether it was the work of arsonists, or through the negligence of the plaintiff or his tenants, or some other reason, it is not known. It was never suggested that the lack of water caused the building to commence burning. What the plaintiff is

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81 [1913] DLR 649.

82 *Ibid*, p 652.

saying is that, however the fire started, the defendant is under a duty to supply him with water from its hydrants to put out that fire, and that that duty arises either from the specific provisions of the Parishes Water Supply Act or at common law. The defendant has failed to perform the duty of supplying the water and, as a result, more damage was done to his premises than would have been done had he been supplied the water, and consequently the defendant must pay. I find myself quite unable to agree with this contention. It is entirely novel. The defendant is not an insurer so as to be liable to pay for the damage done by fire to the plaintiff's building. The defendant, acting under discretionary statutory powers, supplies water to the Frankfield area, and the plaintiff is a person on whom a benefit is bestowed as a result of the exercise of the statutory powers. The only duty that the defendant owes to the plaintiff, whether it be in the exercise of its statutory powers or at common law, is the common duty of care; to see that, by its acts or omissions in its operations, it does not cause injury to the property or person of another through negligence.

In my judgment, the defendant was under no obligation, either as a result of any statute or at common law, to provide a constant flow of water in the water main and hydrant or any sufficient flow therein. The Parishes Water Supply Act does not place a duty on the defendant 'to provide a proper water supply by which water would be available to the fire brigade at all times', nor have I pointed to any statutory or common law obligation on the defendant so to do. Having provided a public water system for the town of Frankfield and its outlying districts, the defendant is not bound to keep water in its mains and hydrants at all times. Indeed, the evidence is that the locking off of water at nights was necessary in order to build up the quantity of water in the reservoir by night to meet the demands by day. The source was proving inadequate to meet the demands. This course of action is not unusual throughout the length and breadth of Jamaica, and public policy demands it. The defendant is not to be made liable for failing to provide water in the mains or hydrants at any given time.

### PROOF OF NEGLIGENCE—*RES IPSA LOQUITUR*

The burden of proving negligence always lies on the plaintiff; but where the cause of an accident is unknown,<sup>83</sup> he may be assisted by the doctrine *res ipsa loquitur* ('the facts speak for themselves'). This doctrine has been very frequently applied by courts in the Caribbean, and a large body of case law has accumulated on the topic. It should be noted, however, that it has been rightly pointed out that cases of *res ipsa* are really no more than illustrations of the manner in which a court may draw an inference of negligence from circumstantial evidence.<sup>84</sup>

The best known definition of *res ipsa loquitur* is that propounded by Erle CJ in *Scott v London and St Katherine Docks Co*:<sup>85</sup>

83 Where the facts are sufficiently known, *res ipsa loquitur* has no application. See *Barkway v South Wales Transport Co Ltd* [1950] 1 All ER 392, p 394; *Green v Vincent* (1994) Supreme Court, Jamaica, No G 102 of 1988 (unreported); *Whyllie v Campbell* (1997) Supreme Court, Jamaica, No W 103 of 1994 (unreported); *Wilson v Caven* (1993) Supreme Court, Jamaica, No W 029 of 1989 (unreported); *Courage Construction Ltd v Royal Bank Trust Co (Jamaica) Ltd* (1992) 29 JLR 115 (Court of Appeal, Jamaica).

84 *Op cit*, Rogers, fn 21, p 204. The Supreme Court of Canada has even suggested that *res ipsa* should no longer be treated as a 'separate component' in the law of negligence: *Fontaine v British Columbia* [1998] 1 SCR 424.

85 (1865) 159 ER 665, p 667.

Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

Where *res ipsa loquitur* is successfully invoked, the effect is:

- (a) to afford *prima facie* evidence of negligence, so that the defendant cannot succeed in a submission of ‘no case to answer’; and
- (b) to shift the onus on to the defendant to show either that the accident was due to a specific cause which did not involve negligence on his part, or that he had used reasonable care in the matter.

### Requirements of the doctrine

In order to rely on the doctrine, the plaintiff must establish two things:

- (a) that the thing causing the damage was under the management or control of the defendant or his servants; and
- (b) that the accident was of such a kind as would not, in the ordinary course of things, have happened without negligence on the defendant’s part.

### Control

It is a question of fact in each case as to whether or not the thing causing the accident was under the defendant’s control. In the most common type of case, that of negligent driving, the driver of a motor vehicle will be presumed to have sufficient control over his vehicle and the surrounding circumstances to attract the doctrine.<sup>86</sup>

Where the activity causing the damage is under the control of one of several servants of the defendant and the plaintiff is unable to identify which particular servant had control, he may still invoke the doctrine so as to make the defendant vicariously liable.<sup>87</sup> Thus, for example, a hospital authority has been held liable to a patient in respect of negligent treatment, even though the patient could not show which member of the hospital staff was responsible.<sup>88</sup>

### Presumed negligence

Negligence will be presumed under the doctrine where the common experience of mankind shows that the type of mishap which occurred would not normally have happened unless the defendant had been careless. Thus, *res ipsa loquitur* has been applied in the Caribbean where, for example, a car being driven along the road suddenly mounted the pavement and injured a bystander or collided with an electricity pole;<sup>89</sup> where a boat’s tow rope broke suddenly, causing the vessel to

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86 *Halliwel v Venables* (1930) 99 LJ KB 353.

87 See below, Chapter 12.

88 *Cassidy v Ministry of Health* [1951] 1 All ER 575.

89 *Parejo v Koo* (1966–69) 19 Trin LR (Pt IV) 272 (below, pp 96, 97), *Bartlett v Cain* (1983) High Court, Barbados, No 234 of 1983 (unreported); *Richards v Clarke* (1990) High Court, St Lucia, No 142 of 1989 (unreported).

collide with pipelines;<sup>90</sup> where a large tree was felled onto a neighbouring house;<sup>91</sup> where a dead tadpole was found in a bottle of stout purchased by a customer in a restaurant;<sup>92</sup> where a parked bus suddenly caught fire, resulting in the destruction of a nearby building;<sup>93</sup> where scaffolding, on which a workman was standing, collapsed;<sup>94</sup> where a crane collapsed suddenly;<sup>95</sup> where a heavy knife fell from a hotel window, striking a guest in the garden below;<sup>96</sup> and where a fire which started in an electric power line connected to a dwelling house destroyed the house and its contents.<sup>97</sup>

*Res ipsa loquitur* is thus a useful evidential aid to a plaintiff who is unable to establish precisely how an accident occurred. Megaw LJ in *Lloyde v West Midlands Gas Board* explained the principle thus:<sup>98</sup>

It means that a plaintiff *prima facie* establishes negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (2) on the evidence as it stands at the relevant time, it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

However, it has frequently been emphasized that the doctrine does not entirely relieve the plaintiff of the burden of proof. He must still bring evidence sufficient to call for a rebuttal from the defendant. Thus, for example, where a pedestrian is knocked down by a vehicle as he is crossing a road and there are no eyewitnesses to the accident and no evidence of excessive speed on the part of the driver of the vehicle, *res ipsa loquitur* cannot be relied upon to establish negligence on the driver's part since this is not the sort of accident which only happens in the ordinary course of things by reason of the driver's negligence, and pedestrians frequently get run over when they attempt to cross the road, having failed to see oncoming traffic. The mere fact that the court is unable to decide precisely how an accident occurred does not make a defendant liable.

90 *Alco Shipping Agencies Co Ltd v Freeport Bunkering Co Ltd* (1965–70) 1 LRB 260.

91 *Seeraj v Dindial* (1985) High Court, Trinidad and Tobago, No 4696 of 1982 (unreported) (below, p 351).

92 *Barnett v Belize Brewing Co Ltd* (1983) 36 WIR 136.

93 *Barbados Transport Board v Imperial Optical Co (Barbados) Ltd* (1990) Court of Appeal, Barbados, Civ App No 16 of 1989 (unreported).

94 *Nisbett v Wheatley* (1993) High Court, British Virgin Islands, No 113 of 1987 (unreported).

95 *Swan v Salisbury Construction Co Ltd* [1965] 1 WLR 208 (Privy Council appeal from Bermuda).

96 *Kohanian v Carnival Crystal Palace Resort and Casino* (1999) Supreme Court, The Bahamas, No 1421 of 1994 (unreported). See McDowell, Z (2000) 10 Carib LR 87.

97 *Yearwood v Trinidad and Tobago Electricity Commission* (1992) High Court, Trinidad and Tobago, No 346 of 1986 (unreported); *Persad v Trinidad and Tobago Electricity Commission* (2000) High Court, Trinidad and Tobago, No S 1031 of 1992 (unreported). A different approach was taken by the Trinidad and Tobago Court of Appeal in *Trinidad and Tobago Electricity Commission v Sookram* (1999) 57 WIR 473, where it was held that the plaintiff (whose house was destroyed by a fire which started at the point where the defendant's power line connected with the house wiring on a 'bashboard' under an eave at the side of the house) had the onus of proving either a specific cause of the fire involving negligence on the defendant's part, or that the fire had occurred in circumstances in which *prima facie* it could not have occurred without such negligence. De la Bastide CJ further opined (at p 485) that, in order to render *res ipsa loquitur* inapplicable, it was sufficient for the defendant to show that it was equally likely that the fire had been caused by negligence on the plaintiff's part as by negligence on its part, and that therefore it was highly relevant if the defendant could show that the system of wiring in the plaintiff's house *might* have been defective and this *might* have caused the fire, or that the fire *might* have been caused by overloading of the circuits by the plaintiff, coupled with the failure of their fuses or breakers to provide the necessary safeguards.

98 [1971] 2 All ER 1240, p 1246.

There must be some evidence upon which the plaintiff's allegation of a breach of duty of care can be based.<sup>[99]</sup>

A case which illustrates the requirements of the *res ipsa loquitur* doctrine is *Jamaica Omnibus Services Ltd v Hamilton*.

### **Jamaica Omnibus Services Ltd v Hamilton (1970) 16 WIR 316, Court of Appeal, Jamaica**

The plaintiff/respondent, a nine year old boy, was a passenger in one of the defendant/appellant's buses. As the bus rounded a bend, the emergency door, beside which the plaintiff was seated, suddenly flew open and the plaintiff was thrown through the open door, sustaining injuries. The plaintiff relied on *res ipsa loquitur*.

*Held*, the maxim applied. The emergency door was sufficiently under the control of the defendant and its servants, and the presumption of negligence had not been rebutted. Fox JA said:

In *Scott v London and St Katherine Docks Co*,<sup>[100]</sup> Erle CJ described the conditions for the application of the doctrine *res ipsa loquitur* in a statement which has long been famous:

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

To obtain the assistance of the doctrine, a plaintiff must therefore prove two facts:

- (1) that the 'thing' causing the damage was under the management of the defendant or his servants; and
- (2) that, in the ordinary course of things, the accident would not have happened without negligence.

Mr Hines [counsel for the defendant/appellant] submitted that the first fact had not been established because, on the evidence, the emergency door was not under the continuous and sole control of the defendant's servant, the driver or the conductor of the bus. The authority advanced in support of this proposition was *Easson v London and North Eastern Rly Co*.<sup>[101]</sup> In that case, the plaintiff, a boy aged four, had fallen through a door of a corridor train about seven miles from its last stopping place. In the course of his judgment, Goddard LJ said:<sup>[102]</sup>

It is impossible to say that the doors of an express train travelling from Edinburgh to London are continuously under the sole control of the defendant railway company in the sense in which it is necessary that they should be for the doctrine of *res ipsa loquitur*, or a doctrine analogous to that expression, to apply. People are walking up and down the corridors during the journey and people are getting in and out at stopping places. I do not want it to be thought

99 *Adams v Rajkumar* (2000) High Court, Trinidad and Tobago, No 1812 of 1997 (unreported), per Archie J; *Knight v Fellick* [1977] RTR 316. Cf *Guyana and Trinidad Mutual Fire Insurance Co Ltd v Boodoosingh* (2000) High Court, Trinidad and Tobago, No 560 of 1984 (unreported).

100 (1865) 159 ER 665, p 667.

101 [1944] 2 All ER 425.

102 *Ibid*, p 429.

for a moment that I am minimising the duty of the company. It is, of course, the duty of the company to see before a train leaves a station that the carriage doors are closed. I do not mean to say that I think there is a duty upon them to inspect the off-side doors of the carriages at every stop. There must be reasonable inspection and they must do the best they can.

This statement must be understood in the light of the special circumstances of that case. The learned judge was being mindful that in the course of a long journey, when passengers on an express train were free to walk up and down the corridors, it was impossible for the officers on the train to have all such passengers under constant surveillance so as to prevent any one of them from interfering with the doors of the train.

It was also unreasonable to expect the officers to detect at once that a door had been opened by an interfering passenger and to take steps to obviate the danger the moment it occurred. The case is illustrative of circumstances in which a 'thing' is not under the control of a defendant. It does nothing more. It does not lay down any principle of law whereby a plaintiff is required to prove that the 'thing' was under the actual control of the defendant at the time of the accident. If it is shown that the defendant had the right to control, this is sufficient. Thus, in *Parker v Miller*,<sup>[103]</sup> where the fact of a car which was left unattended having run down a hill of itself was held to be sufficient evidence of negligence, the defendant, the owner of the car, was held to be liable even though he was not in actual control of the car and was not present at the time of the accident. He had the right to control of the car, and this was enough. Also, it is not always necessary that all the circumstances should be within the control of a defendant. This was the view taken by Fletcher-Moulton LJ in *Wing v London General Omnibus Co* when, in *obiter dicta*, he generalised:<sup>[104]</sup>

The principle (*res ipsa loquitur*) only applies when the direct cause of the accident, and so much of the surrounding circumstances as was essential to its occurrence, were within the sole control and management of the defendants, or their servants, so that it is not unfair to attribute to them a *prima facie* responsibility for what happened...

The basic duty upon the defendant was to provide a vehicle which was as safe for the use of passengers as reasonable care could make it. The defendant must have known that the absence of reasonable care,

- (1) in the maintenance of the lock mechanism of the emergency door so as to keep that mechanism free of defects which may cause the door to fly open; or
- (2) in securing the catches of the door; or
- (3) in guarding against the irresponsible action of meddlers, including passengers, who, as the driver said, generally interfered with the emergency door,

could result in the release of the catches of the door whilst the vehicle was in motion, with the consequence of the door flying open and a passenger in the position of the plaintiff being precipitated through the door and injured in the way in which the plaintiff was in fact injured. The defendant therefore owed a duty to the plaintiff to take that reasonable care. The critical question which now arises is whether that duty has been breached. Was the defendant negligent? In answer, the plaintiff is in a position to pray in aid the assistance of the doctrine *res ipsa loquitur*. Negligence may be found as a matter of inference from the mere fact that the door flew open whilst the vehicle was in motion. Such negligence may be in terms of any of the three respects indicated above in which the duty of care was owed. The plaintiff was not required to specify the exact respect in which the duty was breached. It was for the defendant to rebut the inference of negligence. This would have been accomplished if the defendant showed:

103 (1926) 42 TLR 408.

104 [1909] 2 KB 625, p 663.

that the accident was just as consistent with (it) having exercised due diligence as with (it) having been negligent. In that way, the scales which have been tipped in the (plaintiff's) favour by the doctrine of *res ipsa loquitur* would once more balance, and the (plaintiff) would have to begin again and prove negligence in the usual way.<sup>[105]</sup>

Mr Hines contended that the evidence adduced by the defendant described a plausible explanation which brought the scales more in balance. His submissions were based upon two propositions which were, however, not mutually exclusive. First, he argued that from the mere fact that the door was accessible to others, it was reasonable to infer that the catches could have been released by a meddler in circumstances which were as consistent with the diligence as with the negligence of the driver and the conductor of the bus. The argument is based upon the view that the control of the door was not exclusively in the servants of the defendant, but was shared by them with other persons. It is a view which has already been discussed in relation to the applicability of the doctrine to the facts of the case, but which must now be considered in connection with the rebuttal of the inference of negligence. Accessibility of the door to persons other than the servants of the defendant is not necessarily decisive of the issue of negligence in favour of the defendant. It is a question of the demonstrated effect of the accessibility.

In *Grant v Australian Knitting Mills Ltd*,<sup>[106]</sup> the garments were merely put in paper packets which in the ordinary course would be taken down by the shopkeeper and handled by him. The possibility of the goods being tampered with before they came into the possession of the user had not been excluded. It was argued on behalf of the manufacturers that they had not retained an exclusive control over the goods, and it was therefore impossible to conclude that they had been in breach of their duty of care. Their Lordships did not accept that contention. When the garments reached the plaintiff, they were in the same defective condition as when they left the manufacturer. The defect had not been shown to be the result of exposure to handling by the shopkeeper or his assistants or any other person, and the negligence which had been 'found as a matter of inference from the existence of the defects taken in connection with all the known circumstances'<sup>[107]</sup>—*res ipsa loquitur*—was held not to have been rebutted by the mere proof of such exposure. Here, too, the mere fact that it was shown that the door was accessible to persons other than the driver and conductor of the bus, is not sufficient to bring the scales once more in balance. The defendant must go further and show either directly or inferentially that the catches of the door had been released by an unauthorised person in circumstances which excluded the want of care in the driver or the conductor. The defendant was not able to prove this by direct evidence. Mr Hines argued that it had been established inferentially by the evidence of the driver and the chief engineer. Here, counsel developed the second of his two propositions. It was to this effect. The door could have flown open only if the catches had been released. The catches must have been secure up to the point of the stage-fare stop before the accident. The door could not have been interfered with by the driver or the conductor. The inescapable inference which was dictated by the logic of this situation, argued Mr Hines, was that the door must have been tampered with by some unauthorised person at or after the stage-fare stop. This conclusion challenges a contrary finding of the magistrate, which was based upon his acceptance of the evidence of the plaintiff, whom the magistrate described as 'bright-eyed' and as 'a very intelligent nine year old who happily has nothing to hide', and who said that he didn't see the door open before he fell. The magistrate's finding flows from

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105 *Colvilles Ltd v Devine* [1969] 1 WLR 475, p 479, per Lord Donovan.

106 [1936] AC 85.

107 *Ibid*, p 101.

the advantage which he had of having seen and heard the plaintiff, and from an evaluation which he was prepared to undertake on the strength of that evidence. I can see no reason why it should be rejected. It is a finding which lays an axe at the root of counsel's second proposition, and is sufficient to dispose of the conclusion for which he argued. But the conclusion itself overlooks a critical factor which cannot be allowed to pass unnoticed.

On the assumption that the effect of the evidence of the plaintiff is to be treated as having been neutralised by the evidence of the driver and the engineer, and if it is reasonable to infer that some unknown, unauthorised person tampered with the door either at the stage-fare stop or at some point in the very short journey between the stop and the point of the accident, and that this was the sole cause of the door flying open, this would not be sufficient to exonerate the defendant from liability. The defendant would have had to go further and show that interference had not occurred as a consequence of any neglect on its part to guard against such an event. This was never attempted. The conductor, whose evidence might have been of assistance in this area, was never called as a witness on behalf of the defendant. In the absence of any evidence as to the precautions which were taken or the watchfulness which was maintained by the conductor to guard against unauthorised interference with the lock mechanism of the door, it had not been established that the accident was equally consistent with no negligence on the defendant's part, and the scales would therefore remain tilted in the plaintiff's favour by the doctrine of *res ipsa loquitur*.

But I do not think that interference with the door by an unauthorised person is the only explanation which may be inferred as the cause of the door flying open. On the basis of 'common sense and what the courts so aptly call the common experience of mankind', the magistrate was convinced—expert evidence notwithstanding—that 'if there is a defect in its mechanism, or if the door or any part of its fastening is shaking loose from not having been properly fastened in the first place, from being worn, or from any other cause, that condition will worsen if not corrected with each mile the bus is driven until—if it is that kind of defect—the door flies open'. With due respect to the magistrate, this view is essentially correct. It was not sufficient for the chief engineer to say that if the catches were in a locked position, the occurrence of a defect in the door would not cause it to fly open. Neither was it adequate for the driver to state that he had checked the emergency door at 2 pm, when he came on duty, by looking at it. To establish that the accident was equally consistent with the exercise of due diligence on its part, the defendant ought to have proved:

- (a) that the mechanism of the catches of that particular door was in fact free of any defect which could have caused the catches to work loose during the course of a journey; and
- (b) that safeguards which were maintained to ensure that the catches of the door were kept in a fastened position had not been tampered with.

As to (a), no evidence was adduced that the mechanism of the emergency door was in good working order. The chief engineer might have been able to rectify this omission, but he had not examined the door and was therefore unable to testify as to the actual condition of the lock mechanism. As to (b), there was also no evidence. There was no proof of periodic inspection of the catches of the door by the driver, or the conductor, or the engineer, and no information as to the condition of the catches at or about or immediately after the time of the accident. In the absence of such evidence in proof of (a) and (b), on this ground also the defendant failed to restore the equilibrium of the scales, which continued tipped in the plaintiff's favour. In the result, it is clear that the onus upon the defendant has not been discharged.

## Traffic accidents

A driver of a vehicle on the road is under a duty to take proper care not to cause damage to other road users<sup>108</sup> (including drivers and passengers in other vehicles, cyclists and pedestrians) or to the property of others. In order to fulfil this duty, he should, for example, keep a proper lookout;<sup>109</sup> observe traffic rules and signals;<sup>110</sup> avoid excessive speed,<sup>111</sup> and avoid driving under the influence of alcohol<sup>112</sup> or drugs. It is a question of fact in each case as to whether the defendant has observed the standard of care required of him in the particular circumstances.<sup>113</sup> Failure to observe any of the provisions of the Highway Code may be *prima facie* evidence of negligence.<sup>114</sup>

In deciding whether there has been a breach of duty, the courts in the Commonwealth Caribbean have frequently had recourse to certain presumptions of negligence. Negligence is commonly presumed where, for example, a moving vehicle collides with a stationary one which is properly parked<sup>115</sup> or correctly positioned in a line of traffic;<sup>116</sup> or where an unlighted vehicle is parked on the road at night, with the result that another vehicle collides with it;<sup>117</sup> or where the defendant's vehicle collides with the plaintiff's vehicle which is travelling in the opposite direction, the point of collision being on the plaintiff's side of the road.<sup>118</sup>

One particular facet of road accident cases is that 'no one case is exactly like another'.<sup>119</sup> For instance, the state of the road, the weather conditions and the speed of the vehicles involved will vary considerably from one case to another. It has

108 *Bourhill v Young* [1943] AC 92.

109 *Almon v Jones* (1974) 12 JLR 1474 (Court of Appeal, Jamaica); *Wilson v Caven* (1993) Supreme Court, Jamaica, No W 029 of 1989 (unreported); *Ramharack v Caroni 1975 Ltd* (1998) High Court, Trinidad and Tobago, No S723 of 1996 (unreported); *Samuel v Surajh* (2002) High Court, Trinidad and Tobago, No 2656 of 1998 (unreported).

110 *James v Seivwright* (1971) 12 JLR 617 (Court of Appeal, Jamaica).

111 *Waaldyk v Trim* (1977) Court of Appeal, Guyana, Civ App No 37 of 1975 (unreported); *Ali v Mustapha* (1982) High Court, Trinidad and Tobago, No 1096 of 1979 (unreported); *Samuel v Surajh* (2002) High Court, Trinidad and Tobago, No 2656 of 1998 (unreported). A driver must adjust his speed according to the prevailing conditions; eg, where a road is wet, owing to heavy rain, he must reduce his speed so as to be able to manoeuvre the vehicle in the event of an emergency: *Tiwari v Jagessar* (1976) Court of Appeal, Guyana, Civ App No 7 of 1974 (unreported), *per* Luckhoo JA.

112 *Owens v Brimmell* [1976] 3 All ER 765; *Gunness v Ramdeo* (2001) High Court, Trinidad and Tobago, No S 1606 of 1995 (unreported).

113 *Tidy v Battman* [1934] 1 KB 319, p 322.

114 *Jamaica Omnibus Services Ltd v Gordon* (1971) 12 JLR 487 (Court of Appeal, Jamaica), p 490, *per* Edun JA; *Charles v Ramnath* (1991) High Court, Trinidad and Tobago, No S 2584 of 1987 (unreported), *per* Maharaj J; *Kariah v Maharaj* (1992) High Court, Trinidad and Tobago, No 1002 of 1975 (unreported), *per* Maharaj J.

115 *Sibbles v Jamaica Omnibus Services Ltd* (1965) 9 WIR 56; *Coelho v Agard* (1975) High Court, Trinidad and Tobago, No S 2704 of 1985 (unreported).

116 *Granger v Murphy* (1975) Court of Appeal, The Bahamas, No 11 of 1974 (unreported).

117 *Wong v Campbell* (1969) 11 JLR 435, Court of Appeal, Jamaica; *Nation v Collins* (1962) 8 JLR 25 (Supreme Court, Jamaica); *Waaldyk v Trim* (1977) Court of Appeal, Guyana, Civ App No 37 of 1975 (unreported); *Ramsarran v McLean* (1972) High Court, Guyana, No 103 of 1971 (unreported); *Porter v Armin* (1976) High Court, Guyana, No 3779 of 1970 (unreported); *Farfan v Warren-Davis* (1968) High Court, Trinidad and Tobago, No 815 of 1966 (unreported); *Blaize v Poyah* (1976) High Court, Trinidad and Tobago, No 922 of 1970 (unreported).

118 *James v Seivwright* (1971) 12 JLR 617 (Court of Appeal, Jamaica).

119 *Tidy v Battman* [1934] 1 KB 319, p 322.

thus been emphasised that the courts should be careful to avoid 'exalting to the status of propositions of law what really are particular applications to special facts of propositions of ordinary good sense'.<sup>120</sup> And, in Lord Greene's words:

There is sometimes a temptation for judges, in dealing with these traffic cases, to decide questions of fact in language which appears to lay down some rule which users of the road must observe... That is a habit into which one perhaps slips unconsciously...but it is much to be deprecated, because these are questions of fact dependent on the circumstances of each case.<sup>121</sup>

Thus, for example, it has been pointed out in several cases that, where there is an unlighted obstruction on the road, such as a vehicle parked at night without lights, there is no rule of law that a careful driver of another vehicle is bound to see it in time to avoid it and must, therefore, be guilty of negligence if he runs into it.<sup>122</sup>

### *Skids, tyre bursts and latent defects*

Where *res ipsa loquitur* applies, a common plea of defendants is that the collision causing the damage was due to a skid, a tyre burst or a latent defect in the defendant's vehicle. It is well established that such a plea will not in itself absolve the defendant. Rather, he must go further and show that the skid occurred without fault on his part, or that the tyre burst or mechanical failure of his vehicle was not due to faulty inspection or maintenance for which he is responsible.

The following are examples of the application of the doctrine in this context.

## Skids

### **Parejo v Koo (1966–69) 19 Trin LR (Pt IV) 272, High Court, Trinidad and Tobago**

D, a 14 year old boy, was fatally injured when he was struck by a car which skidded on a wet road and mounted the pavement where he was playing with some other boys. One of the issues in the case was whether, in accordance with the maxim *res ipsa loquitur*, a presumption of negligence was raised against the driver of the car. Rees J:

*Prima facie*, the fact of the car leaving the road and mounting the pavement on its off-side raises a presumption of negligence against the driver of the car. The evidence clearly discloses that the accident was due to a skid and a skid by itself is neutral, but the fact that the car skidded on a wet road does not displace the burden which rests upon the driver of rebutting the *prima facie* presumption of negligence which is raised by the extraordinary manoeuvre of the car and the position in which it struck the deceased. This is the proposition illustrated in *Laurie v Raglan Building Co Ltd*,<sup>[123]</sup> the facts of which bear a close resemblance to the facts of the present case. There, a lorry was travelling on a road which was in an extremely dangerous condition from a fall

<sup>120</sup> *Easson v London and North Eastern Rly Co* [1944] 2 All ER 425, p 430, *per* Du Parcq LJ.

<sup>121</sup> *Morris v Luton Corp* [1946] 1 KB 114, p 115.

<sup>122</sup> *Tidy v Battman* [1934] 1 KB 319; *Waaldyk v Trim* (1977) Court of Appeal, Guyana, Civ App No 37 of 1975 (unreported); *Farfan v Warren-Davis* (1968) High Court, Trinidad and Tobago, No 815 of 1966 (unreported); *maize v Poyah* (1976) High Court, Trinidad and Tobago, No 922 of 1970 (unreported).

But see *Kunwarsingh v Ramkelawan* (1972) 20 WIR 441, p 444, *per* Rees J (below, p 363).

<sup>123</sup> [1941] 3 All ER 332.

of snow which had frozen. It skidded and killed the plaintiff's husband, who was on the pavement. At the hearing, counsel for the defendant submitted that there was no case to answer on the ground that it had not been proved that the accident was due to the negligence of the defendant's driver. Lord Greene MR in his judgment held that there was, and had this to say:<sup>[124]</sup>

...the plaintiff gave evidence which showed...that the position of the lorry over the pavement was due to a skid, and it is contended on behalf of the defendants that, assuming that a *prima facie* case of negligence arose, the circumstances establishing that the accident was due to a skid are sufficient to displace that *prima facie* case. In my opinion, that is not a sound proposition. The skid by itself is neutral. It may or may not be due to negligence. If, in a case where a *prima facie* case of negligence arises, such as that with which I have been dealing, it is shown that the accident is due to a skid, and that the skid happened without fault on the part of the driver, then the *prima facie* case is clearly displaced, but merely establishing the skid does not appear to me to be sufficient for that purpose...

In the present case, there is evidence that, as the car turned into King Street, there was a screeching of tyres. I am unable to say why this should be so, but it is clear from the authorities that, if a driver brings a car on to the public road and is involved in an accident which in the ordinary course of things does not happen if proper care is used, then the driver is *prima facie* negligent and he must give some satisfactory explanation that he was not negligent. Benjamin gave an explanation, but, as it is not acceptable, the *prima facie* case of negligence has not been displaced.<sup>[125]</sup> (The car might have skidded through the negligence of the driver or without his negligence, but it is for the driver to show that the skid occurred without any negligence on his part.) In the circumstances, I can come to no other conclusion than that this accident was caused solely by the driver's negligence.

### *Violent skidding*

In *Bushell v Chefette Restaurants Ltd*,<sup>126</sup> Douglas CJ pointed out that, in *Richley v Faull*,<sup>127</sup> where the defendant's car suddenly went into a violent skid and collided with another vehicle on the other side of the road, MacKenna J had referred to *Laurie v Raglan Building Co Ltd*<sup>128</sup> and said:<sup>129</sup>

I of course agree that where the defendant's vehicle strikes the plaintiff on the pavement or, as in the present case, moves on to the wrong side of the road into the plaintiff's path, there is a *prima facie* case of negligence, and that this case is not displaced merely by proof that the defendant's car skidded. It must be proved that the skid happened without the defendant's default. But I respectfully disagree with the statement that the skid by itself is neutral. I think that an unexplained and violent skid is in itself evidence of negligence.

124 *Ibid*, p 336.

125 See also *Tugwell v Campbell* [1965] Gleaner LR 191 (Court of Appeal, Jamaica).

126 (1978) 13 Barb LR 110, High Court, Barbados.

127 [1965] 3 All ER 109. Followed in *Wisdom v Johnson* (2002) Supreme Court, Jamaica, No CL 1996/W-240 (unreported), *per* Anderson J.

128 [1941] 3 All ER 332.

129 [1965] 3 All ER 109, p 110. See also *Batwah v Harrinanan* (1997) High Court, Trinidad and Tobago, No 136 of 1994 (unreported), *per* Maharaj J.

Douglas CJ then continued:

In the instant case, it is clear that the accident was caused by the van suddenly skidding, striking the left curb and then going out of control across the carriageway. The second defendant's explanation, apart from his saying that the road was wet, is no explanation at all. The result is that, here, all the evidence points to the accident being caused by a sudden, violent and unexplained skid, which is, without more, evidence of negligence. On the issue of negligence, the plaintiff must, therefore, succeed as against the second defendant.

**McAree v Achille (1970) High Court, Trinidad and Tobago,  
No 438 of 1968 (unreported)**

The defendant's car skidded diagonally across the road and struck a stationary car which was parked immediately behind the plaintiff's car, pushing it into the plaintiff's car and causing damage.

*Held*, the skid was caused by the oily surface of the road and the defendant was not at fault. Rees J said:

In matters of this kind, where a stationary car is parked on one side of the road and is struck by a moving one which ought to be on the other side of the road, reference is usually made to a passage in the judgment of Erle CJ in *Scott v London and St Katherine Docks Co*, where he said:<sup>[130]</sup>

There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.

In the ordinary course of things, a car does not leave its proper side and run into another vehicle which is at a standstill on the other side of the road. As the defendant did this, there is a *prima facie* case of negligence against him and the burden is cast on him to give an explanation. He can only escape liability if he is free from fault.

The defendant's account, which was substantially supported by his witness, Othello Pagus, is that he ran into a patch of oil on the surface of the road and this caused his car to skid. Although I accept this explanation, a skid in itself does not displace the *prima facie* presumption of negligence arising from the defendant's car being in a position where it had no right to be. On the contrary, a skid raises a presumption that the driver was either going too fast or applied his brakes too suddenly, having regard to the road conditions prevailing at the time. However, I find that in this case the defendant was driving his car at 15 mph before the skid and this was not an excessive speed. The defendant unexpectedly got into the skid because of the oily surface of the road and the skid was not in any way due to his fault.

It was argued by counsel for the plaintiff that there is no evidence that, having picked up the skid, the defendant did all that he could which was reasonable to correct it. I agree that there was no evidence by the defendant as to what efforts he made to get out of the skid or deal with the situation to avoid causing damage to other users of the road. It is quite conceivable that some act or omission of the driver of a vehicle who gets into a skid might have the effect of causing the results of the skid to be worse than they would be but for that act or omission, in which case the driver would be at fault. If he is found to be at fault, he has not discharged the burden that lies upon him.

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130 (1865) 159 ER 665, p 667.

However, every case must depend on its particular facts and, in the present case, although there was no direct evidence as to what the defendant did after he got into the skid, in my opinion the time and space at his disposal in which to remedy the skid were so short that he was unable to do anything to avoid striking Moss' car. The defendant's car, on getting into the oil patch, skidded and shot diagonally across the street for a distance of 30 ft, so that the car travelled 30 ft between the skid and Moss' car.

In *Hunter v Wright*,<sup>[131]</sup> the defendant was driving a car when it skidded and subsequently mounted the pavement and injured the plaintiff who was walking thereon. It was found that the skid was not due to any negligence on the part of the defendant, but it was contended that she had been negligent (a) in steering the wrong way to correct the skid; and (b) in accelerating after the skid. Before the accident, the speed of the car was estimated at 16–20 mph, and the car travelled 13–20 ft between the skid and the pavement. It was held by the Appeal Court that the time and space at the disposal of the defendant in which to remedy the skid were so short that, it being proved that the skid was not due to any fault of hers, she had discharged the onus of showing how her car came to be on the pavement, and could not be said to have been in any way to blame for the accident.

In the present case, I find that the skid was not due to any fault of the defendant and the time and space at the disposal of the defendant in which to remedy the skid were so short that the defendant is in no way to be blamed for this accident.<sup>[132]</sup>

## Tyre burst

### **Smith v CO Williams Construction Ltd (1981) 16 Barb LR 282, High Court, Barbados**

The plaintiff was employed by the defendant company to drive its truck, which transferred marl fill from the defendant's quarry to various worksites. On one such journey, the front off-side tyre burst, the cab door flew open, and the plaintiff was thrown from the vehicle and seriously injured. The plaintiff relied on the maxim *res ipsa loquitur*.

*Held*, the defendant had shown that it had a system of routine examination and inspection of its trucks and that the tyre burst was not attributable to any negligence on its part. Husbands J said:

One of the difficulties in this case is that there was no evidence given as to the cause of the tyre bursting. The tyre was not produced in evidence and no expert opinion was expressed about the tyre's condition immediately before or after the accident or the reason for its failure. Indeed, very little was said about the tyre after the accident. Thomas, the workshop foreman, was the only witness who spoke of seeing any damage to the tyre after the accident. All he says is, 'It was blown out at the side. It has treads on it. Good treads'. The question that poses itself is whether on the established facts a reasonable inference may be drawn as to the cause of the tyre bursting. Was it fabric fatigue? Was it an inherent manufacturing defect? Was it the result of previous tyre abuse? Was it the defendant's negligence? In the cases cited, there is some evidence or opinion given as to the probable cause of the happening. Here there is none, nor any setting in which the 'res' may speak for itself with

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131 [1938] 2 All ER 621.

132 A similar decision was reached in *Oliver v Sangster* (1951) 6 JLR 24 (Court of Appeal, Jamaica). Cf *Maharaj v Rampersad* (1950) 10 Trin LR 65 (Supreme Court, Trinidad and Tobago).

clarity. There is no evidence of the life expectancy of a tyre such as the one that burst, and no assistance was given to the court as to the amount of tread such a tyre used for the said purposes should have so as to be safe. On this aspect, counsel for the plaintiff urges that the tyre damage may have been caused by the quarry roads, whose condition was known to the defendant company. But what of the condition of the quarry roads? Nothing was said about this and it would be hazardous to guess. For nowadays, with Barber Green surfaces sometimes seen in the most unlikely places and often in no place at all, it is futile to speculate. Counsel for the plaintiff submits that the sudden bursting of the tyre raises the *res ipsa loquitur* rule. In *Lloyde v West Midlands Gas Board*, Megaw LJ said:<sup>[133]</sup>

I doubt whether it is right to describe *res ipsa loquitur* as a 'doctrine'. I think it is no more than an exotic, though convenient, phrase to describe what is in essence no more than a common sense approach, not limited by technical rules, to the assessment of the effect of evidence in certain circumstances. It means that a plaintiff *prima facie* establishes negligence where: (a) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; but (b) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety.

In *Woods v Duncan*, Viscount Simon, discussing the application of the rule of *res ipsa loquitur*, said:<sup>[134]</sup>

...that principle only shifts the onus of proof, which is adequately met by showing that the defendant was not in fact negligent. He is not to be held liable because he cannot prove exactly how the accident happened.

And Lord Simonds said:<sup>[135]</sup>

But to apply the principle is to do no more than shift the burden of proof. A *prima facie* case is assumed to be made out, which throws upon the defendant the task of proving that he was not negligent. This does not mean that he must prove how and why the accident happened; it is sufficient if he satisfies the court that he personally was not negligent. It may well be that the court will be more easily satisfied of this fact if a plausible explanation which attributes the accident to some other cause is put forward on his behalf; but this is only a factor in the consideration of the probabilities. The accident may remain inexplicable, or at least no satisfactory explanation other than his negligence may be offered: yet, if the court is satisfied by his evidence that he was not negligent, the plaintiff's case must fail.

So a defendant may, by affirmative proof that he was not negligent, discharge the burden that shifts upon him without satisfying the court how otherwise the accident happened.

In this case, I accept the defendant company's evidence that there was a system of routine examination and inspection of their trucks, and I do not find them negligent in this regard. Also, I accept the evidence that the replacement tyre was road worthy when it was fitted to the truck. I find that the truck door flew open because of the structural damage to the cab's frame after the tyre burst. On the facts established, I do not hold that the sudden bursting of the tyre is attributable to any negligence on the part of the defendant company. Consequently, the action fails.

133 [1971] 2 All ER 1240, p 1246.

134 [1946] AC 401, p 419.

135 *Ibid*, p 439.

## Latent defect

### **Browne v Browne (1967) High Court (Appellate Jurisdiction), West Indies Associated States, St Vincent Circuit, No 13 of 1967 (unreported)**

The respondent was driving his taxi with the appellant as a passenger. On reaching a steep hill, the respondent lost control. The vehicle mounted a bank and the appellant was injured. The respondent's defence was that the brakes had failed owing to a latent defect.

*Held*, the respondent had failed to displace the presumption of negligence raised against him. St Bernard J said:

In our view, the mere statement 'I had no brakes' is a neutral event equally consistent with negligence or due diligence on the part of the defendant. To displace the presumption of negligence, the defendant must go further and prove, or it must emerge from the evidence, the specific cause of the failure of the brakes. If the statement 'I applied brakes, no brakes' were a defence, then all a motorist would have to do to escape damages for his negligence would be to say 'I had no brakes'. He must go further and prove that he exercised due diligence in the driving of his car and equal diligence in the maintenance and use of his vehicle, and that negligence was not a probable cause of the accident...

The mere statement 'I applied my brakes, no brakes' is not sufficient to displace the presumption of negligence on the part of the respondent in this case. The statement 'I had no brakes' is equal to saying 'My tyre burst' or 'I had a skid'. These statements are not defences in actions for negligence and do not, in our view, rebut the presumption of negligence.

### **Ramdhan Singh Ltd v Panchoo (1975) High Court, Trinidad and Tobago, No 764 of 1976 (unreported)**

The plaintiff's car was being driven on the proper side of the road when it was struck by the defendant's van, which was travelling in the opposite direction. The defendant's defence was that the collision was caused by the sudden breaking of the main leaf of the right front spring assembly, which caused his vehicle to swerve across the road. The defendant sought to attribute this to a latent defect in the vehicle for which he was not responsible.

*Held*, the defendant had failed to rebut the presumption of negligence raised against him. Hassanali J said:

The defence of a latent defect in a vehicle was considered in the House of Lords in *Henderson v Henry E Jenkins and Sons*.<sup>[136]</sup> There, a lorry owned by the first respondents was descending a hill when the brakes failed and the lorry struck and killed a post office driver who had just alighted from his van. The failure was due to the sudden escape of brake fluid from a hole in a pipe in the hydraulic braking system, resulting from corrosion of that pipe. The pipe was fixed under the lorry's chassis and only 60% of the pipe could be seen on visual inspection with the pipe *in situ*: only the unseen part of the pipe had been affected by corrosion. The claim against the respondents alleged, *inter alia*, that they had been negligent in failing to keep the braking system in efficient repair. The respondents pleaded that the accident had been caused by a latent defect which had occurred without any fault on their part and the existence of which was not discernible by the exercise of reasonable care.

The evidence showed that the lorry was about five years old; the weekly maintenance had included washing the lorry and inspection of the pipe *in situ*. Nine months prior to the accident, the lorry had been steam cleaned. The Ministry of Transport and the manufacturers did not advocate the removal of the pipes and it was stated that there was a danger of fracturing or kinking if they were removed for inspection, but there was no evidence as to the lorry's mileage, the loads it had carried or the areas in which it had been used. None of the experts stated an opinion as to the cause of the corrosion, but it was suggested that leakage from a corrosive substance carried by the lorry, travelling near the sea, or travelling over snow treated with salt, might cause corrosion.

It was held by a majority of the members of the House that the respondents could not rely on the defence of latent defect not discoverable by the exercise of reasonable care unless they showed that they had taken all reasonable care in the circumstances, and to do so they had to show that there were no special circumstances in the past use of the vehicle to indicate that the lorry might have been subjected to a corrosive agent resulting in the corrosion of the pipe. Accordingly, since the respondents had not adduced evidence of the past history of the vehicle, they could not rely on the defence of a latent defect, and, therefore, they had not discharged the inference that they had been negligent.

In the instant case, the van was about six to seven years old on the day of the accident. The defendant had bought it about four months before. It had been examined and passed for licensing some four months before 26 May 1969—that it was in good working condition does not provide an 'adequate answer' in this case. The defendant is not a mechanic, as he himself testified. Nor is it enough that he never had reason to suspect any latent defect. Further, the fact that the van was 'passed for inspection' a mere two or three weeks before 26 May 1969 does not rebut the inference of negligence raised against the defendant. Mr Charles himself testified that an examination of a vehicle for licensing purposes is not an adequate inspection for the proper maintenance of a vehicle. Indeed he might, he testified, without any fault on his part, fail to observe a cracked or otherwise defective main spring in the course of such an inspection (for licensing purposes) if, as sometimes happened, the spring was covered with a layer of grease. At all events, for the like reason, the effects of a defect in the spring due to wear and tear may not be noticed on such inspection.

In Mr Charles' view, one cannot, for the purposes of good maintenance and efficiency of a given vehicle, make a general statement as to how frequently its undercarriage ought to be examined. If he had to express any such general opinion—and it would be too loose an opinion—he would say every 5,000 miles is a good frequency. However, the frequency of such examination depends on several factors, including the roads over which the vehicle travels, the manner in which it is driven, the nature and extent of the loads which it carries, etc. Depending on all the relevant circumstances, such inspection may be desirable and necessary more frequently or less frequently than every 5,000 miles.

Finally, it is to be observed that there has been no evidence of any examination of the vehicle—for its maintenance—or of the form or method of maintenance, if any, practised in respect of the van from the time of its purchase, when it was already six years old. Nor has there been any evidence of the history of the vehicle prior to the accident or since its purchase by the defendant relating to the nature of the driving to which it was subjected, of the loads it carried or of the roads over which it travelled.

The defendant has failed to discharge the onus cast upon him in this case and the plaintiff succeeds in his claim in negligence.<sup>137</sup>

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137 See also *Bain v Mohammed* (1964) 7 WIR 213 (Court of Appeal, Trinidad and Tobago).

**Granger v Murphy (1975) Court of Appeal, The Bahamas, No 11 of 1974  
(unreported)**

G's vehicle ran into the back of M's car, which had stopped at an intersection. G alleged that the collision was caused by the failure of his brakes and pleaded 'inevitable accident'.

*Held*, the fact that G's vehicle ran into M's car when the latter was at a standstill and was properly positioned in the line of traffic was *prima facie* evidence of negligence, and the onus lay upon G to establish that the collision was not due to any negligence on his part. G had failed to do this. Georges JA said:

If it can be shown that the accident was due to a latent defect in the mechanism which the plaintiff could not by reasonable diligence have discovered, then the accident would indeed have been inevitable. Such indeed was the plea in *Winnipeg Electric Company v Geel*,<sup>[138]</sup> the facts of which bear a striking resemblance to the facts of this case. Perhaps the position is most logically analysed by Lord Greene, who stated in *Brown v De Luxe Car Services*:<sup>[139]</sup>

I do not find myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way namely: has it been established that the driver of the car was guilty of negligence?

In this case, the appellant's vehicle ran into the respondent's car when it was at a standstill and properly positioned in the line of traffic. This is *prima facie* evidence of negligence and the burden would, therefore, lie on the appellant to establish that the collision was not due to any negligence on his part.

The learned trial judge, after a careful analysis of the evidence, concluded that the appellant had not discharged the onus of establishing that the failure of the brakes was not due to any negligence on his part. The broken cylinder or brake line was not produced. No evidence was led to show what may have caused the break—whether a latent defect or some other cause which reasonable care could not have discovered and prevented. No competent mechanic inspected the vehicle after the accident, so that there was no technically reliable evidence as to its condition. The evidence was conflicting and unsatisfactory as to what part of the mechanism had ruptured—whether the master cylinder or the brake line. The service personnel who attended to the pick-up were not called, so that there was no evidence as to the nature of the maintenance inspection which the vehicle regularly underwent. The only evidence on that point was that of the appellant, who said that the vehicle was regularly serviced. Assuming that the evidence of the appellant is accepted that the collision was caused by the failure of his brakes, the conclusion of the learned judge that he had failed to show that this was not due to negligence on his part appears eminently correct.

The argument for the appellant, as I understand it, was that since the appellant's vehicle was not a public service vehicle the standard of care required of him was less than that required in the case of such vehicles, and that accordingly the high standards prescribed in cases such as *Barkway v South Wales Transport Co Ltd*<sup>[140]</sup> were not applicable.

Even if this proposition were accepted, it would avail the appellant nothing. He has led no precise evidence establishing exactly what part of the braking mechanism failed or the cause for such failure. He has led no evidence detailing the type of inspection carried out in the periodic maintenance services of which he testified. One

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138 [1932] AC 690.

139 [1947] 1 KB 549, p 552.

140 [1950] 1 All ER 392.

is left, therefore, in doubt as to precisely what was the defect which caused the brakes to fail, and similarly one cannot tell whether failure to discover the defect may not have been due to obviously faulty maintenance procedures. The issue is not whether a sufficiently high standard of care was achieved but an absence of reliable evidence as to whether any care had been taken at all.

## CAUSATION

Having established that the defendant owed a duty of care to him and that the defendant was in breach of that duty, the plaintiff must then prove that he has suffered damage<sup>141</sup> for which the defendant is liable in law. There are two aspects to this requirement:

- (a) causation in fact; and
- (b) remoteness of damage in law.

### Causation in fact

The first question to be answered is: did the defendant's breach of duty in fact cause the damage? It is only where this question can be answered in the affirmative that the defendant may be liable to the plaintiff. A useful test which is often employed is the 'but for' test; that is to say, if the damage *would not have happened but for the defendant's negligent act*, then that act will have caused the damage.

The operation of the 'but for' test is well illustrated by *Barnett v Chelsea and Kensington Hospital Management Committee*.<sup>142</sup> In this case, the plaintiff's husband, after drinking some tea, experienced persistent vomiting for three hours. Together with two other men who had also drunk the tea and were similarly affected, he went later that night to the casualty department of the defendant's hospital, where a nurse contacted the casualty officer, Dr B, by telephone, telling him of the man's symptoms. Dr B, who was himself tired and unwell, sent a message to the men through the nurse to the effect that they should go home to bed and consult their own doctors the following morning. Some hours later, the plaintiff's husband died of arsenic poisoning and the coroner's verdict was one of murder by a person or persons unknown. In a subsequent action for negligence brought by the plaintiff against the defendant hospital authority as employer of Dr B, it was held that, in failing to examine the deceased, Dr B was guilty of a breach of his duty of care, but this breach could not be said to have been a cause of the death because, even if the deceased had been examined and treated with proper care, he would in all probability have died anyway. It could not, therefore, be said that 'but for the doctor's negligence, the deceased would have lived'.

A more severe application of the 'but for' test occurred in *McWilliams v Sir William Arrol & Co Ltd*.<sup>143</sup> There, a steel erector was killed when he fell from a building on which he was working. Had he been wearing a safety harness, he would not have fallen. The defendants, his employers, were under a statutory duty to provide

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141 Negligence is not actionable *per se*; accordingly, where no damage is proved, no action lies. See *Richardson v Richardson* (1993) Court of Appeal, Anguilla, Mag App No 5 of 1992 (unreported).

142 [1968] 1 All ER 1068.

143 [1962] 1 WLR 295.

safety harnesses for all their employees working on high buildings, and they were in breach of that duty by failing to provide them. Nevertheless, they were held not liable since they proved that, on previous occasions when safety harnesses had been provided, the plaintiff had never bothered to wear one. The inference, therefore, was that even if a harness had been provided on the day of the accident, the plaintiff would not have worn it. Thus, it could not be said that the failure to provide a harness was a cause of death.

A third example of the application of the 'but for' test is the Guyanese case of *Twins Pharmacy Ltd v Marshall*.<sup>144</sup> In this case, the plaintiff, a seven year old child, was injured while playing with a bicycle. The plaintiff's mother purchased a bottle of 'Ioderm' ointment from a drug store. Ioderm ointment was of two kinds: one, called 'Ioderm plain', contained iodine only; and the other, 'Ioderm compound', contained both iodine and methyl salicyl. Ioderm compound was to be used only where the patient's skin was unbroken, whilst Ioderm plain was suitable for use on broken skin. The Ioderm sold to the plaintiff's mother was Ioderm compound, but the bottle was wrongly labelled with an 'Ioderm plain' label.

Following one application of the ointment on her leg, the plaintiff became ill and subsequently developed necrosis of the skin at the spot where the ointment had been rubbed in. The plaintiff's action for negligence against the defendants as manufacturers and bottlers of Ioderm ointment failed on the ground, *inter alia*, that the negligent act of the defendants in putting the wrong label on the bottle was not the cause of the damage to the plaintiff, because the plaintiff's skin was unbroken and the ointment had been used in exactly the same circumstances as the correct label would have directed. Put in another way, even if the correct 'Ioderm compound' label had been on the bottle, the result would have been the same. It could not be said that, but for the defendant's negligence, the damage would not have occurred. Crane JA, in the Court of Appeal of Guyana, said:<sup>145</sup>

It is clear that, apart from the [defendants'] negligent omission to sell the [plaintiff's] mother and next friend Ioderm compound without having statutorily complied by declaring the presence of methyl cum salicylate on the label of the package, that omission could not have been the cause of the damage to Denise Marshall's leg. As we have seen, Ioderm cum methyl salicylate (that is, Ioderm compound) has not been proved to be dangerous *per se*, as the [plaintiff] had set out to show. So, no real point can be made of the fact that methyl salicylate did not appear on the label of the bottle. The [plaintiff] could not successfully contend that the ointment was used on broken skin in contravention of the 'directions for use', which cautioned that it should be used on unbroken skin, because Dr Nauth was clear that the patient's skin was intact and the judge found as a fact that Denise's skin was unbroken; so, notwithstanding that there was a negligent omission by the [defendants] to put the appropriate label on Ioderm compound, the fact remains that Denise's mother had complied, albeit in ignorance, with the 'directions for use' on which it was plainly written—'where the pain is severe and the skin is not open. "Ioderm" cum methyl salicylate is the preparation of choice, because it contains wintergreen oil which is a remarkable pain-reducing agent'.

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144 (1979) 26 WIR 320.

145 *Ibid*, p 334.

It seems to me that what the plaintiff had to establish to prove her case was that Ioderm compound, as sold to her mother, had been negligently compounded, so was harmful and had caused her necrosis. However, the initial negligence of putting the wrong label on the bottle, although it created a wrong impression of the composition of Ioderm compound, could not have caused her necrosis. In my opinion...apart from the negligent act of the [defendants] in putting the wrong label on the wrong bottle, which did not matter in this case, there was no evidence of any negligent compounding of Ioderm compound which caused the alleged necrosis.

It has been pointed out, however,<sup>146</sup> that although the 'but for' test is sufficient for cases in which there is a single breach of duty and a single defendant, but it is not adequate to deal with cases where there are two or more breaches of duty, that is, where there are multiple causes of damage and two or more tortfeasors. For example, D1 and D2 both negligently start fires, and the two independent fires converge simultaneously on P's house and destroy it. Assuming that either fire alone would have been sufficient to destroy the house, the result of applying the 'but for' test would be that neither D1 nor D2 would be liable for the damage, since it could not be said that the damage would not have occurred 'but for' D1's fire or, equally, 'but for' D2's fire. The courts, therefore, do not apply the test in such cases, but simply hold both tortfeasors fully liable for the whole loss, subject to the right of each to obtain a contribution from the other.

### Remoteness of damage

The consequences of an act of carelessness on the part of a defendant may be far reaching. The concept of remoteness of damage is one way in which the law sets limits to the extent of a person's liability for the consequences of his negligence, and the basic rule is that a defendant will be liable only for those consequences of his negligent act which are not too remote in law, even though such act may be said, on an application of the 'but for' test, to have caused the damage complained of.

According to the Judicial Committee of the Privy Council in the leading case of *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))*,<sup>147</sup> consequences are too remote if a reasonable man would not have foreseen them. Thus, foreseeability is the criterion not only for the question of whether a duty of care is owed, but also for the question of whether damage is or is not too remote. The foreseeability test was applied to the facts of the case itself, which were as follows: the defendants negligently discharged oil from their ship into Sydney Harbour, where the plaintiffs were carrying out welding operations at their wharf. Molten metal from the welding operations set fire to some cotton waste floating on the oil beneath the wharf. The waste, in turn, set fire to the oil and, in the ensuing conflagration, the wharf was severely damaged. The oil also found its way onto the plaintiffs' slipways adjoining the wharf and interfered with the plaintiffs' use of them. The Privy Council held that since, on the evidence, the defendants neither knew nor ought to have known that the oil was capable of catching fire when spread on water, they could not reasonably have foreseen that

<sup>146</sup> Strachan, DMA (1970) 33 MLR 386.

<sup>147</sup> [1961] AC 388. Cf *Re Polemis* [1921] 3 KB 560, which laid down that, provided that some damage is foreseeable, the defendant is liable for all the direct consequences of his act, whether those consequences are foreseeable or not.

their act of discharging the oil would have resulted in the plaintiffs' wharf being damaged. The damage was thus too remote and they were not liable for it. But they were liable for the fouling of the slipways, since that was a foreseeable consequence of the discharge of the oil.

### Other rules regarding remoteness

Apart from the basic rule in *The Wagon Mound (No 1)*, there are certain other well established principles, which are discussed below.

### Foreseeable type of harm

The harm which was foreseeable must be of the same kind, type and class as that which actually occurred.<sup>148</sup> Thus, for example, if the damage which occurs is damage by fire, the defendant will be liable only if damage by fire was foreseeable; foresight of any other kind of damage will not suffice. Similarly, if D carelessly allows an 11 year old boy to handle his gun, and the boy drops the gun onto P's foot and injures it, D will not be liable to P for the injury because the type of harm which was foreseeable was damage by shooting, which is quite different from the injury which actually occurred.<sup>149</sup> However, so long as the damage which occurs is of the same kind as that which is foreseeable, it matters not that the precise sequence of events leading to the damage was not foreseeable. In *Hughes v Lord Advocate*,<sup>150</sup> the defendants left a manhole in the street uncovered and protected only by a tent and paraffin lamps. A child climbed down into the hole and, as he was coming out, kicked over one of the lamps, which fell into the hole, causing an explosion by which he was burned. The lower court held that the defendants were not liable on the ground that, although injury by burning was foreseeable, as the child might easily have come into contact with one of the lamps, burning by means of this sequence of events was not. The House of Lords reversed the lower court, holding that once the *type* or *kind* of damage was foreseeable, it was irrelevant that the precise sequence of events was not.

The question of foreseeability of harm was in issue in *Witter v Brinks (Jamaica) Ltd.*<sup>151</sup> In this case, the plaintiff was employed by the defendants as a 'clearance driver'. His duties included the transporting of cheques between various banks and a data processing centre, for which purpose he was supplied with an unmarked car and a firearm. The plaintiff had been having trouble starting the vehicle and he returned it to his employers, whose serviceman later assured the plaintiff that it had been checked and was starting properly. That same evening, the plaintiff was driving the car home before beginning his early morning rounds, when it suddenly stalled and would not restart. The plaintiff got out of the car, opened the bonnet and was looking at the engine when a gunman walked up to him and threatened to kill him. In attempting to disarm the man, the plaintiff received a gunshot in his hand, which became partially paralysed.

The plaintiff brought an action for negligence against the defendants, contending that, by supplying him with a defective and unreliable vehicle, they were in breach

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148 *The Wagon Mound (No 2)* [1966] 2 All ER 709.

149 Brazier, M, *Street on Torts*, 10th edn, London: Butterworths, p 254.

150 [1963] AC 837. See also *Malcolm v Broadhurst* [1970] 3 All ER 508, p 511.

151 (1992) 29 JLR 344.

of a duty of care owed to him. The defendants argued that, at the material time, the plaintiff was not doing anything inherently dangerous, that is, he was not transporting cheques, and it was unforeseeable that, as a consequence of the vehicle breaking down, he would be held up and shot by a gunman. Harrison J, in the Jamaican Supreme Court, agreed with the defendants' contention. He said:<sup>152</sup>

This court holds that the employer has a duty of care at common law to his employee to provide, *inter alia*, proper plant and appliances and a safe system of work during the course of such employment. The employer has this general personal duty to take reasonable care for the safety of his workmen.<sup>[153]</sup>

This duty does not extend to the protection of all risks, but only such risks as may be reasonably foreseeable or reasonably contemplated. The reasonable employer is required to foresee the probable consequences of his act, not the possible consequences. As a result, the law seeks to restrict, within a certain range, the liability even of apparent wrongdoers...

In the instant case, the plaintiff, as an employee, was required to take the motor vehicle home prior to the commencement of his actual transportation duties. Though he deviated to visit his friend, at the time of the occurrence he was on his way home and, therefore, is deemed to have been in the course of his employment. On the evidence, which is unchallenged, the said motor vehicle had a defect, that is, a difficulty in starting. This defect was known to the defendant company, who attempted, unsuccessfully, to correct it. In this regard, therefore, the defendant was in breach, in failing to provide a defect-free vehicle to its employee, the plaintiff...

This court needs to determine whether or not provision of the defective vehicle was a breach of duty which created the type of risk which, in the reasonable contemplation of the parties, would probably give rise to the situation that the plaintiff would be attacked and shot by a gunman.

The motor vehicle provided by the defendant company was for the transportation of the plaintiff and the cheques. There is no evidence that it was regarded as a part of the security system of the employment. Whereas a firearm is clearly so, a motor vehicle in itself is not. If, of course, the vehicle was, for example, armoured, it could be so regarded.

The defect in the said vehicle was not, therefore, referable to the obligation as to the provision of a safe system of work. The action of the gunman was not referable to any enticement caused by the ostensible activity or patent conduct of the plaintiff transporting valuable cargo. Nor was the gunman's action suggestive of an attempt to rob any such property contained in the vehicle. One may not import into the case circumstances that are not supported by the facts. The court cannot say that it is reasonable to assume that, when a car stalls in the streets of Kingston, and particularly in Seaview Gardens, the driver thereof is likely to be held up and shot by a gunman.

The plaintiff's action succeeded, however, in the Bahamian case of *Nottage v Super Value Food Stores Ltd.*<sup>154</sup> Here, armed robbers shot and injured the plaintiff, who was employed by the defendants as a store manager, when he went to open the defendants' supermarket one morning. Strachan J held that the defendants were in breach of their duty to take reasonable precautions to protect the plaintiff,<sup>155</sup> such as by providing a security officer to accompany the plaintiff at opening times, since 'they did foresee that there would be armed robbers at their food stores.

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152 *Ibid*, pp 348, 350.

153 See *Wilson and Clyde Coal Co v English* [1938] AC 57 (below, pp 141 *et seq*).

154 (1997) Supreme Court, The Bahamas, No 389 of 1994 (unreported).

155 An aspect of the employer's common law duty to provide a safe place of work (see below, pp 144, 145).

They may not have known the hour or the day, but they certainly foresaw that there would be robberies. There had been in the past, and they anticipated that there would be in the future'. Strachan J continued:

Since *Dorset Yacht Co Ltd v Home Office*,<sup>156</sup> as Lord Steyn observed in *Marc Rich and Co AG v Bishop Rock Marine Co Ltd (The Nicholas H)*,<sup>157</sup> it is settled law that the elements of foreseeability and proximity as well as considerations of fairness, justice and reasonableness are relevant to all cases of negligence, whatever the nature of the harm sustained by the plaintiff. This, among other things, provides in my view the answer to a real concern that Mr Ward had about the effect of a conclusion that the defendant was liable. As he saw it, an obligation to take precautions against criminal acts would be simply too burdensome for many small operators; indeed, if I understood him correctly, even the cost of leaving the car park lights on was considered too onerous for those concerned in the present case. Cost is a relevant factor and a court will have regard to it in the context of 'fairness, justice and reasonableness'. The point is, however, that profitability is not invariably linked to scale and there are, apart from cost, other relevant and material considerations, for example, that the system of work of the small operator is not likely to be substantially the same as Super Value's.

Here, as I see it, the employee was at the material time performing a duty under circumstances which, in the absence of appropriate precautions, amounted to negligence by omission on the part of his employer.

A similar situation obtained in the Jamaican case of *Wheatle v Townsend*.<sup>158</sup> Here, the plaintiff was employed by the defendant as a delivery man, his duty being to deliver products in the defendant's van to individuals and shops in St Andrew. One morning, the plaintiff was returning to the van after making a delivery to a shop in the Cavallers area when he was attacked and wounded by a gunman. Harris J held the defendant liable in negligence for failing to take precautions for the security of the plaintiff, as previous robberies had occurred in the Cavallers area and 'the defendant knew that there was a distinct possibility that the plaintiff could have been attacked and some violence could have been committed against him... A duty resides with the employer to exercise reasonable care for the safety of his employee when that employee is performing his task'.<sup>159</sup>

### The 'egg-shell skull' principle

This principle was concisely explained by Kennedy J thus:<sup>160</sup>

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.

In other words, a tortfeasor takes his victim as he finds him, and the latter can claim damages for the entire injury to his person even though, because of some special physical weakness or sensitivity unknown to the tortfeasor, the harm suffered was greater than would have been suffered by a normal person. Thus, for example, one who carelessly inflicts a minor cut on a haemophiliac, with the result that the latter bleeds to death, will be fully liable for the consequences, even though

156 [1969] 2 QB 412.

157 [1995] 3 All ER 307.

158 (1998) Supreme Court, Jamaica, No W 380 of 1995 (unreported).

159 Cf *Williams v Grimshaw* [1961] 3 KIR 610; *Haughton v Hackney BC* [1961] 3 KIR 615.

160 *Dulieu v White and Sons* [1901] 2 KB 669, p 679. See *Rowe, PJ* (1977) 40 MLR 377.

a normal person would have suffered little injury.<sup>161</sup> And where the defendant negligently inflicted a burn on the plaintiff's lip which, owing to a pre-malignant condition in the tissues of the lip, caused cancer to develop, from which the plaintiff died, the defendant was held fully liable for the death.<sup>162</sup>

This principle can be reconciled with the rule in *The Wagon Mound (No 1)* by saying that, once the type of damage (for example, the cut or burn) was foreseeable, 'any consequence which results because the particular individual has some peculiarity is a consequence for which the defendant is liable'.<sup>163</sup>

The 'egg-shell skull' principle was applied in the Barbadian case of *Brewster v Davis*.<sup>164</sup> Here, the defendant negligently drove into the back of the plaintiff's car while the latter was waiting in a line of stationary traffic. The plaintiff suffered no apparent physical injuries but she became anxious and nervous. At the time of the accident, the plaintiff was suffering from an auto-immune disease known as *lupus nephritis*, and the stress and anxiety caused by the accident exacerbated her condition, which ultimately resulted in acute renal failure. Holding the defendant liable for the consequences of the renal failure, Williams CJ said:

I hold that the 'egg-shell skull' rule is still part of the law of Barbados and for the purposes of that rule there is, in my judgment, no difference between inflamed kidneys and a thin skull, a bad heart or a pre-cancerous condition. Accordingly I hold that a causal link has been established between the defendant's negligence and the plaintiff's acute renal failure.

In the more recent Jamaican case of *Crandall v Jamaica Folly Resorts Ltd*,<sup>165</sup> the plaintiff, a guest at the defendant's hotel, fell from an unstable chair in the hotel bar and sustained injuries which necessitated two operations. The plaintiff was obese and, after the second operation, he suffered a heart attack. Ellis J held that the defendant was in breach of its duty of care under the Occupiers' Liability Act<sup>166</sup> and was fully liable for the consequences, including the heart attack, which was not too remote an injury. The learned judge expressly referred to *Smith v Leech Brain and Co Ltd*<sup>167</sup> as laying down the principle that the defendant must 'take his victim as he finds him'.

### *Quantum of damages*

Another aspect of the principle that a tortfeasor must take his victim as he finds him is the rule that if the defendant injures a high-income earner or a particularly valuable chattel, he cannot argue that he could not have foreseen that the amount of the loss would be so great, and he will be liable for the full loss of earnings of

161 *Bidwell v Briant* (1956) *The Times*, 9 May.

162 *Smith v Leech Brain and Co Ltd* [1962] 2 QB 405.

163 *Warren v Scruttons Ltd* [1962] 1 Lloyd's Rep 497, p 502, per Paull J.

164 (1992) High Court, Barbados, No 944 of 1989 (unreported).

165 *Smithfield Digest* 1998 ([www.smithfield.com.jm/SD250698c.htm](http://www.smithfield.com.jm/SD250698c.htm)). The decision has been upheld by the Jamaican Court of Appeal: (1999) Court of Appeal, Jamaica, Civ App No 102 of 1998 (unreported). See also *Neely v Minister of Tourism* (1996) Supreme Court, The Bahamas, No 1183 of 1994 (unreported), where Osadebay J emphasised that under the egg-shell skull rule, the plaintiff's weight and height had nothing to do with the issue of liability.

166 See below, Chapter 5.

167 [1962] 2 QB 405.

the victim or the full value of the chattel, as the case may be.<sup>168</sup> Foreseeability is, in any case, irrelevant here, since the issue is one of assessment of damages rather than of remoteness.<sup>169</sup>

### *Plaintiff's impecuniosity*

In contrast with the 'egg-shell skull' principle, it has been held that a defendant is not liable to compensate the plaintiff for any extra damage he suffers because of his (the plaintiff's) own impecuniosity:

The [plaintiff's] financial disability [is not] to be compared with that physical delicacy or weakness which may aggravate the damage in the case of personal injuries, or with the possibility that the injured man in such a case may be either a poor labourer or a highly paid professional man.<sup>170</sup>

Thus, where the defendant's ship, through careless navigation, damaged and sank the plaintiffs' vessel, the plaintiffs were entitled to recover the full value of their ship, but they could not recover the additional expenses they had incurred in hiring a ship in order to fulfil an existing contract, because the need to hire the ship arose only on account of the fact that they were too poor to buy an immediate replacement for their lost vessel.<sup>171</sup>

### *Novus actus interveniens*<sup>172</sup>

Where, subsequently to the defendant's breach of duty, an independent event occurs which causes damage to the plaintiff, the question arises as to whether the defendant is to be held liable for the damage, or whether the intervening event is to be treated as a *novus actus interveniens* which 'snaps the chain of causation' and thus relieves the defendant from liability. There are no firm principles as to when the court will and when it will not regard an occurrence as a *novus actus interveniens*, and the answer depends largely on the policy to be pursued in allocating responsibility for negligent conduct.

Of the various tests which have been suggested for deciding this difficult question, perhaps the clearest and most useful is whether a reasonable man would have said that the damage caused by the intervening event was within the likely or foreseeable risk created by the defendant's negligence.<sup>173</sup> Thus, for instance, where a decorator, working alone in a house, had been told by the owner to lock the front door whenever he had to go out, and he carelessly left the door unlocked while he went away for two hours, with the result that a thief entered and stole some jewellery and clothes, it was held that the act of the thief was within the foreseeable risk created by the decorator's breach of duty and he could not plead *novus actus interveniens*. He was, therefore, liable for the loss.<sup>174</sup>

168 *The Arpad* [1934] P 189, p 202.

169 *Op cit*, Winfield and Jolowicz, fn 77, p 220.

170 *Liesbosch Dredger v SS Edison* [1933] AC 449, p 461. See Kodilinye, V (2000) 10 Carib LR 75.

171 *Ibid*.

172 See Millner, MA (1971) 22 NILQ 168.

173 See Clerk and Lindsell, *Torts*, 15th edn, London: Sweet & Maxwell, paras 11–53.

174 *Stansbie v Troman* [1948] 2 KB 48.

Similarly, where the defendant's servant negligently left a horse-drawn van unattended in a street where children were playing, and a mischievous boy threw a stone at the horses, causing them to bolt and run the plaintiff down, the act of the boy was not a *novus actus*, since it was a foreseeable consequence of leaving the horses unattended where children were about.<sup>175</sup> On the other hand, a contractor who carelessly leaves an open pit in a road is not liable to a policeman who is deliberately thrown into it by an escaping prisoner,<sup>176</sup> nor is a railway company which negligently allows a train to become overcrowded liable to a person who has his wallet stolen by a pickpocket, since such events are not within the foreseeable risk of the defendant's carelessness.<sup>177</sup>

An intervening act may be the act of a third party (as in all the above examples), or it may be the act of the plaintiff himself. In many cases, the careless act of the plaintiff will constitute contributory negligence; alternatively, it may be treated as a *novus actus interveniens* which breaks the chain of causation. The court will more readily accept a plea of *novus actus* where the intervening act is that of the plaintiff himself, due to the rule that it is the plaintiff's duty to mitigate the damage, and he cannot recover damages for an aggravation or prolongation of his injuries which is due to his own neglect or wilful default.<sup>178</sup> Thus, 'if a man suffering from a sprained leg wishes to win a prize in a high-jumping competition and proceeds to endeavour to win it and makes his leg so much worse that it takes an additional six months to recover, he is only entitled to damages for such part of his suffering as was not due to such heedless conduct'.<sup>179</sup>

## LIABILITY FOR ECONOMIC LOSS

As a general rule, no damages can be claimed for 'pure' economic loss in the law of torts.<sup>180</sup> Pure economic loss is financial loss which is not consequent upon any physical damage to the person or property of the plaintiff. Economic loss which is consequent upon physical damage to the plaintiff or his property is compensable. A simple example may clarify the distinction: if D negligently runs down P, a fashion model, with his car, P can recover damages for loss of earnings, including such items as a lucrative modelling contract which P is prevented, by her injuries, from obtaining. But P's agent, Q, who expected to earn a large commission from the modelling contract, cannot recover damages for his loss of earnings caused by the injuries to P, because his loss is not consequent upon any physical damage to him; it is consequent only upon damage to P. The leading case on this point is *Spartan Steel and Alloys Ltd v Martin and Co Ltd*,<sup>181</sup> where it was held that a person who negligently damaged a cable belonging to the power authority, thereby cutting off the electricity supply to the plaintiffs' nearby factory, was not liable to the plaintiffs for loss of profits arising

175 *Haynes v Harwood* [1934] All ER Rep 103.

176 *Alexander v Town of New Castle* (Ind 1888) 17 NE 200.

177 *Cobb v Great Western Rly* [1894] AC 419.

178 *Op cit*, Heuston and Buckley, fn 78, p 525. For a case in which a plea of *novus actus* failed, see *Wieland v Cyril Lord Carpets Ltd* [1969] 3 All ER 1006.

179 *Jones v Watney* (1912) 28 TLR 399, p 400.

180 *Laufer v International Marbella Club SA* (1988) Court of Appeal, Jamaica, Civ App No 2 of 1986 (unreported).

181 [1973] 1 QB 27.

from the stoppage of steel production during the power cut, because there was no duty to avoid causing purely economic loss. It is significant, however, that in this case the plaintiffs did recover for financial loss arising from damage to molten metal which was in their furnace at the time of the power cut, because this loss was consequent upon physical damage to the metal.

### Negligent misstatement causing economic loss

The most important and well established exception to the rule that damages for pure economic loss are not recoverable in the law of torts is the principle arising from the case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd*,<sup>182</sup> which established that damages can be recovered in tort for economic loss caused by careless misstatements.

A negligent misstatement may have either of the following effects:<sup>183</sup>

- (a) it may cause physical damage to the person who relies on it; or
- (b) it may cause purely financial (or economic) loss to such person.

There has never been any difficulty in holding a defendant liable for physical harm caused by his careless misstatement. For example, an architect who carelessly gave wrong instructions to a bricklayer, which resulted in the collapse of a wall and consequent injury to the bricklayer, was held liable in negligence,<sup>184</sup> and a doctor who carelessly certified a man as being of unsound mind was held liable for the subsequent detention of the man in a mental hospital.<sup>185</sup> Until 1963, however, it was a firm rule that, except where there was a fiduciary relationship between defendant and plaintiff (for example, as between solicitor and client), there was no duty of care to avoid causing purely economic loss through negligent misstatements.

It was the leading case of *Hedley Byrne and Co Ltd v Heller and Partners Ltd*<sup>186</sup> which established for the first time that a negligent misstatement, whether spoken or written, which causes financial loss may give rise to an action in damages for negligence, despite the absence of any fiduciary or contractual relationship between the parties. The facts of the case were that the plaintiffs, who were advertising agents, asked their bankers to inquire into the financial stability of E Co, with whom the plaintiffs were contemplating entering into certain advertising contracts. In answer to inquiries by the plaintiffs' bankers, the defendants, E Co's bankers, carelessly gave favourable references about E Co. Relying upon these references, the plaintiffs went ahead with the advertising contracts, but shortly afterwards E Co went into liquidation and the plaintiffs lost £17,000. The plaintiffs' action in negligence failed because the defendants had expressly disclaimed responsibility for their references, but the House of Lords held that, if it were not for this express disclaimer, the defendants would have owed a duty of care to the plaintiffs not to cause financial loss by their statements. All five judges of the court proceeded to

182 [1963] 2 All ER 575.

183 Where a misstatement is fraudulent, ie, made without belief in its truth or made recklessly as to whether it is true or false, the representor may be liable for the tort of deceit: *Derry v Peek* (1889) 14 App Cas 337.

184 *Clayton v Woodman* [1962] 2 QB 533.

185 *De Freville v Dill* [1927] All ER Rep 205.

186 [1963] 2 All ER 575.

expound their views as to the basis of liability for negligent misstatements, but unfortunately there was no uniformity of approach among their Lordships, and subsequent cases have done little to clarify the position. However, the following points are sufficiently clear:

- (a) A duty of care will exist only where there is a 'special relationship' between the parties. A majority of the judges in *Hedley Byrne* considered that a special relationship would arise whenever, in the circumstances: (i) it was reasonable for the plaintiff to have relied upon the care or skill of the defendant who made the statement; and (ii) the defendant knew or ought to have known that the plaintiff was relying on him. Thus, professional advisers, such as accountants,<sup>187</sup> bankers, commission agents and surveyors, will owe a duty of care to their customers in respect of any professional advice given.
- (b) No duty of care will arise where advice is given on a purely social occasion (for example, advice 'cadged' at a cocktail party, or given on a bus or aeroplane by one passenger to another), since it would be neither foreseeable by the defendant that the plaintiff would rely on the advice, nor reasonable for the plaintiff to do so.
- (c) A non-professional person who gives information or advice on a 'business occasion' (for example, one trader advising another as to the creditworthiness of a potential buyer) owes a duty of care, at least if he has a financial interest in the transaction in question.<sup>188</sup>

The requirements for liability for economic loss caused by negligent misstatements were further considered by the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*.<sup>189</sup> In this case, the plaintiff was a policyholder with the defendant insurance company. He sought gratuitous advice from the company as to the wisdom of investing in the defendant's sister company. He was advised that the sister company was financially stable, and so he went ahead and invested in it. When the sister company crashed, he brought an action against the defendant company, alleging that it had been negligent in giving the advice. The Privy Council held, by a majority of 3:2, that the defendant was not liable since, being an insurance company, it was not in the business of giving investment advice.

The majority held that, where the defendant is not in the business of giving advice and does not hold itself out as competent to give the advice sought, the only duty owed is a duty of honesty, and that duty had been fulfilled in this case. It did, however, recognise that where the defendant has a financial interest in the advice given, then the requirement that the defendant be in the business of giving advice does not apply. The dissenting minority in *Evatt* took the view that a duty of care is owed by anyone who takes it upon himself to make a representation, knowing that another will justifiably rely on his representation. According to the minority, foresight of reasonable reliance being placed upon the representor's words

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187 In *JEB Fasteners Ltd v Marks* [1981] 3 All ER 289, Woolf J held that auditors preparing company accounts owed a duty of care to any person whom they ought reasonably to have foreseen might rely on those accounts; though in *Caparo Industries plc v Dickman* [1990] 2 WLR 358, the House of Lords held that the duty of care of an auditor of a public company is owed only to his client company and its shareholders, collectively and individually, and not to potential investors.

188 *Anderson v Rhodes* [1967] 2 All ER 850.

189 [1971] 1 All ER 150.

is the critical test, and it is this more liberal view of the scope of *Hedley Byrne* which has found favour with the English courts. On the other hand, it was the majority view in *Evatt* which was applied by the Jamaican Court of Appeal in *Imperial Life Assurance Co of Canada v Bank of Commerce (Jamaica) Ltd*.

**Imperial Life Assurance Co of Canada v Bank of Commerce (Jamaica) Ltd  
(1985) Court of Appeal, Jamaica, Civ App No 35 of 1981 (unreported)**

A, the registered fee simple owner of premises, mortgaged the property to the Imperial Life Assurance Co of Canada to secure a loan of \$50,000 in October 1970 and the mortgage was registered. In unexplained circumstances, the certificate of title was made available to the solicitors representing the First National City Bank, in whose favour a mortgage was executed and registered in January 1971 to secure another loan. This latter mortgage was endorsed on the title which was returned to Imperial Life through their solicitors, J & Co.

In 1974, A approached Imperial Life for an additional loan on the security of the premises. Imperial Life was prepared to entertain the request but, owing to an unfavourable cash flow position, was unable to make an immediate disbursement. H, an official of Imperial Life, explored with S, a manager of the Bank of Commerce (Jamaica) Ltd, the possibility of the Bank of Commerce providing A with bridging financing. H led S to understand that Imperial Life was in the process of granting an additional mortgage of \$80,000 to A and that, if the Bank of Commerce would provide A with a bridging loan, they would be repaid in full by Imperial Life. Later, both Imperial Life and J & Co wrote to Bank of Commerce, confirming that Imperial Life was prepared to grant A an additional loan subject to satisfactory completion of the mortgage formalities.

In February 1975, the Bank of Commerce decided to grant the bridging loan to A, and \$55,000 was disbursed to him.

In May 1975, J & Co discovered the existence of the mortgage to First National, and Imperial Life accordingly declined to proceed with the additional mortgage transaction, informing the Bank of Commerce of its decision.

The Bank of Commerce brought an action against Imperial Life for, *inter alia*, negligence, contending that the disbursement of \$55,000 to A had been made in reliance upon the negligent misstatements of Imperial Life, its servants and agents, to the effect that the additional loan to A had been approved. The trial judge found for the plaintiff.

*Held*, on appeal (Carberry J A dissenting), Imperial Life was in breach of its duty of care owed to the Bank of Commerce in failing to inspect the certificate of title to the property before advising the Bank of Commerce that the mortgage loan to A had been approved. Rowe P said:

On the findings of fact of the learned trial judge, Bank of Commerce can only succeed if the evidence discloses the making of negligent misstatements by the appellants in circumstances which give rise to a cause of action in negligence under the principles adumbrated by the Privy Council in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*.<sup>[190]</sup> On this crucial question, counsel on both sides in the course of their arguments did not find it necessary to go outside the decision in *Mutual Life v Evatt* and a

commentary in Spencer Bower and Turner, *Actionable Misrepresentation* (3rd edn, 1974, London: Butterworths, p 414 *et seq*). I will similarly confine myself.

The respondent contends that a duty of care arises in relation to representations made by one person to another where the representations concern business transactions which by their nature make it clear that the information contained in the representations are matters of importance and will be significant in relation to the contemplated action by the party to whom the representations are made. In a case where a person carries on a business or profession which requires special skill and competence, or where by his conduct he makes it appear that he possesses special skill and competence in the subject matter, then, if he gives information to a person which is negligently given, and that person, in reliance on that information, suffers damage, he will be liable in damages to that other person.

Not every kind of negligent misstatement will give rise to a cause of action in negligence. Lord Diplock summarised the position as it existed at common law before the decision in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*<sup>191</sup> in *Mutual Life v Evatt*, thus:<sup>192</sup>

Prior to *Hedley Byrne*, it was accepted law in England that, in the absence of contract, the maker of a statement of fact or opinion owed to a person, whom he could reasonably foresee would rely on it in a matter affecting his economic interest, a duty to be honest in making the statement. But he did not owe any duty to be careful, unless the relationship between him and the person who acted on it to his economic detriment fell within the category of relationships which the law classified as fiduciary. *Hedley Byrne* decided that the class of 'relationships between the maker of the statement and the person who acted on it to his economic detriment which attracted the duty to be careful was not so limited, but could extend to relationships which, though not fiduciary in character, possessed other characteristics'.

The relationships possessing characteristics other than fiduciary ones came to be termed 'special relationships'. Should there be rigid rules or classifications or categorisations of the classes of case which can give rise to that special relationship? The powerful dissenting speech by Lord Reid and Lord Morris of Borth-y-Gest in *Mutual Life v Evatt* was against such rigid classification, and in their opinion the true test should be whether the reasonable man would think that, in the particular circumstances, he had some obligation beyond merely giving an honest answer. But the majority opinion of the Privy Council limited the special relationship to two kinds of case. Spencer Bower in his treatise...listed them as:

*First*, the case where, by carrying on a business or profession which involves the giving of advice calling for special skill and competence, the defendant has let it be known that he claims or possesses and is prepared to exercise the skill and competence used by persons who give such advice in the ordinary course of their business.

*Secondly*, the case where, though the defendant does not carry on any such business, he has let it be known in some other way that he claims to possess skill and competence in the subject matter of the particular enquiry comparable with that of persons who do carry on the business of advising on that subject matter, and is prepared to exercise that skill and competence on the occasion in question.

The facts in *Mutual Life v Evatt* were entirely different from those in *Hedley Byrne*, as are the facts in the instant case different from those two cases above. But, as

191 [1963] 2 All ER 575.

192 [1971] 1 All ER 150, p 154.

Lord Diplock said in *Mutual Life v Evatt*,<sup>[193]</sup> the categories of negligence are never closed:

As with any other important case in the development of the common law, *Hedley Byrne* should not be regarded as intended to lay down the metes and bounds of the new field of negligence of which the gate is now opened. Those will fall to be ascertained step by step as the facts of particular cases which come before the courts make it necessary to determine them. The instant appeal is an example; but their Lordships would emphasise that the missing characteristic of the relationship which they consider to be essential to give rise to a duty of care in a situation of the kind in which the respondent and the company found themselves when he sought their advice is not necessarily essential in other situations, such as, perhaps, where the advisor has a financial interest in the transaction on which he gives his advice. The categories of negligence are never closed...

In the instant case, Imperial Life carried on the business of lending money on long term mortgages. The method of operating this business, as the instant case shows, involved a scheme or a series of transactions in which Imperial Life would first consider and approve a mortgage loan, then a willing bank would be asked to provide immediate finance as a bridge between the approval of the mortgage loan and the date of disbursement. When, therefore, Imperial Life, as the long term lender, makes a statement of the approval of the mortgage loan and conveys that approval to the short term lender, Imperial Life must reasonably have contemplated and anticipated that the short term lender would place reliance upon its statement of approval and be influenced thereby into the grant and disbursement of the bridging finance. The statements were made by Imperial Life in a context in which it fully appreciated that short term advances would be made before the completion and registration of the mortgage, and the entire series of negotiations were conducted on the basis that immediate advances would be made to Andrade and the Bank would be reimbursed from the proceeds of the mortgage sometime in the future.

The representations made through the agents of Imperial Life orally and in writing conveyed the information to Bank of Commerce that a binding agreement to grant a first mortgage existed between itself and Andrade, and from these representations it could be reasonably inferred that all the essentials relating to the grant of a first mortgage had been agreed and settled satisfactorily between Andrade and Imperial Life and that there was no existing or easily ascertainable factor which would provide an impediment to the grant of the mortgage.

In my opinion, Imperial Life owed a duty of care to Bank of Commerce and failed to use reasonable care in giving the assurances to Bank of Commerce, in that it failed to inspect the certificate of title which was in its own possession before advising Bank of Commerce that it had approved the mortgage loan to Andrade. The learned trial judge was entirely correct when he concluded that Imperial Life led the manager of Bank of Commerce to assume or believe that all was clear for the advances to be made to Andrade. Indeed, it was the opinion of Imperial Life that Bank of Commerce was being unduly protective of itself when dealing with assurances given by so reputable a company as Imperial Life in such a very simple and straightforward transaction. Indeed, Imperial Life was impatient at what it considered to be undue delay on the part of Bank of Commerce to make the short term advance to Andrade.

A special relationship was established between the two financial institutions, both being money lenders, the one on long term mortgages and the other on short term 'bridging financing'. The long term lenders' assurances of a mortgage loan in a specified sum, to a named person, to be disbursed at a stated future time, was in the instant case intended to be acted upon by the short term lender, who, acting upon the

faith of those representations, incurred loss. The long term lender owed a duty of care to the short term lender and was in breach of that duty. I would dismiss the appeal of Imperial Life.

Carberry JA (dissenting) said:

The special relationship necessary to support the imposition of a duty of care in making representations has been found in a number of cases:

In *Anderson and Sons v Rhodes (Liverpool) Ltd*,<sup>[194]</sup> it was found to exist between dealers in the fruit market, where one enquiring as to the creditworthiness of a newcomer was told by the other (negligently), 'they are quite all right'. In fact, the newcomer owed thousands of pounds to the representor's firm, but, due to the negligence of the accounting department, this was unknown to him.

In *Esso Petroleum Co Ltd v Mardon*,<sup>[195]</sup> the company in pre-contract discussions told the intending lessee that their estimated through-put of gasoline likely to be sold at the station was 200,000 gallons a year. The estimate was negligently made, or rather, not reconsidered in the light of the local planning authority having refused to allow the pumps to front on the main highway, and the actual through-put proved to be some 78,000 gallons. The Court of Appeal found: (a) that the representation was in fact a contractual warranty; (b) that it was also a negligent representation by a party holding itself out as having special expertise, and that there was a duty to take reasonable care to see that the representation was correct. In short, that there was a special relationship.

In *Arenson v Arenson*,<sup>[196]</sup> a case which turned on whether there was a quasi-judicial immunity from liability for making negligent statements attaching to or protecting the auditors of a company who were asked to value the shares of a shareholder who was selling them to another, it was clearly implicit that the auditors or valuers would or could be liable in negligence in respect of their valuation of the shares. It was held that they had no such immunity in respect of this negligence—assuming it had been proved.

I would hold that, on the facts of this case, and possibly in all situations involving the relationships between a borrower, a long term lender and a short term lender, there is a 'special relationship' which imposes on the long term lender who knows that the short term lender is depending upon the long term loan being ultimately made, a duty to exercise care in the making of representations to the short term lender. There is a relationship of proximity equivalent to contract.

It is, however, not enough to establish that the situation gives rise to a duty of care: it is necessary to go further and find that that duty of care has been broken. This involves, as I understand it, that the representor has made a false statement of fact; or possibly advanced an opinion which itself is one that he could not honestly have entertained or which involves directly the existence of facts which are false.

In all of the cases which have been discussed above, the representation of fact has been clear. There are none that have involved a representation as to future intent, and in that respect the case before us is not only unique, but involves a very substantial extension of the duty to use care in the making of representations. I think that, in the absence of such authority, the courts will have to fall back on the principles established in the cases dealing with deceit or the known making of false statements.

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194 [1967] 2 All ER 850.

195 [1976] QB 801.

196 [1977] AC 405.

The statement or representation, 'we intend to lend \$80,000 to Andrade on a mortgage to be consolidated with a first mortgage that we already have on his premises at Hagley Park Road', was true when made, and honestly believed. Can any false statement of fact be inferred from it? I regret that I cannot find it possible to infer from it any representation of fact that is untrue. It may perhaps be implied that we have examined his circumstances and are of the view that we can safely lend him money. But how much further can it be taken? The real complaint is: 'You promised to lend money to Andrade, and you have changed your mind because of something which you had the means of discovering before.' For such a complaint to succeed, it seems to me that it must amount to a contract, an enforceable agreement; nothing less will sustain it. I have already pointed out that the promise to Andrade was at best a 'subject to contract' one, and that it was conditional on the satisfying of the requirements as to title and the completion and registration of a new mortgage, and there was no direct contract between the bank and the insurance company...

For these reasons, I am of the view that the insurance company is not liable in negligence to the bank, and I would allow the appeal on this ground also.

The proposition that there is no liability under *Hedley Byrne* for advice given on a social occasion was put to the test in *Chaudry v Prabhakar*.<sup>197</sup> In this case, the defendant, who was a friend of the plaintiff, offered to help her to find a suitable used car to purchase. The defendant was not a mechanic, but he did profess to have some knowledge of cars. The plaintiff had insisted that she did not want a car that had been involved in an accident. The defendant found and recommended a car which had low mileage but which he knew had had its hood repaired or replaced. The plaintiff bought the car in reliance upon the defendant's recommendation, but it turned out that the car was unroadworthy, having been inadequately repaired after an accident. The plaintiff successfully brought an action in negligence against the defendant, the majority of the Court of Appeal being of the view that this was not a purely social relationship because the plaintiff had relied on the defendant's skill and judgment and the defendant was aware of that reliance. The decision is a weak authority, however, since the defendant had conceded that he owed a duty of care under *Hedley Byrne*. This concession arguably should not have been made, since it was not reasonable for the plaintiff to have relied solely on her friend's advice when, for example, she could have had the car properly surveyed by a mechanic. May LJ, dissenting, doubted that the concession was correct because he did not consider to be 'entirely attractive' the imposition of a duty of care on a family friend giving gratuitous assistance as a personal favour. It is submitted with respect that May LJ's view is preferable to that of the majority.

Another rather dubious decision is the majority ruling of the Privy Council in the Trinidadian case of *Royal Bank Trust Co (Trinidad) Ltd v Pampellonne*.

**Royal Bank Trust Co (Trinidad) Ltd v Pampellonne (1986) 35 WIR 392,  
Judicial Committee of the Privy Council, on appeal from the Court of Appeal,  
Trinidad and Tobago**

The respondents, Mr and Mrs Pampellonne, were customers of the appellant bank. They invested sums of money in a deposit-taking company (Pinnock Finance Co)

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197 [1989] 1 WLR 29.

on various occasions over a period of two years. When Pinnock later went into liquidation, the respondents lost most of their money. They brought an action in negligence against the bank, alleging that the investments in Pinnock had been made on the advice of K, the bank manager. The trial judge found on the facts that K had given information to the respondents about Pinnock and had supplied them with relevant literature and application forms, but that the respondents had not relied upon the skill and judgment of K, nor did K believe that they were relying upon such skill and judgment. Thus, no special relationship between the bank and the respondents giving rise to any duty of care on the part of the bank had been created.

The Court of Appeal of Trinidad and Tobago reversed the decision of the trial judge, holding that the information given by K was equivalent to 'advice'. A special relationship had been created between the respondents and the bank which gave rise to a duty of care on the part of the bank, 'whose business it was to supply, and who supplied, information which influenced [the respondents] to invest' within the principle in *Mutual Life and Citizens' Assurance Co Ltd v Evatt*.<sup>198</sup> In giving this advice, the bank 'carried on, and held itself out as carrying on, the business of giving advice as to reliable financial investments' and 'the bank fell short of the standard of care expected of a prudent investment adviser, when it failed to make adequate inquiries into the personal circumstances of [the respondents] and the financial position of Pinnock...before tendering the advice'.

*Held*, on appeal to the Judicial Committee of the Privy Council, by a majority of 3:2, that the question of whether the information provided by the bank was equivalent to advice depended upon the facts of the case, and in particular upon the circumstances in which the information was given. There was ample evidence on which the trial judge could find that the bank could not be responsible for any investment or reinvestment by the respondents in Pinnock, and the Court of Appeal was not entitled to substitute its own view of the facts for that of the trial judge. Lord Goff (delivering the opinion of the majority of the members of the Board) said:

Before their Lordships, Mr Longmore for the bank submitted that the Court of Appeal, in reversing the decision of the judge on the question whether there was a duty of care with regard to the Pinnock investments, substituted their own view for that of the judge on questions of fact when they had no right to do so. In the opinion of their Lordships, that submission is well founded. Kelsick JA treated the information provided by Mr Kennedy regarding Pinnock as equivalent to advice; he held that 'a duty-care situation' arose when, at the first meeting, Mr Pampellonne requested Mr Kennedy to recommend a suitable UK deposit-taking company in which he should invest, and Mr Kennedy then mentioned Pinnock and supplied Mr Pampellonne with relevant literature and application forms. However, the question whether the furnishing of information is in any particular case to be treated as equivalent to advice must depend upon the facts of the case, and in particular upon the precise circumstances in which the relevant information has been given. It was the judge who heard, at length, the evidence of Mr Kennedy and the Pampellonnes concerning the two meetings in the autumn of 1964; and he, having heard that evidence, formed the opinion that Mr Kennedy gave no recommendation to the Pampellonnes that it was safe to invest in Pinnock, simply providing Mr Pampellonne with such information concerning Pinnock as was available to him. It was not, in their Lordships' opinion, open to the Court of Appeal to conclude, on the basis of the judge's notes of the evidence, that he erred in reaching that conclusion of fact...

If the bank had provided advice to the Pampellonnes about their investments, it would in all probability have been held that the occasion was one of sufficient gravity to give rise to a duty of care, in which event the evidence of Mr Girdharrie concerning the extensive inquiries which, in his opinion, the bank should have made, would have become relevant; although it is usual for any such advice to be contained in, or regulated by, some form of document. But once it was held, as the judge held, that at a brief meeting the bank was prepared to do no more than provide such information as was available to them, the judge was entitled to form the opinion on the evidence before him that no duty of care arose, other than (no doubt) to pass such information accurately to Mr Pampellonne. For these reasons, in the opinion of their Lordships, the decision of Kelsick JA that a duty of care rested upon the bank in relation to advice concerning the Pinnock investments (and the like decision of Sir Isaac Hyatali CJ and Cross JA) cannot stand.

Lord Templeman and Sir Robin Cooke (dissenting) said:

In our opinion, the reversal by the Court of Appeal of Trinidad and Tobago of the decision of Roopnarine J in favour of the trust company did not involve the Court of Appeal in submitting their own view for that of the judge on questions of fact.

The Court of Appeal held from the facts as found a legal duty of care by Mr Kennedy to Mr Pampellonne in connection with the investment by Mr Pampellonne of his deposit of £6,250. We agree. That duty of care arose when Mr Kennedy, the expert, supplied to Mr Pampellonne, the layman, information about Pinnock which influenced Mr Pampellonne to invest in Pinnock. That duty of care would not have arisen if Mr Pampellonne had been familiar with finance companies and their accounts. But the naive inquiry from Mr Pampellonne for the name of a deposit-taking company was an indication of Mr Pampellonne's ignorance. If Mr Kennedy failed to appreciate the significance of that inquiry, nevertheless Mr Kennedy had no right to assume that Mr Pampellonne would understand the relevance of information contained in or omitted from the Pinnock brochure which Mr Kennedy handed over in order to assist Mr Pampellonne.

The trial judge appears to have held that there was no special relationship and no duty of care at all, because Mr Kennedy only gave information and, of the two relevant interviews, the second took only half an hour. While agreeing that the Court of Appeal went too far if they meant that the trust company was bound to make further investigations into the financial position of the Pinnock group, we think that Mr Pampellonne's two visits to the manager, Mr Kennedy, were manifestly not merely casual or devoid of serious business purpose. At the very least, Mr Pampellonne was seeking information. In the words of Lord Reid in *Hedley Byrne and Co Ltd v Heller and Partners Ltd*,<sup>[199]</sup> he was 'trusting the other to exercise such a degree of care as the circumstances required'. So, on principles that we regard as settled, there must have been a duty of care, a duty not onerous, for it entailed no more than what was reasonable in the circumstances.

Mr Kennedy's duty of care could have been satisfied in a number of ways. He could have offered to study the literature fully; make any necessary further inquiries and advise Mr Pampellonne (no doubt for a fee); or he could have advised Mr Pampellonne to take other professional advice. At the very least, Mr Kennedy could have warned Mr Pampellonne that Mr Kennedy had inadequate information about Pinnock to enable him to recommend the company as an investment and, without further investigation, had no means of knowing whether Pinnock was a safe haven for Mr

Pampellonne's money. In the circumstances, the duty naturally extended to warning Mr Pampellonne of the shortcomings of the information passed on by Mr Kennedy about Pinnock.

It is submitted with respect that the view of the minority of the Privy Council on *Pampellonne* is to be preferred. The distinction drawn by the majority between giving advice and passing on information seems artificial in the circumstances, where a 'naïve' layman goes to his bank manager and asks him to recommend a suitable deposit-taking company in which to invest. The minority view certainly seems more consistent with the rationale of *Hedley Byrne*.

A more recent, and straightforward, application of the *Hedley Byrne* principle in the Caribbean is *Wiggan v Morrison*.<sup>200</sup> In this case, the plaintiffs, a Jamaican couple who were residing in England but wished to return to live in Jamaica, decided to purchase land with the intention of building a house thereon for their occupation. The lot which they purchased was No 90, Greenwich Park, St Ann. Before starting to build, they engaged the defendant, a qualified land surveyor, to survey the property for the purpose of verifying its location. The defendant carried out a survey and identified a particular lot as being 'Lot 90'. Relying on the defendant's representation, the plaintiffs started construction of a house, but when the building was about 40% completed, they discovered that they had been building on Lot 91, a neighbouring property, which had been wrongly identified as Lot 90 by the defendant. The plaintiffs were obliged to demolish the building.

McIntosh J held that under the *Hedley Byrne* principle, the plaintiff had to show six factors:

- (a) that representations were made by the defendant;
- (b) that a special relationship 'equivalent to contract' existed between the parties, and that the defendant held himself out in his profession or otherwise as being in a position to give an opinion or advice on which reasonable persons would rely;
- (c) that the defendant was aware that the plaintiff would rely on his representations;
- (d) that the plaintiff did rely on those representations;
- (e) that the representations were made negligently; and
- (f) that, as a result, the plaintiff suffered loss.

Finding that all six factors were present in this case, McIntosh J held the defendant liable for the losses incurred by the plaintiffs.

### Other cases of liability for economic loss

Another important exception to the rule that compensation for pure economic loss is not recoverable in tort arose in *Ross v Caunters*.<sup>201</sup> In this case, the defendant solicitor carelessly failed to warn or advise a testator, his client, that attestation of the will by the spouse of a beneficiary would invalidate a bequest to the beneficiary. The plaintiff, whose husband had attested the will, lost her bequest under the will and brought an action in negligence against the solicitor. This was a case in which

200 (2000) Supreme Court, Jamaica, No E 360 A of 1996 (unreported).

201 [1980] Ch 297. See also *Ministry of Housing and Local Government v Sharp* [1970] 2 QB 223.

the defendant's negligence had caused financial loss to a *third party*. Megarry VC held that the plaintiff was entitled to recover the value of the lost bequest, not under the *Hedley Byrne* principle, because the plaintiff had not relied on any advice from the solicitor, but under *Donoghue v Stevenson*,<sup>202</sup>

The rationale for the decision was that the solicitor should be held liable for economic loss caused by his negligence when he could reasonably foresee that the specific plaintiff, as opposed to a general class of persons, would suffer economic loss as a result of such negligence. In *Ross*, there was a close relationship of proximity between the defendant and the plaintiff, in that the plaintiff, as an intended beneficiary under the will, must have been in the defendant's direct contemplation as the specific person likely to be affected by his negligence. In such a case, it is easier for the court to find the existence of a duty of care because there is no danger of liability in an indeterminate amount...to an indeterminate class'<sup>203</sup> of persons.

The reasoning, though not the result, in *Ross v Caunters* was later disapproved by the House of Lords in the landmark case of *White v Jones*.<sup>204</sup> In this case, following a family dispute, a testator had made a will disinheriting his daughters. He later became reconciled with them and instructed his solicitors to prepare a new will in which they were beneficiaries, but, owing to the negligence of his solicitor, the new will was not prepared in time before the testator died. The result was that, on the testator's death, the original will took effect and the daughters received nothing. The House of Lords held, by a majority, that the daughters had a good cause of action in negligence against the solicitor. Lord Goff's view was that the beneficiaries' claim was based on the *Hedley Byrne* principle, not on *Donoghue v Stevenson* as Megarry VC had stated in *Ross v Caunters*, in the sense that the 'assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor',<sup>205</sup> and this satisfied a strong 'impulse for practical justice'.<sup>206</sup>

It is submitted with respect that the reasoning of Lord Goff fails to address the objection which Megarry VC clearly expressed in *Ross v Caunters*, namely that it is not correct to base cases such as these on *Hedley Byrne*, on account of the absence of any reliance by the plaintiff beneficiary on advice given by the defendant solicitor. However, the reasoning of Lord Browne-Wilkinson in *White* is much more persuasive. In his view,<sup>207</sup> 'assumption of responsibility' was actually derived from the much earlier case of *Nocton v Ashburton*,<sup>208</sup> which established that liability arose in equity from the existence of a fiduciary relationship, and reliance was not necessary in the case of a special relationship of the fiduciary type. In *White v Jones* there was no fiduciary relationship between plaintiff and defendant, and it was not a case of careless misstatement; however, there was no reason, according to

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202 [1932] AC 562. On the meaning of 'reliance', see Stapleton, J (1991) 107 LQR 249.

203 *Ultramares Corp v Touche* (1931) 174 NE 441, per Cardozo.

204 [1995] 2 AC 207.

205 *Ibid*, p 262.

206 *Ibid*, p 260.

207 *Ibid*, pp 270, 271.

208 [1914] AC 932.

his Lordship, why the law should not recognise new categories of 'special relationships' and no reason why reliance should always be required: 'What is important is not that A knows that B is consciously relying on A, but that A knows that B's economic well being is dependent upon A's careful conduct of B's affairs.'<sup>209</sup>

A Caribbean example of negligence of a solicitor causing loss to a third party is *Maharaj v Republic Bank Ltd*.<sup>210</sup> In this case, M (the plaintiff) wished to purchase a car which was offered for sale for \$45,000. M had only \$27,000, so he approached the defendant bank for a loan of \$18,000. M supplied the bank with a certificate of registration of the car obtained from the vendor, R, which contained the name of R as owner and the vehicle's registration number. Unknown to M, R had himself obtained a loan from another branch of the same bank when he purchased the car and a bill of sale (bill of sale A) relating to the loan had been registered. At the time of the proposed sale of the car to M, R had not completed repayment of his loan and bill of sale A was still effective, but R did not divulge this fact to M. Before approving the loan to M, the bank instructed a firm of solicitors, N & Co, to carry out a search in the Registrar General's Department for any incumbrances there might be on the car. N & Co made a search but failed to discover the existence of bill of sale A. M obtained the loan of \$18,000 from the bank and a second bill of sale (bill of sale B) was registered in favour of the bank against the car. M later repaid the \$18,000 to the bank, but R never repaid the balance of his loan, and the bank sought to repossess the car on the basis of bill of sale A.

Blackman J held that N & Co were liable in negligence both to the bank and to M. He said:

I have come to the conclusion that the failure on the part of [N and Co] to discover the first bill of sale was due to negligence on their part. It seems obvious that if a search was made...the registered number of the car PAE 2350 would have been discovered and such a discovery would certainly have put [N & Co] on enquiry. In Trinidad and Tobago, two cars would not have the same registration number...

Did [N and Co] owe the plaintiff a duty of care in carrying out the search?

In *Al-Kandari v JR Brown and Co*,<sup>[211]</sup> French J said (quoting Sir Robert Megarry VC in *Ross v Caunters*<sup>[212]</sup>):

A solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party owes a duty of care towards that third party in carrying out that transaction, in that the third party is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions.

[N & Co] knew, or ought to have known, that they were having a search done in circumstances in which Deonarine Maharaj, the plaintiff, could have been affected by their acts or omissions. I have reached this conclusion because it is clear [from the certificate of registration] that the current owner of the car was Behmal Ramgolam. A letter from N & Co to the bank reads:

209 *Ibid*, p 275.

210 (1987) High Court, Trinidad and Tobago, No 10 of 1983 (unreported).

211 [1987] 2 WLR 469, p 477.

212 [1980] Ch 297, pp 322, 323.

Re: Searches one motor vehicle registration No PAE 2350—Deonarine Maharaj-Behmal Ramgolam.

This letter contains the names Behmal Ramgolam, the owner, and Deonarine Maharaj, the plaintiff. It can obviously be inferred from these facts that [N & Co] would have known or ought to have known that Mr Maharaj was a person who might be affected by the search. [N & Co] should, therefore, have had the plaintiff in their contemplation as a person who could be adversely affected by their acts or omissions. Therefore, [N & Co] owed the plaintiff a duty of care. There was, in my view, a breach of that duty of care. [N & Co] are therefore liable for any damage sustained by their omission to discover the true position in respect of the car.

In addition, [N & Co] also owed a duty of care in the performance of their functions, that is, in carrying out a search, to the defendant bank, and would therefore be liable to the bank in failing in that duty.



## CHAPTER 5

### OCCUPIERS' LIABILITY

In Barbados and Jamaica, the liability of occupiers of premises to lawful visitors is governed by the respective Occupiers' Liability Acts (OLAs).<sup>1</sup> In other Commonwealth Caribbean jurisdictions, such as The Bahamas and Trinidad and Tobago, the liability of occupiers is governed by common law principles.

#### THE OCCUPIERS' LIABILITY ACTS

Both the Barbadian and the Jamaican statutes are closely modelled on the English OLA 1957. Under the Acts, 'an occupier of premises owes the same duty, the common duty of care, to all his lawful visitors, except in so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor by agreement or otherwise': s 4(1) of the OLA (Barbados), Cap 208; s 3(1) of the OLA (Jamaica).

It has been suggested that the differences between an action in negligence and one under the Acts are minimal<sup>2</sup> and, in some cases, plaintiffs have succeeded in ordinary negligence where the facts appeared to fall more naturally within the Acts.<sup>3</sup>

The duty under the Acts is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there: s 4(2) of the OLA (Barbados); s 3(2) of the OLA (Jamaica). Thus, there was a breach of the duty where, for example, a slippery substance left on a shop floor caused a customer to slip and fall, there being no proper system for removing spillages and no warning notices;<sup>4</sup> and where the management of a sports club failed to prevent spectators from sitting on a dangerous wall, with the result that a visitor fell off and sustained injuries from which he died.<sup>5</sup>

#### The occupier

The occupier may be defined as a person having possession or control of the premises. 'The foundation of occupiers' liability is occupational control, that is to say, control associated with and arising from presence in and use of or activity in the premises.'<sup>6</sup>

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1 See also Occupiers' and Highway Authorities' Liability Act 1978 (Bermuda).

2 Jones, *Textbook on Torts*, 6th edn, 1998, London: Blackstone, p 265.

3 See, eg, *Ward v Tesco Stores Ltd* [1976] 1 All ER 219.

4 *Gibbs v Cave Shepherd and Co Ltd* (1998) High Court, Barbados, No 35 of 1989 (unreported); cf *Ward v Tesco Stores Ltd* [1976] 1 All ER 219.

5 *Morris v National Sports Club* (1993) Court of Appeal, Bermuda, Civ App No 25 of 1992 (unreported).

6 *Wheat v Lacon and Co Ltd* [1966] AC 552, p 589, per Lord Pearson.

The owner of the property, if in possession, will be deemed to be the occupier; but if he is out of possession, for example, where the property is let to a tenant, then the tenant will be the occupier for the purposes of the statutes, not the owner.

It is possible for there to be more than one 'occupier' at the same time, as for example where an occupier engages a contractor to do repairs or building work,<sup>7</sup> in which case the contractor may be a co-occupier as well as a visitor.

### Premises

The term 'premises' is defined very widely to include not only land and buildings thereon, but also any fixed or movable structure, including any vessel, vehicle or aircraft: s 2(3) of the OLA (Jamaica); ss 2 and 3(3) of the OLA (Barbados).<sup>8</sup>

### Visitors

The common duty of care is owed to all visitors to the premises, and visitors are those persons who would, at common law, have been treated as invitees or licensees. Thus, in effect, any person who enters lawfully, that is, not as a trespasser, will be a visitor for the purposes of the statutes. Trespassers are not protected by the statutes, and special rules apply to them.<sup>9</sup>

Where the plaintiff enters under the express permission or invitation of the occupier, there is no difficulty in holding that he is a visitor. Problems sometimes arise, however, in determining whether a plaintiff had implied permission to enter. It is well established that any person who enters the premises in order to communicate with the occupier will be regarded as having implied permission to enter, unless he knows or ought to know that his entry is forbidden,<sup>10</sup> but otherwise it seems that each case must be decided on its own facts, and there are no firm rules for determining the question, except that:

- (a) the burden of proving implied permission rests on the plaintiff; and
- (b) the plaintiff must show that it can be inferred from the occupier's conduct that he permitted entry. It is not sufficient to show that he merely tolerated it,<sup>11</sup> since knowledge of an intrusion does not constitute consent to it and 'failure to turn one's premises into a fortress does not confer a licence on anyone who may seek to take advantage of one's inaction'.<sup>12</sup>

7 As in *Fisher v Atkinson* (2000) Supreme Court, Jamaica, No CL 1993/F-202 (unreported), where the work site on college premises was fenced around by the contractor, but the college's representatives gave directions concerning the conduct of the work, so that the college and the contractor were both 'occupiers' for the purposes of the Act.

8 In *Watson v Arawak Cement Co Ltd* (1998) High Court, Barbados, No 958 of 1990 (unreported), Chase J held that the owners of a ship were liable as occupiers to a visitor who was injured when he fell from an unlit walkway inside the ship.

9 See below, pp 136–39.

10 *Robson v Hallett* [1967] 2 QB 939.

11 *Edwards v Rly Executive* [1952] AC 737.

12 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 295.

## Common duty of care

The common duty of care owed to all visitors is defined as 'a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there': s 4(2) of the OLA (Barbados); s 3(2) of the OLA (Jamaica). It is a question of fact in each case as to whether the occupier has taken reasonable safety precautions. For example, the occupier of a house should ensure that ceilings and stairs are in an adequate state of repair and that electrical fittings, such as light switches, are in a safe condition; and the occupier of a ship will be in breach of his duty of care if he fails to provide adequate lighting for walkways inside the vessel.<sup>13</sup> The Jamaican statute gives some guidance as to the standards of care required in two circumstances, by providing that an occupier:

- (a) must be prepared for child visitors to be less careful than adults; and
- (b) is entitled to expect that a person, in the exercise of his calling, will appreciate and guard against special risks ordinarily incident to that calling: s 3(3) of the OLA (Jamaica).

With respect to (a), the occupier must have regard to the fact that what may not be a danger to an adult might well be a danger to a child. For instance, children might be tempted to eat brightly coloured but poisonous berries in a garden, or to play with a disused vehicle in a yard; and if a child is injured thereby, the occupier may be liable for failing to remove the objects, or at least to take reasonable precautions to prevent children from tampering with them.

With respect to (b), the occupier is entitled to assume that a skilled, professional worker doing a job on the premises, such as a carpenter, electrician or window cleaner, will exercise sufficient care for his own safety when carrying out his work and will guard against the dangers normally associated with work of that kind.<sup>14</sup>

The common duty of care is owed only where the visitor is using the premises for the purposes for which he is invited or permitted to be there. Thus, if he is injured whilst using the place in an unauthorised way or for an unauthorised purpose, the occupier will not be liable.<sup>15</sup>

## Independent contractors

Where the injury to the visitor is caused by the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the latter will not be liable if:

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13 *Watson v Arawak Cement Co Ltd* (1998) High Court, Barbados, No 958 of 1990 (unreported).

14 See, however, *Salmon v Seafarer Restaurants Ltd* [1983] 1 WLR 1264 and *Ogwo v Taylor* [1988] 1 AC 431 and 443.

15 See also *Allerup v Paynter* (1993) Court of Appeal, Bermuda, Civ App No 4 of 1993 (unreported).

- (a) he acted reasonably in entrusting the work to the contractor; and
- (b) he took reasonable steps to satisfy himself that the contractor was competent and that the work had been properly done: s 4(6) of the OLA (Barbados); s 3(6) of the OLA (Jamaica).<sup>16</sup>

## DEFENCES

The defences of *volenti non fit injuria* and contributory negligence (see below, Chapter 13) are available to the occupier under s 4(7) and (8) of the OLA (Barbados) and s 3(7) and (8) of the OLA (Jamaica).

## EXCLUDING LIABILITY

The occupier may restrict or exclude altogether his duty of care 'by agreement or otherwise' with the visitor. Thus, the occupier may escape liability by, for example, posting a notice at the entrance to the premises to the effect that every person enters at his own risk and should have no claim against the occupier for any damage or injury, howsoever caused: s 4(1) of the OLA (Barbados); s 3(1) of the OLA (Jamaica).

## WARNINGS

Merely to give a warning of a danger to a visitor will not absolve the occupier from liability unless in the circumstances the warning was sufficient to enable the visitor to be reasonably safe in using the premises: s 4(5) of the OLA (Barbados); s 3(5) of the OLA (Jamaica).

This provision is illustrated by *Weekes v AG*.

### **Weekes v AG (1986) High Court, Barbados, No 911 of 1985 (unreported)**

The plaintiff was walking towards the check-in counter at Grantley Adams International Airport when she slipped and fell on a wet floor. She claimed that the defendant was liable for breach of its duty under s 4 of the Occupiers' Liability Act, Cap 208 (Laws of Barbados). The defendant alleged that there were adequate notices warning of the wet floor and that the accident was caused by the negligence of the plaintiff in failing to observe the notices and to take care for her own safety.

*Held*, the warning given by the defendant to the plaintiff was sufficient to enable the plaintiff to be reasonably safe within s 4(5) of the Act, and the defendant was not liable. Rocheford J said:

As I have found that the damage was caused to the plaintiff by a danger of which she had been warned, the provisions of s 4(5) are crucial to the determination of this case.

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<sup>16</sup> But where the occupier knows that an unsafe system of work is being used by the contractor, it may be reasonable to require the occupier to take steps to ensure that the system is made safe: *Ferguson v Walsh* [1987] 3 All ER 777, p 783, *per* Lord Keith; *Fisher v Atkinson* (2000) Supreme Court, Jamaica, No CL 1993/F-202 (unreported), *per* Clarke J.

[Section 4(5) provides:

Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability unless in all the circumstances it was enough to enable the visitor to be reasonably safe.]

The question to be answered is: 'Was the warning given to the plaintiff enough, in all the circumstances, to enable the plaintiff to be reasonably safe?'... The plaintiff admitted seeing two ['Caution—Wet Floor'] signs. The warning was not a verbal warning (see *Bishop v JS Starnes and Son Ltd*);<sup>17</sup> the signs were not in unsuitable places (see *Coupland v Eagle Bros*);<sup>18</sup> nor in too low a position to be seen (see *Steward v Routhier*)<sup>19</sup>. ... [The plaintiff] saw the janitors and the scrubbing machine and she saw the floor being scrubbed... There were more than 12 signs placed around the boundary of the area being scrubbed... The plaintiff ought to have seen these signs. I must answer the question posed in the affirmative. The warning given by the defendant to the plaintiff was enough, in all the circumstances, to enable the plaintiff to be reasonably safe. The defendant had done all that a reasonable occupier could be expected to do. He had thereby discharged the duty imposed on him by s 4 of the Act. The sole cause of the accident was a failure on the part of the plaintiff to do what was reasonable to safeguard herself.

## COMMON LAW LIABILITY

At common law, the occupier of premises owes an invitee a duty to exercise reasonable care to prevent damage to the invitee from an *unusual danger* known to the occupier or of which the occupier ought to have known.

An 'invitee' was defined in the leading case of *Indermaur v Dames* as a person who enters premises 'upon business which concerns the occupier, and upon his invitation, express or implied',<sup>20</sup> the commonest case being that of a customer in a shop. An 'unusual danger' is one which is 'not usually found in carrying out the task or fulfilling the function which the invitee has in hand'.<sup>21</sup> Whether a danger is unusual or not depends not only on the character of the danger itself, but also on 'the nature of the premises on which it is found and the range of experience with which the invitee may fairly be credited'.<sup>22</sup> Thus, for example, a defective ceiling in a shop might be an unusual danger for a customer, but not for a pest control expert; and an unrailed gangplank of a ship might be an unusual danger for a passenger, but not for a seaman.

As Sawyer J pointed out in the Bahamian case of *Cox v Chan*,<sup>23</sup> the occupier's duty is 'not an absolute duty to prevent any damage to the plaintiff, but is a lesser one of using reasonable care to prevent damage to the plaintiff from an unusual

17 [1971] 1 Lloyd's Rep 162.

18 (1969) 210 EG 581.

19 (1974) 45 DLR (3d) 383.

20 (1866) LR 1 CP 274, p 288.

21 *London Graving Dock v Horton* [1951] AC 737, p 745.

22 Fleming, *The Law of Torts*, 6th edn, Sydney: LBC Information Services, p 433. In *Rambaran v Port Authority of Trinidad and Tobago* (1991) High Court, Trinidad and Tobago, No 1040 of 1985 (unreported), Deyalsingh J held that a crane was a necessary piece of equipment in a container terminal and was not an unusual danger to a truck driver who was delivering containers.

23 (1991) Supreme Court, The Bahamas, No 755 of 1988 (unreported).

danger of which the defendant knew or ought to have known, and of which the plaintiff did not know or of which he could not have been aware'. In a case where it was alleged that a ramp giving access to a shop was an unusual danger, the shop owner's duty was 'to ensure that the plaintiff was aware of that danger either by posting a notice or taking other reasonable steps to let him know of its existence or by taking reasonable steps to prevent him from falling on the ramp'.<sup>24</sup>

In the Trinidadian case of *Kirpalani's Ltd v Hoyte*,<sup>25</sup> the plaintiff slipped and fell whilst shopping in the defendants' supermarket. It was alleged that the cause of the fall was a substance called 'Sweep Clean', which the defendants admitted to having used on the floor earlier in the day. Des Iles J held<sup>26</sup> the defendants liable because the 'Sweep Clean' was an unusual danger, as evidenced by the plaintiff's fall; however, the Court of Appeal (Hyatali CJ and Corbin JA, Rees JA dissenting)<sup>27</sup> overruled the trial judge on the ground that it was not proved that the 'Sweep Clean' was slippery, that it had rendered the premises unsafe or that it had caused the plaintiff to fall. It could not be said that the 'Sweep Clean' was an unusual danger merely because the plaintiff had fallen; nor was this a case where negligence could be presumed or inferred under the *res ipsa loquitur* maxim, since the substance was not in the same category as oil, yoghurt or cream, which are inherently slippery.

Two further examples of the application of the rule in *Indermaur v Dames* in the Caribbean are *Harripersad v Mini Max Ltd* and *McSweeney v Super Value Food Store Ltd*.

#### **Harripersad v Mini Max Ltd (1978) High Court, Trinidad and Tobago, No 654 of 1973 (unreported)**

The plaintiff was shopping in the defendants' supermarket when she slipped and fell to the ground, injuring her knee. It was proved that the plaintiff had fallen in a part of the store where water, dripping from an air conditioner, had collected on the floor. The defendants had placed sheets of newspaper on the floor to absorb the water but, after some time, the paper became saturated and the water continued to collect there. The floor itself was made of terrazzo tiles, which were known to have a very smooth surface, and the presence of the water made it 'slippery and potentially dangerous to customers'.

*Held*, the plaintiff's fall was caused by the wet floor, which was an unusual danger known to the defendants, who were therefore liable in negligence. Maharaj J said:

The question of whether an existing state of affairs rendering premises dangerous is to be considered unusual or not must depend upon the particular facts and circumstances of each case, including the actual nature and degree of the danger involved, whether the type of risk is generally known to be associated with the particular type of premises, or whether the dangerous condition of the premises was open for all to see, and so could have been avoided with the exercise of reasonable care on the part of the injured party, and other matters of that sort, and that finally

24 *Cox v Chan* (1991) Supreme Court, The Bahamas, No 755 of 1988 (unreported). See also *Berry v Golf Club Apartments Ltd* (1999) Supreme Court, The Bahamas, No FP 186 of 1994 (unreported).

25 (1972) 19 WIR 310. See also *Wotherspoon v Airports Authority of Trinidad and Tobago* (1999) High Court, Trinidad and Tobago, No CV 2533 of 1995 (unreported).

26 *Kirpalani's Ltd v Hoyte* (1972) 19 WIR 310.

27 (1977) Court of Appeal, Trinidad and Tobago, Civ App No 77 of 1971 (unreported).

this question is to be answered on the facts of the case and is not, therefore, one of law as counsel contends...

In my judgment, the condition of the floor...amounted to what is called in this branch of the law an unusual danger... I am of the view that the presence of the water on the floor was not easily visible, for obvious reasons, and in fact the plaintiff did not see it and was not aware of its presence. Even so, I am not persuaded that, had the plaintiff been aware of the water on the floor, the position would have been any different. Let it be supposed that there was nowhere else for the plaintiff to pass except over that slippery portion of the floor; would it have availed the defendants that she knew of the slippery condition of the floor, or had notice of its condition? I do not think so.

The danger with which the plaintiff was there confronted that morning was not only unusual, it was covert and insidious and one of which the defendants were fully aware, or at least had anticipated and taken steps to avoid, albeit inadequate steps. The least that could be said is that the defendants ought to have known of the dangerous condition of the shop's floor and should have taken the necessary steps to see that no one came to harm because of it... The defendants showed scant regard indeed for the safety of their customers in the steps they took to prevent such a situation developing...

In my opinion, the facts of *Kirpalani's Ltd v Hoyte*<sup>[28]</sup> are distinguishable from those of the present [case], the crucial difference being that the floor of the defendants' premises in the instant case became slippery and dangerous by reason of the presence of the water thereon. This state of affairs amounted, in my view, to an unusual danger which caused the plaintiff to slip and fall, and so renders the defendants liable for the plaintiff's injury.

**McSweeney v Super Value Food Store Ltd (1980) Supreme Court,  
The Bahamas, No 481 of 1979 (unreported)**

The plaintiff slipped on some liquid and fell whilst shopping at the defendant's supermarket, sustaining injuries. She brought an action for damages against the defendant, claiming that the defendant, as occupier of the premises, had failed to exercise reasonable care to prevent damage to her, an invitee, from an unusual danger known to it or of which it ought to have known.

*Held*, the defendant had failed to exercise reasonable care in the operation of the system it had for keeping the floor of the supermarket clear of unusual dangers, and was liable.<sup>[29]</sup> Malone J said:

There is no reason to doubt that the defendant was not aware that there was liquid on the floor of the aisle, and I am also satisfied that the presence of the liquid on the floor constituted an unusual danger. Because of those findings...the real question posed by this case is whether the unusual danger was one which the defendant ought to have known of by the exercise of reasonable care. If the defendant should have known of it by the exercise of reasonable care, then as it did not, it will be liable. On the other hand, if reasonable care was exercised by the defendant, the fact that it did not know of the unusual danger will not render it liable. That the burden is on the defendant to

28 (1977) Court of Appeal, Trinidad and Tobago, Civ App No 77 of 1971 (unreported).

29 See also *Pemberton v Hi-Lo Food Stores Ltd* (1991) High Court, Trinidad and Tobago, No 6036 of 1988 (unreported) (plastic bag on floor of supermarket was unusual danger: defendant liable to shopper who slipped on bag and fell).

show that it did exercise reasonable care is, I think, made clear by the judgment of Lawton LJ in *Ward v Tesco Stores Ltd*. He said:<sup>[30]</sup>

If an accident does happen because the floors are covered with spillage, then, in my judgment, some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and, in the absence of any explanation, the judge may give judgment for the plaintiff. Such burden of proof as there is on defendants in such circumstances is evidential and not probative.

The nature of the explanation was also, I think, indicated by Lawton LJ in that case, when he said:<sup>[31]</sup>

...there must be some reasonably effective system for getting rid of the dangers which may from time to time exist.

In this case, the defendant recognised that it did have an evidential burden to discharge. On its behalf, evidence was led of a system of cleaning the floor of the shop. That task was primarily performed by Mrs Miller, but she would also be assisted by employees described as the packaging boys. Mrs Miller's job was to sweep the aisles with a push broom and/or a mop and, if spills occurred, she was to be summoned to remove them. There was evidence also that other employees were instructed that if they should see a spill, they should not only cause Mrs Miller to be summoned, but should stand by the spill or in some way mark it, as by putting a trolley over it, so as to give warning to customers. By that evidence the defendant has, on the face of it, raised an issue as to the exercise of reasonable care by it. It still, however, remains for me to decide whether I should accept that evidence and by the standard of the greater probability be satisfied that reasonable care was exercised by the defendant.

How a system should operate can, of course, be very different from how it in fact operates. When I consider the evidence relating to the duties that Mrs Miller was required to perform, it appears to me that a very great deal was expected of her by the defendant. As willing a worker as she might be—and Mrs Miller certainly appeared to be most willing—it is expecting a lot of the worker that throughout the working hours she should be constantly in motion like a machine. Even allowing for the fact that Mrs Miller must have exaggerated when she said that she did not take time off for lunch and could not afford to get tired, it still seems to have been expected of her that, on completing a sweep of the floor, Mrs Miller would immediately begin the next sweep. In fact, such evidence as there is tends to confirm the reasonable supposition that Mrs Miller was not as active as that.

(Malone J concluded on the evidence that the defendant did not exercise reasonable care in the operation of the system it had instituted for keeping the floor of its supermarket clear of unusual dangers.)

At common law, a distinction is drawn between an invitee and a licensee. Whereas the former enters the premises on business which concerns the occupier (the typical example, as we have seen, being the customer who enters a shop), a licensee is a person to whom the occupier 'Voluntarily concedes a benefit or privilege...without deriving a corresponding material advantage from [his] presence',<sup>32</sup> or simply 'a person who has permission from the occupier to enter

30 [1976] 1 All ER 219, p 222.

31 *Ibid*, p 221.

32 *Op cit*, Fleming, fn 22, p 425.

premises where, without that permission, his presence would be unlawful'.<sup>33</sup> The typical example of a licensee is a person who is invited by the occupier for some social or recreational purpose. Herein lies a paradox, since a friend who has been invited to dinner or to play tennis on the occupier's court will be a licensee, whereas a person who comes to do business with the occupier, without any express invitation, will be classed as an 'invitee'. It seems that, in the modern law, the main distinction between the duty owed to a licensee and that owed to an invitee is that whereas, in the case of the invitee, the occupier is under a duty to maintain a reasonable system of inspection and safeguards against latent dangers, in the case of the licensee the occupier's only duty is to warn of concealed dangers or traps actually known to him,<sup>34</sup> and the licensee must otherwise 'take the occupier's premises as he finds them'.<sup>35</sup>

In the Bahamian case of *Favre v Lucayan Country Clubs Ltd*,<sup>36</sup> the plaintiff was a non-paying member of a privately run club with a 250 acre golf course. While he was out on the course alone one morning, he was robbed and shot by two masked gunmen who had been hiding in the bushes. On the previous day, an official of the club had been held up and robbed by a gunman near the same part of the course and at about the same time of day. Smith J held that the plaintiff was a mere licensee, being 'a person who was given, without cost to him, the privilege of playing golf on the course. He did not have to pay greens fees and, if he wanted to, he was free to go around the course on foot and would not have to spend one cent for a cart'. The learned judge held the club liable for the injuries sustained by the plaintiff, on the ground that its officials knew of the risk of attacks by bandits on the golf course, yet did not warn the plaintiff of the danger. He said:

It is admitted by the defendant that on the day before the plaintiff was robbed and injured, Mr Walter Graf, an important official of the defendant, was also robbed at the point of a sawed off shotgun on the same course near the same spot and at about the same time of the day. The plaintiff suffered his injuries as a result of being shot by a robber who trespassed on the golf course occupied by the defendant and on which the plaintiff was a licensee of the defendant. It was known by the defendant that Walter Graf was robbed by a gun-toting bandit at the seventh tee of the golf course at about 9 o'clock in the morning of the 19 June 1983.

The plaintiff avers that the injuries he suffered on 20 June 1983 came directly from the danger to which he was exposed on that day and it was a danger known to the defendant. In the circumstances, the defendant ought properly to have warned the plaintiff or provided ample security. I am satisfied that the defendant knew of the danger or ought to have known of the likelihood of the plaintiff being injured by armed thugs as in fact he was, and should have warned the plaintiff of the danger. No warning was given to the plaintiff, although there was ample time and opportunity to give him that warning. It has been stated before and I believe it is still good law to state that, if the possibility of danger emerging is reasonably apparent, then to take no precautions, when there is a duty to, is negligence.

The defendant also claims that it had no actual knowledge of the armed robber's presence on the course; but, in the light of what can be reasoned out of the decision in

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33 *Favre v Lucayan Country Clubs Ltd* (1990) Supreme Court, The Bahamas, No 725 of 1985 (unreported), per Smith J.

34 *Op cit*, Fleming, fn 22, p 436.

35 *Favre v Lucayan Country Clubs Ltd* (1990) Supreme Court, The Bahamas, No 725 of 1985 (unreported).

36 *Ibid*.

*Hawkins v Coulsdon and Purley UDC*,<sup>37</sup> this would make no difference when the evidence is that the presence of a gun-toting robber there earlier was something the defendant knew. The likelihood of the gunman's return would almost have become a certainty, in the light of his success on 19 June 1983.

In all the circumstances, I am satisfied that the injuries suffered by the plaintiff on the premises occupied by the defendant were due to the negligence of the defendant in its failing to warn the plaintiff, its licensee, of the earlier robbery and the likelihood of being attacked by armed thugs on the golf course while playing alone. There was no negligence on the part of the plaintiff.

## LIABILITY TO TRESPASSERS

The liability of an occupier to trespassers on his land falls outside the OLAs and remains governed by common law principles. Until 1972, the rule was that an occupier owed no duty to trespassers other than a duty to refrain from deliberately or recklessly causing harm to them.<sup>38</sup> Thus, for example, he would be liable to a trespasser who was injured by a man-trap or a spring gun set with the intention of injuring intruders, or by the reckless blasting of rocks in a quarry, but he would not be liable if a trespasser fell down a dangerous well or pit on his land or was electrocuted on some dangerously exposed electrical wires, where those hazards were not created deliberately or recklessly. This rule was felt to be unduly harsh to trespassers, particularly 'innocent' ones, such as playful children or wandering adults, and was altered in 1972 by the leading case of *British Rlys Board v Herrington*.<sup>39</sup> There, it was laid down that whereas an occupier does not owe a duty of *care* to trespassers, he does owe a duty of 'common humanity', or a duty to act 'in accordance with common standards of civilised behaviour'. This, according to Lord Pearson,<sup>40</sup> means that:

...if the presence of the trespasser is known to or reasonably to be anticipated by the occupier, then the occupier has a duty to the trespasser, but it is a lower and less onerous duty than the one which the occupier owes to a lawful visitor... It is normally sufficient for the occupier to make reasonable endeavours to keep out or chase off the potential or actual intruder who is likely to be or who is in a dangerous situation. The erection and maintenance of suitable notice boards or fencing, or both, or the giving of suitable oral warnings, or a practice of chasing away trespassing children, will usually constitute reasonable endeavours for this purpose... If the trespasser, in spite of the occupier's reasonable endeavours to deter him, insists on trespassing or continuing his trespass, he must take the condition of the land and the operations on the land as he finds them, and cannot normally hold the occupier of the land or anyone but himself responsible for injuries resulting from the trespass, which is his own wrongdoing.<sup>41</sup>

The principle is illustrated by *Kirton v Rogers*.

37 [1954] 1 All ER 97.

38 *Addie v Dumbreck* [1929] AC 358.

39 [1972] 1 All ER 749.

40 *Ibid.*, p 783.

41 A landowner has a right to keep a guard dog to protect his premises: *Sarch v Blackburn* (1830) 172 ER 712, p 713 (see below, p 220). The effect of the *Herrington* principle appears to be that a warning notice, eg, 'Beware of the Dog', should be placed at the entrance to the premises.

**Kirton v Rogers (1972) 19 WIR 191, High Court, Barbados**

The plaintiff, an eight year old boy, was struck on the forehead by a stone expelled from the defendant's land, where explosives were being used for the purpose of quarrying. The evidence was not clear as to whether the plaintiff was trespassing on the defendant's land at the material time.

*Held, inter alia*, on the assumption that the plaintiff was a trespasser, the defendant ought to have anticipated that potential trespassers were likely to be present and was under a duty to take reasonable steps to avoid the danger to them. This duty could be fully discharged only by posting someone to warn persons approaching to keep out of the range of the blasting until the danger was past. Hanschell J said:

By the Occupiers' Liability Act 1957 in England and Wales, a 'common duty of care' was enforced on occupiers towards all persons lawfully on their land. That act pointedly omitted to alter the existing law as to trespassers. The Occupiers' Liability Act (Cap 208) of this Island is a similar statutory provision which likewise does not alter the existing law as to trespassers.

In *British Rlys Board v Herrington*,<sup>[42]</sup> decided by the House of Lords, the draconian rule of *Addie v Dumbreck*<sup>[43]</sup> [which was that an occupier owed no duty to a trespasser other than a duty not to harm him deliberately or with reckless disregard of his presence] was not followed, and the House recognised and explained a duty on the part of the occupier towards trespassers on his land, as well as trespassers likely to come there in certain circumstances.

To quote the headnote in part:

That duty would only arise in circumstances where the likelihood of the trespasser being exposed to the danger was such that, by the standards of common sense and common humanity, the occupier could be said to be culpable in failing to take reasonable steps to avoid the danger.

The actual decision in its entirety in the *Herrington* case contains considerably more than the portion quoted above, and since that case there has been decided in the Court of Appeal the case of *Pannett v P McGuinness and Co Ltd*.<sup>[44]</sup> In the judgment of Lord Denning MR, the decision in *Herrington* is considered, and he explains and interprets the *Herrington* case as deciding that there is now no general rule to be applied to all trespassers; that each case depended on its special circumstances and whether on those a duty was owed to the trespasser. Lord Denning went on to show that reasonable steps taken by the occupier to avoid the danger would vary according to the occupier and the particular circumstances; such steps may amount to fencing out the trespassers, warning them or doing something to keep them away, but that may not be regarded in every sense as sufficient. In part, it was held in the *Herrington* case that, where an occupier (or contractor doing work on the land) knew of circumstances that made it likely that trespassers would come on to his land and also knew of some activity carried out on the land which would constitute a serious danger to persons on the land who were unaware of those facts, the occupier (or contractor) was under a duty to take reasonable steps to enable the trespasser to avoid the danger. Such a duty would arise in the circumstances quoted above from the headnote.

At the risk of repetition, I shall proceed to relate to the facts of the instant case the essence of the *Herrington* decision.

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42 [1972] 1 All ER 749.

43 [1929] AC 358.

44 [1972] 3 All ER 137.

The defendant was, by his agent, Crichlow, carrying out blasting operations in his quarry. The plaintiff failed or omitted to put in evidence the boundaries of the defendant's land in relation to the place on the track where the plaintiff was struck. The defendant did not lead any such evidence as is fit and proper in our adversarial proceedings. The result is that it cannot be decided whether the plaintiff was a person outside the boundary of the defendant's land or a trespasser on the defendant's land. If the plaintiff was not a trespasser and he was passing within the range of the explosion, as is the fact, he was clearly a neighbour, to whom a duty of care was owed by the defendant who was in breach of that duty. If the plaintiff was a trespasser, he was, in my view, in the particular circumstances of this case, no less a neighbour although he remained a trespasser, for, by the standards of common sense and common humanity, the defendant was clearly culpable in failing to see to it, in the use of explosives on his land, that proper care was taken by Crichlow, whom he employed to use the same, to take reasonable steps to avoid danger to the trespassing plaintiff. In this case, reasonable steps would at least amount to ensuring that any person within range of the results of the explosion but obscured from view by the bush, as well as any person about to come within that range, is at least adequately warned that the charge is about to be ignited before this is done.

In applying the decision in *Herrington* in a case such as the present one, the defendant ought to have anticipated that potential trespassers were likely to arrive, and in my opinion that duty to take reasonable steps to avoid the danger could only be fully discharged by posting someone in a position to continue the warning and thereby keeping those approaching out of range until the danger is past. Such steps would not involve any considerable work, staff or expense, and in the circumstances of the instant case would in my opinion have been reasonable.

In the words of Lord Reid in *Herrington's* case:<sup>[45]</sup>

By trespassing, they [the trespassers] force a neighbour relationship on him [the occupier]. When they do so he must act in a humane manner—that is not asking too much of him—but I do not see why he should be required to do more.

Lord Reid also said:<sup>[46]</sup>

I think that current conceptions of social duty do require occupiers to give reasonable attention to their responsibilities as occupiers, and I see nothing in legal principle to prevent the law from requiring them to do that.

This last passage is, in my opinion, most apt in relation to the instant case which has arisen in our densely populated Island with its maze of footpaths and thousands of adults and children daily walking along them, and in many instances in the vicinity of quarries which are in operation.

Although, as already stated in this judgment, there was a time in the development of the common law in relation to trespassers when it was accepted that the Atkinian principle did not affect the occupier's liability to trespassers, then considered as already settled by *Addie's* case, it is of interest, particularly in relation to the instant case, to note that Windeyer J, in the case of *Rlys Comr (NSW) v Cardy*,<sup>[47]</sup> expressed the view that the duty of an occupier is rooted at bottom in his duty to his neighbour in Lord Atkin's sense. The following passage from his judgment was quoted by Lord Morris in the *Herrington* case, and I quote Windeyer J's words here, with which I agree. He said:

No man has a duty to make his land safe for trespassers. But if he has made it dangerous and the danger he has created is not apparent, he may have a duty to

45 [1972] 1 All ER 749, p 758.

46 *Ibid*, p 759,

47 (1961) 104 CLR 274.

warn people who might come there of the danger of doing so. Whether there be such a duty in a particular case must depend upon the circumstances, including the likelihood of people coming there. But if they would be likely to come, the duty does not, in my view, disappear, because in coming they would be trespassing. It is a duty owed to likely comers, to those who would be intruders as to those who would be welcome.

For the reasons above stated, I find that the defendant was negligent and is liable to pay damages for the plaintiff's injuries.

### Trespassing employees

As will be seen in Chapter 6, an employer owes a duty at common law to his employees to take reasonable care to provide a safe place of work, but this duty is confined to those areas of the workplace which the employee is authorised to enter. If he enters a part of the premises which he knows to be 'out of bounds' to him, he will be generally treated as a trespasser. The issue has arisen in two Jamaican cases.

In *Alcan Jamaica Ltd v Nicholson*,<sup>48</sup> a welder, during his lunch break, left his area of work at a bauxite installation and entered a location called a 'precipitation area', in search of cigarettes. There, he suffered a serious eye injury when caustic soda, which was stored in tanks, splashed into his eye. The employer/occupier was held not liable for the injury, since the welder was a trespasser in the area who knew he had no right to be there and was well aware of the dangers of caustic soda. Applying the principle in the *Herrington* case, Carey JA emphasised that:

...a balance must be struck between a sensitivity for human suffering and a reluctance to place too heavy a burden on the occupier of land...and the duty of an occupier to a trespasser, despite its humanising patina, is not to be assimilated to the duty of an occupier vis à vis a visitor under the Occupiers' Liability Act.

On the other hand, in the more recent case of *Manchester Beverages Ltd v Thompson*,<sup>49</sup> where an employee was injured by the careless operation of a fork lift truck in a warehouse on his employer's premises which he had no permission to enter, Langrin JA in the Jamaican Court of Appeal agreed with the statement of the trial judge that there was little, if any, difference between the kind of duty which an occupier owes towards trespassers and the ordinary duty of care in negligence'. The learned judge considered that, following certain observations of Lord Denning in *Pannett v P McGuinness and Co Ltd*,<sup>50</sup> it was relevant in the instant case that the plaintiff's trespassing was 'not malicious', such as that of a thief or poacher, in that 'he went to have a shower...in the warehouse bathroom...there being only two showers on the property', and that 'the incident could...have happened to any worker, and was not resultant from the plaintiff's trespass *per se*'. It is submitted with respect, however, that it is not correct to assimilate the duty of common humanity owed to trespassers with the duty of care owed to lawful visitors; and, on the facts, liability was more correctly founded on breach of the employer's duty to provide a safe system of work on its premises.<sup>51</sup>

48 (1986) Court of Appeal, Jamaica, Civ App No 49 of 1985 (unreported).

49 (1999) Court of Appeal, Jamaica, Civ App No 88 of 1994 (unreported).

50 [1972] 3 All ER 137, p 141.

51 See below, p 143.



## CHAPTER 6

### EMPLOYERS' LIABILITY

The basis of the liability of an employer for negligence in respect of injury suffered by his employee during the course of the employee's work is twofold:

- (a) he may be liable for breach of the personal duty of care which he owes to each employee;
- (b) he may be *vicariously* liable for breach by one employee of the duty of care which that employee owes to his fellow employees.<sup>1</sup>

#### PERSONAL DUTY OF EMPLOYER AT COMMON LAW

The common law duty of an employer to his employees was enunciated in *Davie v New Merton Board Mills Ltd*<sup>2</sup> as a duty to take reasonable care for their safety. The duty is not an absolute one and can be discharged by the exercise of due care and skill, which is a matter to be determined by a consideration of all the circumstances of the particular case.<sup>3</sup>

The duty is a non-delegable one, and the employer is accordingly not absolved from his responsibility by the employment of an independent contractor.<sup>4</sup>

It is well established that every employer has a duty at common law to provide:

- (a) a competent staff of men;
- (b) adequate plant and equipment;
- (c) a safe system of working, with effective supervision;<sup>5</sup> and
- (d) a safe place of work.

#### Competent staff of men

An employer will be in breach of this duty if he engages a workman who has had insufficient training or experience for a particular job and, as a result of that workman's incompetence, another employee is injured. An employer will similarly be liable where he continues to employ a man who is known by him to be a bully, addicted to practical jokes or 'skylarking', or is in other respects a danger to his fellow workmen, and another employee is harmed by the man.<sup>6</sup>

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1 See below, Chapter 12. For a recent example, see *Nurse v Trinidad and Tobago Electricity Commission* (2000) High Court, Trinidad and Tobago, No S 3037 of 1993 (unreported), where the defendant was liable both for failure to provide a safe system of working and vicariously liable for the failure of its foreman to supervise his crew (*per* Morean J).

2 [1959] 1 All ER 346.

3 *United Estates Ltd v Durrant* (1992) 29 JLR 468, p 470, *per* Wolfe JA.

4 *Courage Construction Ltd v Royal Bank Trust Co (Jamaica) Ltd* (1992) 29 JLR 115, p 120, *per* Rowe P.

5 *Wilson and Clyde Coal Co v English* [1938] AC 57, p 78, *per* Lord Wright.

6 See *Ifill v Rayside Concrete Works Ltd*, below, pp 147–50.

## Adequate plant and equipment

An employer must take the necessary steps to provide adequate plant and equipment for his workers, and he will be liable to any workman who is injured through the absence of any equipment which is obviously necessary or which a reasonable employer would recognise as being necessary for the safety of the workman. For instance, the employer should ensure that dangerous machinery is fitted with the necessary safety devices, including fencing, and that goggles are provided for those types of work in which there is a risk of eye injuries. He must also take reasonable steps to maintain plant and equipment, and he will be liable for harm resulting from any breakdown or defect which he ought to have discovered by reasonable diligence. Thus, in *United Estates Ltd v Durrant*,<sup>7</sup> the Jamaican Court of Appeal held that the appellants, who were cane farmers, were liable to a sideman employed by them for injuries suffered when a 'chain dog' broke suddenly and caused the sideman to be thrown off a truck. 'Chain dogs' had been supplied by a third party, and the appellants had no proper system for examining them to ensure that they were in good working order. It was not reasonable in the circumstances to rely upon the sidemen to carry out checks on the condition of the chains and to take defective ones out of service. And in a recent Bahamian case, *Forbes v Burns House Ltd*,<sup>8</sup> where an office worker was injured at the workplace when a swivel chair on which she was sitting collapsed, it was held that the employer was in breach of its duty to inspect and maintain office equipment, including the chair.

In the Trinidadian case of *Morris v Point Lisas Steel Products Ltd*,<sup>9</sup> the plaintiff was employed as a machine operator at the defendant's factory. While the plaintiff was using a wire cutting machine, a piece of steel flew into his right eye, causing a complete loss of sight in that eye. Holding the employer in breach of its common law duty of care in failing to provide goggles, Hosein J said that:

...since the risk was obvious to the defendant and not insidious, the defendant ought to have made goggles available and also given firm instructions that they must be worn, and the defendant ought to have educated the men and made it a rule of the factory that goggles must be worn, since, if an accident did happen, the probability was likely to be the loss of sight of one or both eyes.

Similarly, in *Sammy v BWIA*,<sup>10</sup> the plaintiff, who was employed by the defendant as a mechanic, was sent to repair a vehicle which had broken down on a ramp at Piarco Airport. While attempting to start the vehicle, it caught fire. No fire extinguishers were provided either in the vehicle being repaired or in the service vehicle and, in attempting to put out the fire with a cloth, the plaintiff suffered burns. Gopeesingh J held the defendant liable for breach of its common law duty to the plaintiff to take reasonable care for his safety,

...by not exposing him to any unnecessary risk during the performance of his duties as an employee...By failing to provide fire extinguishers on these vehicles, the defendant clearly exposed the plaintiff to an unnecessary risk when the fire started

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7 (1992) 29 JLR 468.

8 (2000) Supreme Court, The Bahamas, No 432 of 1995 (unreported).

9 (1989) High Court, Trinidad and Tobago, No 1886 of 1983 (unreported).

10 (1988) High Court, Trinidad and Tobago, No 5692 of 1983 (unreported).

on the vehicle...The defendant was under a duty to provide proper safety appliances on these vehicles to safeguard the plaintiff in the event of such an occurrence.

### Safe system of working and effective supervision

An employer must organise a safe system of working<sup>11</sup> for his employees and must ensure as far as possible that the system is adhered to. A system of work has been defined as:

...the physical layout of the job; the setting of the stage, so to speak; the sequence in which the work is to be carried out; the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of the job, or it may have to be modified or improved to meet the circumstances which arise.<sup>12</sup>

The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work, an employer must take into account the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organise a system which itself reduces the risk of injury from the workmen's foreseeable carelessness.

In the Barbadian case of *Legall v Skinner Drilling (Contractors) Ltd*,<sup>13</sup> the defendant company was engaged in oil drilling. The plaintiff was employed by the defendant as a derrick man, one of his duties being the removal of nuts and bolts from the rigs as part of the 'rigging down' operation. In order to remove a bolt from a rig platform about 10 ft from the ground, the plaintiff was given an empty oil drum to stand on. The drum toppled over and the plaintiff fell to the ground and was injured. It was held that the defendant, by failing to ensure that its workers used ladders to reach high platforms and to warn the plaintiff of the danger of standing on the oil drum, was in breach of its common law duty to provide a safe system of work.

Another example of failure to provide a safe system of work is the Jamaican case of *Bish v Leathercraft Ltd*.<sup>14</sup> Here, the plaintiff was operating a button pressing machine in the defendants' factory when a button became stuck in the piston. While attempting to dislodge the button with her right index finger, the plaintiff's elbow came into contact with an unguarded lever, which caused the piston to descend and crush her finger. The Jamaican Court of Appeal held that the defendants were in breach of their common law duties to provide adequate equipment and a safe system of work, in that: (a) the button had not been pre-heated, which was the cause of its becoming stuck in the position; (b) no three inch nail, which would have been effective to dislodge the button, was provided for the plaintiff's use, with the result that the plaintiff had to resort to using her finger; and (c) the lever was not provided with a guard, which would most probably have prevented the accident which occurred.

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11 This includes a duty to take reasonable precautions to protect employees from attacks by armed bandits. See above, pp 108, 109.

12 *Speed v Thomas Swift and Co Ltd* [1943] KB 557, pp 563–64, per Lord Greene MR.

13 (1993) High Court, Barbados, No 1775 of 1991 (unreported). See also *Cazaubon v Durahome Construction Ltd* (1998) High Court, Barbados, No 1339 of 1991 (unreported).

14 (1975) 24 WIR 351.

## Safe place of work

An employer has a duty to take care to ensure that the premises where his employees are required to work are reasonably safe.<sup>15</sup> The duty exists only in relation to those parts of the workplace which the employee is authorised to enter. An employee who enters an area which he knows to be 'out of bounds' will generally be treated as a trespasser.<sup>16</sup> It appears that this duty is greater than that owed by an occupier to his visitors or invitees, since it is not limited to unusual dangers, nor is it necessarily discharged by giving warning of the danger.<sup>17</sup> But the employer's duty is not absolute; it is sufficient that the premises are maintained 'in as safe a condition as reasonable care by a prudent employer can make them',<sup>18</sup> and if the employer 'has an efficient system to keep (the workplace) clean and free from obstruction, that is all that can be reasonably demanded from him'.<sup>19</sup>

At one time, it was thought that where an employee was sent to work at premises over which the employer had no control, the employer would owe no duty in respect of those premises; but the modern view is that whether the employer is relieved of the duty will depend upon the nature of the premises.<sup>20</sup> For instance, if an employer sends his technician to install cable television in a private house, the employer will not be required to inspect the house to ensure that there are no potential hazards; but an employer who sends a stevedore onto a ship may be required to inspect the ship for potential dangers, such as defective hatches, and to ensure that any necessary remedial action is taken.<sup>21</sup>

In *Watson v Arawak Cement Co Ltd*,<sup>22</sup> the plaintiff was employed by the defendant as a general worker. He was sent to work on a ship which was in the possession of a third party. While attempting to leave the ship at the end of his day's work, the plaintiff fell from an unlit walkway inside the ship and sustained injuries. Chase J, in the Barbados High Court, held the defendant liable on account of its failure to provide a suitable means of egress from the ship and to instruct the plaintiff as to the method of leaving the vessel. He said:

Another aspect of the employer's duty to exercise reasonable care and not to expose his servants to unnecessary risk is his duty to provide a reasonably safe place of work and access thereto. This duty does not come to an end merely because the employee has been sent to work at premises which are occupied by a third party and not the employer. The duty remains throughout the course of his employment: *General*

15 *Sturup v Resorts International (Bahamas) 1984 Ltd* (1991) Supreme Court, The Bahamas, No 83 of 1985 (unreported), *per* Hall J.

16 See, eg, *Alcan (Jamaica) Ltd v Nicholson* (1986) Court of Appeal, Jamaica, Civ App No 49 of 1985 (unreported), p 139, above.

17 Fleming, *The Law of Torts*, 8th edn, 1993, Sydney: LBC Information Services.

18 *Ibid.* See *Henry-Angus v AG* (1994) Supreme Court, Jamaica, No H 111 of 1988 (unreported) (hospital liable to ward attendant who slipped on wet floor, for failure to take reasonable care).

19 *Levesley v Thomas Firth and John Brown Ltd* [1953] 2 All ER 866, p 869, *per* Denning LJ. See *De Verteuil v Bank of Nova Scotia (Trinidad and Tobago) Ltd* (2002) High Court, Trinidad and Tobago, No 2121 of 1995 (unreported), *per* Jamadar J. (Bank not liable to employee who slipped in kitchen, as bank had employed professional cleaners to clean up after working hours, and staff had responsibility for cleaning up during the day. The floor's surface was not inherently slippery, and there had been no previous mishaps or complaints about the safety of the floor.)

20 *Op cit*, Fleming, fn 17.

21 *Op cit*, Fleming, fn 17.

22 (1998) High Court, Barbados, No 958 of 1990 (unreported).

*Cleaning Contractors Ltd v Christmas*,<sup>[23]</sup> In each case, however, the degree of care to be taken by the employer will vary according to the circumstances. In *Wilson v Tyneside Window Cleaning Co*,<sup>[24]</sup> Parker LJ noted as follows:

The duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party...but what reasonable care demands in each case will no doubt vary.

Pearce LJ<sup>[25]</sup> also echoed the principle in these terms:

The master's own premises are under his control. If they are dangerously in need of repair, he can, and must, rectify the fault at once if he is to escape the censure of negligence. But if a master sends his plumber to mend a leak in a respectable private house, no one could hold him negligent for not visiting the house himself to see if the carpet in the hall creates a trap.

Between these extremes are countless possible examples in which the court may have to decide the question of fact.

In view of the circumstances in the present case, it is in my opinion appropriate to limit my consideration of the merits of the plaintiff's claim against the defendant to whether or not the defendant had exercised due care and skill to ensure that, in the course of his employment, the plaintiff was provided with safe means of access to and egress from the [third party's] motor vessel.

## STATUTORY DUTIES

In addition to the duty of care owed at common law, an employer may be under a statutory duty to provide safety equipment to protect his employees from injury, especially where they are operating dangerous machinery.

An employer who fails to provide equipment as required by statute will be liable for breach of statutory duty. An employee who is injured as a consequence of a breach of statutory duty must show:

- (a) that the act which caused the damage was regulated by the statute;
- (b) that he was one of the persons whom the statute was intended to protect; and
- (c) that the damage suffered was of a kind that the statute was intended to prevent.

The first two requirements are normally easy to satisfy, but the third may be problematic. In the leading case of *Gorris v Scott*,<sup>26</sup> a shipowner was required by statute to provide pens for cattle on board his ship. He failed to do this, with the result that the plaintiff's cattle were swept overboard. It was held that the shipowner was not liable for the loss, because the damage that the statute was intended to prevent was the spread of contagious diseases, not the sweeping overboard of the cattle. Similarly, it was held in *Close v Steel Co of Wales Ltd*<sup>27</sup> that a workman who is injured by a dangerous part of machinery which flies out of a machine and injures him cannot base a claim on the statutory obligation that dangerous parts of machinery 'shall be securely fenced', because the purpose of the statutory duty is

23 [1953] AC 180. See Charlesworth and Percy, *Negligence*, 8th edn, 1990, London: Sweet & Maxwell.

24 [1958] 2 QB 110, p 124.

25 *Ibid*, pp 121–22.

26 (1874) LR 9 Ex 125.

27 [1962] AC 367.

'to keep the worker out, not to keep the machine or its product in'.<sup>28</sup> On the other hand, as in the case of negligence, if the plaintiff's damage is of the same kind as that which the statute was designed to prevent, he will have a good cause of action, notwithstanding that the damage occurred in a way not contemplated by the statute. Thus, a statute requiring the use of crawling boards on roofs covered with fragile material was interpreted as being aimed not only against workmen falling through such material, but equally against a workman falling through a hole uncovered in the course of re-roofing;<sup>29</sup> and a statute requiring that roofs in a coal mine be made secure was interpreted as covering not only the obvious risk of a miner being struck from above, but also a bogie in which he was travelling being derailed by falling debris.<sup>30</sup>

An important example of a statutory duty in the Commonwealth Caribbean is s 7 of the Factories Act, Cap 347 (Barbados), which provides:<sup>31</sup>

7(1) Every dangerous part of machinery on premises to which this Act applies must be securely fenced unless such machinery is in such a position or is so constructed as to be safe to every person employed or working on the premises as it would be if securely fenced.

(2) Where the dangerous part of any machinery, by reason of the nature of an operation, cannot be securely fenced by means of a fixed guard, the requirements of sub-section (1) shall be deemed to have been complied with if a device is provided that automatically prevents the operator from coming into contact with that part of the machinery while it is in motion or use.

Another example of a statutory duty is reg 9 of the Factories Regulations, Ch 30, No 2 (Trinidad and Tobago), which provides:

9(1) In any process which involves a special risk of injury to the eyes from particles or fragments thrown off in the course of the process, suitable goggles or effective screens shall be provided to protect the eyes of persons employed in the process.

(2) Suitable goggles or effective screens shall be provided to protect the eyes of persons employed at welding or cutting of metals by means of an electrical, oxyacetylene or similar process, and effective arrangements shall be made by the provision of screens or otherwise to protect the eyes of other persons working near to such process.

Such legislation imposes an absolute obligation to provide the necessary safety equipment, and failure to do so renders the employer liable in damages to an employee injured as a consequence of the breach of duty.

The following Commonwealth Caribbean cases illustrate the nature of the duty of care owed by employers at common law and the duties under the Factories legislation.

28 *Ibid.*

29 *Donaghey v Boulton and Paul Ltd* [1968] AC 1.

30 *Grant v National Coal Board* [1956] AC 649.

31 This section replaces the previous s 10(1) of the Act. Similar provisions are in force in other jurisdictions, eg, Factories Regulations 1961, reg 3 (Jamaica). Cf Factories Act, Cap 95:02 (Guyana); Factories Act, Cap 339 (St Kitts/Nevis); Factories Act, Cap 118 (Grenada); Factories Act, Cap 233 (Belize); Factories Act, Cap 335 (St Vincent).

**Ifill v Rayside Concrete Works Ltd (1981) 16 Barb LR 193,  
High Court, Barbados**

The plaintiff and J were employed by the defendants as labourers. They were both known by the defendants to have a propensity for 'skylarking' at work, and had been warned on at least two occasions not to do so. One day, J picked the plaintiff up and cradled him in his arms, saying he was 'light as a baby' and singing 'Rock-a-bye-baby'. As J carried the plaintiff forward, he tripped over a pipeline and both J and the plaintiff fell into a cement mixer, which was only partly covered, both of them sustaining injuries. The plaintiff brought an action against the defendants for: (a) breach of statutory duty; and (b) negligence at common law.

*Held:*

- (a) the cement mixer was a 'dangerous part of machinery' within what was then s 10(1) of the Factories Act, Cap 347, and the defendants were in breach of their absolute statutory duty to fence it securely;
- (b) the defendants were in breach of their duty at common law not to expose the plaintiff to risks of danger emanating from indisciplined fellow employees, and were liable in negligence;
- (c) the plaintiff was guilty of contributory negligence and his damages would be reduced by 50%.

Douglas CJ said:

It is not in dispute that the concrete works operated by Rayside constitutes a factory within the meaning of the Factories Act, Cap 347. Thus, s 10(1) of the Act places on Rayside certain obligations in regard to the fencing of dangerous machinery. The section provides:

Every dangerous part of any machinery shall be securely fenced, unless it is in such a position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced...

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with such part.

The section imposes an absolute obligation to fence. As Viscount Simonds observed in *Summers (J) and Sons Ltd v Frost*<sup>[32]</sup> in relation to s 14(1) of the Factories Act 1937 of the UK, which is identical in its terms with s 10(1) of Cap 347:

...the proviso to s 14(1) affords a strong indication that the substantive part of it imposes an absolute obligation: for, unless its effect is absolutely to prevent the operator from coming into contact with a dangerous part of the machine, there would be little meaning in the provision of an alternative which has just that effect.

In *Walker v Clarke*,<sup>[33]</sup> MacGregor CJ stated that the test to be applied to ascertain whether a machine is or is not dangerous is that of the reasonable foreseeability of an accident. He cited with approval the observation of Lord Cooper in *Mitchell v North British Rubber Co*<sup>[34]</sup> that a machine is dangerous if:

32 [1955] 1 All ER 870, p 872.

33 (1959) 1 WIR 143 (see below, pp 153–55). See also *Henry v Superior Plastics Ltd* (2002) Supreme Court, Jamaica, No H-104 of 1994 (unreported).

34 [1945] SC (J) 69, p 73.

...in the ordinary course of human affairs, danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operator intent upon his task, but also to the careless or inattentive worker whose inadvertent and indolent conduct may expose him to risk of injury or death from the unguarded part.

The test is objective and impersonal, but on any view of the evidence in respect of the cement mixer in this case, it could not be considered to be anything else but dangerous with its whirling shaft and blades. If further evidence of its dangerous character is needed, it is to be found in the testimony of Mr Phillips, the foreman, who said that he would describe the shaft and blades of the cement mixer as dangerous.

It is clear, then, that the cement mixer constituted dangerous parts of machinery within the meaning of the Factories Act. As such, Rayside had an absolute obligation to fence those parts securely and, having failed to do so, Rayside was in breach of the statutory duty imposed on it by the Factories Act.

The second limb of the plaintiff's case is that Rayside was negligent and in breach of the common law duty which it owed to its employees, including the plaintiff, in that Rayside exposed the plaintiff to a risk of damage or injury of which it knew or should have known. In *Wilsons and Clyde Coal Co v English*,<sup>[35]</sup> Lord Wright described the employer's obligation to his employees as threefold—the provision of a competent staff; adequate material; and a proper system of work and effective supervision. In stating the principle, Lord Wright quoted with approval a *dictum* of Lord Herschell in *Smith v Baker*,<sup>[36]</sup> in which he stated:

It is quite clear that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

In *Harris v Bright's Construction Ltd*,<sup>[37]</sup> Slade J had to consider the meaning of the word 'unnecessary' in this context. He said:

I would take the duty as being a duty not to subject the employee to any risk which the employer can reasonably foresee, or, to put it slightly lower, not to subject the employee to any risks that the employer can reasonably foresee and which he can guard against by any measures, the convenience and expense of which are not entirely disproportionate to the risk involved.

*Harris'* case had to do with the provision of scaffolding. The instant case raises the issue of the duty of the employer not to expose the employee to risks of danger emanating from [un]disciplined fellow employees. It would seem, therefore, that here the duty imposed at common law on Rayside was not to subject the plaintiff to any risk that Rayside could reasonably foresee and against which Rayside could guard by taking reasonable measures.

Mr Inniss [counsel for the plaintiff], on this aspect of the case, relies on *Hudson v Ridge Manufacturing Co Ltd*.<sup>[38]</sup> In that case, the defendants had had in their employ, for a period of almost four years, a man given to horseplay and skylarking. He had been reprimanded on many occasions by the foreman, seemingly without result. In the end, while indulging in skylarking, he tripped and injured the plaintiff, a fellow employee, who sued his employer for failing to take reasonable care for his safety. Streatfield J said:<sup>[39]</sup>

35 [1938] AC 57.

36 [1891] AC 325, p 362.

37 [1953] 1 QB 617, p 626.

38 [1957] 2 QB 348.

39 *Ibid*, p 350.

This is an unusual case, because the particular form of lack of care by the employers alleged is that they failed to maintain discipline and to take proper steps to put an end to this skylarking, which might lead to injury at some time in the future. As it seems to me, the matter is covered not by authority so much as principle. It is the duty of employers, for the safety of their employees, to have reasonably safe plant and machinery. It is their duty to have premises which are similarly reasonably safe. It is their duty to have a reasonably safe system of work. It is their duty to employ reasonably competent fellow workmen. All of these duties exist at common law for the safety of the workman and if, for instance, it is found that a piece of plant or part of the premises is not reasonably safe, it is the duty of the employers to cure it, to make it safe and to remove that source of danger. In the same way, if the system of working is found, in practice, to be beset with dangers, it is the duty of the employers to evolve a reasonably safe system of working so as to obviate those dangers, and upon principle it seems to me that if, in fact, a fellow workman is not merely incompetent but, by his habitual conduct, is likely to prove a source of danger to his fellow employees, a duty lies fairly and squarely on the employers to remove that source of danger.

Dr Cheltenham's answer to this point is that the form of skylarking on the second defendant's part was so different from anything which had gone on before that it was not foreseeable by management. He cites *Smith v Crossley Bros Ltd*,<sup>[40]</sup> where injury was done to the plaintiff, a 16 year old apprentice, by inserting in him, in horseplay, compressed air. At first instance, it was held that the employers had not exercised adequate supervision over the apprentices and that that lack of supervision constituted negligence. On appeal, it was held that the evidence disclosed no negligence on the part of the employers, because the injury to the plaintiff resulted from what was wilful misbehaviour by the other boys and a wicked act which the employers had no reason to foresee. Reference is also made to *Coddington v International Harvester Co.*<sup>[41]</sup> Here, the workman, who had an unblemished record extending over 16 years, was a practical joker, but his conduct had not caused actual or reasonably apprehended danger. Ormrod J held that the employers could not have foreseen that the workman might be a potential danger, because nothing in his previous conduct suggested that he might endanger the safety of others, although he might annoy some and amuse others. Counsel also cites *Chapman v Oakleigh Animal Products Ltd*,<sup>[42]</sup> where liability was established, there being negligence quite apart from anything done in the course of the practical joke.

In the instant case, it is obvious that the plaintiff and the second defendant each had a marked propensity for skylarking. They persisted in it, in spite of warnings from Mr Phillips. In the context of a block-making factory with its tractors, forklifts, cement mixers and block-making machines in operation, their skylarking constituted a menace, not only to themselves but to their fellow workers. Rayside was aware of their skylarking and sought to put an end to it by warnings. In my view, mere warnings were totally inadequate for such serious cases of indiscipline. After the first warning proved ineffectual, the only reasonable course open to Rayside as a responsible employer was to suspend or dismiss the offending worker, because it must have been obvious to Rayside that this sort of [un]disciplined conduct would expose its employees to the risk of injury. As to the submission made on behalf of Rayside that the skylarking which caused the injuries was different in form from that which went before, it must be remembered that the skylarking sometimes took the form of karate movements, a method of combat involving bodily contact. It appears to me that lifting another individual off the ground and carrying him some distance is all of a pattern

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40 (1951) 95 SJ 655.

41 (1969) 113 SJ 265.

42 (1970) 114 SJ 432.

with skylarking involving bodily contact and the application of force. As to the submission made on behalf of the plaintiff that he did not willingly consent to be lifted up by the second defendant, the whole of their previous conduct negatives any such conclusion. In my view, the acts which resulted in the plaintiff's injuries were no more than a continuation of the thoughtless and dangerous behaviour in which both the plaintiff and the second defendant had become accustomed to indulge. I find that Rayside was negligent in exposing its employees, including the plaintiff, to the risk of injury from the second defendant's skylarking. I also find that the plaintiff was contributorily negligent in participating in the skylarking activity which caused his injury.

**Hurdle v Allied Metals Ltd (1974) 9 Barb LR 1,  
High Court, Barbados**

The plaintiff, who was 16 years old, was employed by the defendants as a machine operator. Without any proper training or instruction, she was put in charge of a power-press, which was set up to stamp out heart shapes for lockets. Whilst the plaintiff was operating the power-press, her hand became trapped in the machine and she was seriously injured. She sought damages in negligence on the ground that the defendants had failed to provide a safe system of work.

*Held*, the defendants were in breach of their duty of care, in that no adequate instruction and training had been given to the plaintiff, having regard to her age and inexperience and the potential risk involved. Douglas CJ said:

As to the complaint that the defendants failed to provide a safe system of work, the duty which the defendants owed to the plaintiff was laid down by Lord Herschell in *Smith v Baker*<sup>[43]</sup> in these terms:

It is quite clear that the contract between employer and employee involves on the part of the former the duty of taking reasonable care to provide proper appliances and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

In considering whether the employers have instituted and maintained a proper system of working, it must be remembered, as Denning LJ pointed out in *Clifford v Challen and Sons Ltd*,<sup>[44]</sup> that allowance must be made for the imperfections of human nature, and that people doing a routine task are often heedless of their own safety and may become careless about using precautions. It must also be remembered that when young people or trainees are employed in a factory, the need for supervision is greater than in the case of skilled and experienced workpeople.

These points must also be borne in mind in considering the duties to instruct, to train, to warn and to supervise. In *Lewis v High Duty Alloys Ltd*,<sup>[45]</sup> the plaintiff, when he was first set on the task of oiling and greasing, was taken round the machines, shown the oiling points and the different oils and was left to carry on. According to the plaintiff, he was given no further instructions, nor was he reprimanded for oiling machines in motion, although it was his practice regularly to do so. Even on the defendant's case, the instructions came only to this: that the plaintiff was warned not to oil machinery in motion if, in the plaintiff's view, it was dangerous to do so.

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43 [1891] AC 325, p 363.

44 [1951] 1 All ER 72.

45 [1957] 1 All ER 720.

Ashworth J held the defendants to be liable because: (a) they failed to issue proper instructions to the plaintiff to ensure that he did not oil any of the dangerous machines when in motion; and (b) they took no steps to ensure that instructions not to oil the machines when in motion were carried out.

I cannot accept Mr Wallace Adams' view that the power-press is not a dangerous machine. I think that the fact that the defendants have fitted two separate safety devices to their power-press strongly suggests that they consider them to be dangerous. In any event, whether they are dangerous or not depends on the degree of risk involved in their operation, and I prefer Mr David Massiah's opinion that they are dangerous machines which one would normally not allow a novice or inexperienced person to operate. It appears to me that the plaintiff should not have been allowed to operate a power-press unless she had been fully instructed as to the dangers arising in connection with it and the precautions to be observed, and had received a sufficient training in work at the machine and had adequate supervision by a person possessing a thorough knowledge and experience of the machine.

In my view, the accident happened because the ram of the power-press was not in its fully raised position, and as soon as the power was turned on it came down to complete its cycle. At that time, the plaintiff was adjusting the material she was going to work on, and her fingers were between the upper and lower dies. I am satisfied that she was not wearing the Possons harness [safety device] and I am further satisfied that she had never been instructed that there was any possibility of the ram coming down merely by switching on the power. Indeed, I find her instructions and training entirely inadequate, having regard to her age, her inexperience and the potential of risk involved. In failing to provide her with adequate training, I hold that the defendants have failed in the duty they owe to her at common law not to expose her to unnecessary risks and are wholly to blame for the injury she sustained.

### **Morris v Seanem Fixtures Ltd (1976) 11 Barb LR 104, High Court, Barbados**

The plaintiff was employed by the defendants as a shophand and fitter. Without being authorised or directed to do so by the defendants, she operated a 'planer' at the factory and, in attempting to remove some wood shavings from the machine while it was still in motion, sustained injuries to her hand when it became caught in the machine's rotating blades. She brought an action against the defendants for negligence and breach of statutory duty.

*Held:*

- (a) the claim in negligence failed, since the plaintiff had not been directed or authorised to use the machine;
- (b) the claim for breach of statutory duty succeeded. The cutting rotor of the planer was a dangerous part of a machine and the defendants were in breach of the duty imposed by s 10(1) of the Factories Act, Cap 347, in failing to fence or to provide some other safety device to prevent contact;
- (c) the plaintiff was guilty of contributory negligence and her damages would be reduced by two-thirds.

Husbands J said:

On a review of the evidence, I am persuaded that the plaintiff is a person of industry and drive. She was employed by the defendant company as a shophand and fitter but was always anxious to improve her situation. She was therefore willing to help in

any area in which she thought her co-operation was required and might assist in the advancement of the defendant's work. It was in this spirit that she undertook to operate the planer on that fateful day. However, I am not persuaded that she was directed or authorised by the defendant, its servants or agents to perform this task... Employed as she was as a shophand and fitter, and finding as I do that she was not authorised to use the said machine, the defendant was under no duty to train her in the use of the planer. Accordingly, I find that the plaintiff's claim in negligence fails.

The plaintiff further claims that the defendant was in breach of the statutory duty imposed by s 10(1) of the Factories Act, Cap 347, which reads in part as follows:

10(1) Every dangerous part of any machinery shall be securely fenced, unless it is in such a position or of such construction as to be safe to every person employed or working on the premises as it would be if securely fenced.

Provided that, in so far as the safety of a dangerous part of any machinery cannot by reason of the nature of the operation be secured by means of a fixed guard, the requirements of this sub-section shall be deemed to have been complied with if a device is provided which automatically prevents the operator from coming into contact with such part.

Although the plaintiff was unable to say exactly where she was standing when her hand was damaged or how it was that her hand got into the machine, there can be no doubt that her hand was injured in the machine. On the engineer's evidence it is equally clear that, had a suction device been attached to the aperture through which the shavings were ejected, her hand could not have entered the machine at this point, and the accident would not have occurred. In *Summers (J) and Sons Ltd v Frost*,<sup>[46]</sup> a revolving grindstone was held not to be securely fenced when there was a space between an upper and a lower guard so that the hands of an operator could reach the revolving wheel. On this authority, it is clear that where there is danger of injury by contact, there is a duty to fence so as to prevent contact, and a dangerous machine is not securely fenced unless such contact is precluded.

Lord Morton of Henryton put it thus in *Summers (J) and Sons Ltd v Frost*:<sup>[47]</sup>

My Lords, to my mind, the natural meaning of the word 'securely', used in regard to the fencing of a dangerous part of a machine, is that the part must be so fenced that no part of the person or clothing of any person working the machine or passing near can come into contact with it.

As was also stated, by Viscount Simonds,<sup>[48]</sup> the statute seeks to give protection not only to the actual operator but to any other person employed on the premises. And this protection was held to extend to a man employed in the factory (subject of course to his own contributory negligence), even though he was not working nor acting within the scope of his employment at the relevant time, but had left his allotted tasks and gone for purposes of his own to a place in the factory where he had no right to be. This was so decided in *Uddin v Associated Portland Cement Manufacturers Ltd*,<sup>[49]</sup> a case in which a workman chasing a pigeon in a factory got into a place of danger and was injured.

As has been pointed out in a number of cases, and as was said by Stable J in *Carr v Mercantile Produce Co Ltd*,<sup>[50]</sup> the provisions [of s 10(1) of the Factories Act] are to protect not only the careful and diligent worker, but also the worker who may be careless or even from time to time indolent, inadvertent, weary and perhaps, in some cases, disobedient.

46 [1955] 1 All ER 870.

47 *Ibid*, p 875.

48 *Ibid*, p 873.

49 [1965] 2 All ER 213.

50 [1949] 2 All ER 531, p 537.

In *Walker v Bletchley Flettons Ltd*,<sup>[51]</sup> Du Parc J said:

A part of machinery is dangerous if it is a possible cause of injury to anybody acting in a way in which a human being may be reasonably expected to act, in circumstances which may reasonably be expected to occur.

Lord Denning in *Smithwick v National Coal Board*,<sup>[52]</sup> a case coming under s 55 of the Coal Mines Act, 1911, said:

...it is not only the likely but also the unlikely accident against which the occupier must guard: he must guard against all conduct which he might reasonably foresee. The limit of his responsibility is only reached when the machinery is safe for all except the incalculable individual against whom no reasonable foresight can provide—the individual who does not merely do what is unlikely, but also what is unforeseeable.

I find that the cutting rotor of the planer was a dangerous part of the machine and the defendant was in breach of the statutory duty imposed by s 10 of the Factories Act and that this breach was a cause of the plaintiff's injuries.

### **Walker v Clarke (1959) 1 WIR 143, Court of Appeal, Jamaica**

The plaintiff/respondent operated a dough-brake machine in the course of his employment at the defendant's/appellant's bakery. The machine had a revolving turntable to feed the dough to rollers, but, as this did not work satisfactorily, the respondent, on the instructions of the appellant, fed the dough to the rollers by hand. While attempting to remove some foreign matter from the machine whilst it was in motion, the respondent put his hand too close to the rollers and his fingers were crushed. The resident magistrate concluded that the machine was dangerous and that the appellant was in breach of his duty under reg 3 of the Factories Regulations 1943 (made under the Factories Law, Cap 124) to fence the machine.

*Held*, upholding the decision of the resident magistrate, the rollers were a dangerous part of the machine and, as they were not securely fenced, the appellant was in breach of his statutory duty. MacGregor CJ said:

Regulation 8 of the Factories Regulations, which are to be found at p 125 of the *Jamaica Gazette* 1943, reads as follows:

Every dangerous part of any machine shall be securely fenced unless it is in such a position or of such construction as to be as safe to every worker as it would be if securely fenced.

This regulation is almost the same as s 14(1) of the Factories Act 1937 (UK), except that this latter has, in addition, a proviso.

In our judgment, the learned resident magistrate correctly stated the questions which arose for his decision. They are:

- (1) are the rollers a dangerous part of the machinery? If the answer to question (1) is 'yes', then
- (2) is that dangerous part securely fenced? If the answer to that question is 'no', then
- (3) is the machine in such a position or of such a construction as to be as safe to every worker as it would be if securely fenced?

51 [1937] 1 All ER 170, p 175.

52 [1950] 2 KB 335, p 351.

In a careful and well reasoned judgment, the learned resident magistrate answered all these questions in favour of the respondent and we agree with him. We would be content to adopt his reasoning, but as we were informed that the machine is the very latest model and is used in the leading bakeries in Jamaica, it is as well that we express our own reasons.

That the learned resident magistrate correctly expressed the first two questions he had to decide is clear. In *Can v Mercantile Produce Co Ltd*,<sup>[53]</sup> Stable J said:

It appears to me that these findings [that is, of the magistrate] may mean either that, even in the absence of the guard, the worm was not dangerous, or that the worm, situated as it was at the time of the accident, beneath the guard, was not a dangerous part of the machine for the reason that, though without the guard it would have been dangerous, the guard rendered it innocuous, or, in other words, a dangerous part of the machine was securely fenced.

To avoid any possible ambiguity in future cases, in my judgment, the proper approach when there is a machine with a guard is first to enquire whether, in the absence of the guard, any part of the machine could properly be described as dangerous. If the answer is 'No', the adequacy or otherwise of the guard as a protection against a hypothetical but nonexistent danger does not arise. It is only if the first question is answered in the affirmative that the second question arises, namely, was the dangerous part securely fenced in accordance with the Act?

In *Summers (J) and Sons Ltd v Frost*,<sup>[54]</sup> Lord Morton said:

As I read the section [14(1) of the Factories Act, 1937 (UK)], only two questions arise on it in the present case. They are: (a) Was the grinding wheel a 'dangerous part' of the power-operated grinding machine...within the meaning of s 14(1) of the Act? (b) If so, was the wheel 'securely fenced' within the meaning of the same section, at the time when the accident occurred?

It is to the first question that we now direct our attention. We refer again to the speech of Lord Morton in the case just referred to.<sup>[55]</sup> He said:

In my opinion, in order to answer the first question stated above, one must disregard for the moment such protection as has been provided, and consider only the wheel itself, which is a part of the machinery, operated by power which can be turned on or off by any person at will...

Counsel for the appellant submitted that this court is in as good a position as was the resident magistrate to draw inferences from the more or less admitted facts. Having seen the machine in operation, we suppose that his submission is correct. But we cannot agree with him that, in considering this first question, the learned resident magistrate should have taken into consideration the presence of the bar which, upon pressure, shut off the machine. To do so appears to us to be in direct conflict with the opinions both of Lord Morton and of Stable J, referred to above.

The test to be applied to ascertain whether a machine is or is not dangerous is that of reasonable foreseeability of accident (*per* Lord Keith of Avonholm in *Summers (J) and Sons Ltd v Frost*).<sup>[56]</sup> In that case, the remarks of Lord Cooper in *Mitchell v North British Rubber Co*<sup>[57]</sup> were referred to with approval, that a machine is dangerous if:

In the ordinary course of human affairs, danger may reasonably be anticipated from its use unfenced, not only to the prudent, alert and skilled operator intent

53 [1949] 2 All ER 531, p 536.

54 [1955] 1 All ER 870, p 875.

55 *Ibid.*

56 *Ibid.*, p 888. For a recent Caribbean example, see *Henry v Superior Plastics Ltd* (2002) Supreme Court, Jamaica, No H-104 of 1994 (unreported).

57 [1945] SC (J) 69, p 73.

upon his task, but also to the careless or inattentive worker whose inadvertent or indolent conduct may expose him to risk of injury or death from the unguarded part. Counsel for the appellant relied on two statements. The first was by the respondent:

The only way one's fingers could get caught in rollers is if one puts fingers under the shelf and into where rollers are situated.

Factually that statement is correct. To reach the rollers, one has to put one's hand under the shelf, which, as already stated, extends forward and over the rollers.

The other statement in the evidence was by the appellant:

One can only get the fingers into that roller if it is done deliberately or carelessly.

That appears to us to be an expression of his opinion and, as such, not evidence. But in any event it is not complete. We can see no reason why it may not happen accidentally.

We have been referred to *Smith v Chesterfield and District Co-operative Society Ltd.*<sup>[58]</sup> In that case, the machine, which was held to be a dangerous one, was used at a bakery to roll out puff pastry. It was provided with a guard which, in the circumstances, was held inadequate. Whilst the question whether a machine is dangerous is one to be decided on the facts in each case, the machine in this case appears to be not unlike the one in the instant case, and supports the conclusion of the resident magistrate that the machine in the instant case was dangerous.

In our judgment, the learned resident magistrate was entitled to come to the conclusion that he did, basing his opinion on the evidence he heard and on his view of the operation of the machine. Having ourselves seen the machine in operation, we agree with him.

As to the second question—was the dangerous part of the machinery securely fenced—we entirely agree with the learned resident magistrate, who stated, 'this poses no problem, as the rollers were not fenced at all'.

We pass to the third question: is it in such a position or of such construction as to be as safe to every worker as it would be if securely fenced?

The answer seems to us to be so obviously that it is not as to need no further discussion. The words of the regulation are 'as it would be if securely fenced'. The rollers, not being fenced at all, are dangerous to the operator as he works the machine ...

The appellant, having therefore failed to comply with the regulations requiring him to fence dangerous machinery, is liable in damages to the respondent.



## CHAPTER 7

### NUISANCE

The word 'nuisance' is used in popular speech to mean any source of inconvenience or annoyance, but the tort of nuisance has a more restricted scope and not every inconvenience or annoyance is actionable. Nevertheless, this tort 'has become a catch-all for a multitude of ill-assorted sins',<sup>1</sup> such as the emission of noxious fumes from a factory, the crowing of cocks in the early hours of the morning, the obstruction of a public highway, the destruction of a building through vibrations, and the interference with a right of access to private property. The remedies available to one who complains of a nuisance are:

- (a) damages;
- (b) an injunction to restrain further nuisance; and
- (c) abatement.

#### PUBLIC AND PRIVATE NUISANCE

##### Public nuisance

A public nuisance is committed where a person carries on some harmful activity which affects the general public or a section of the public, for example, where the owners of a factory cause fumes and smoke to pollute the atmosphere in the locality, or where an obstruction is caused on the public highway. Public nuisance is basically a crime, actionable by the Attorney General. It is a tort, actionable by an individual plaintiff, only where the latter can show that the defendant's conduct has caused him 'particular damage' over and above that suffered by the general public. The reason for this requirement of proof of particular damage is that where a wrong is committed against the community at large, it is considered to be more appropriate to leave the action in the hands of the Attorney General as the representative of the public, rather than to allow the defendant to be harassed by an unlimited number of suits by private individuals, all complaining of the same damage. As to the meaning of 'particular damage', one view is that the plaintiff must show that he has suffered damage which is different in kind, and not merely in degree, from that suffered by the general public;<sup>2</sup> another view is that it is sufficient for the plaintiff to show that he has suffered damage which is appreciably greater in degree than any suffered by the general public.<sup>3</sup> Particular damage will include not only

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1 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 378. See, generally, Buckley, *The Law of Nuisance*, 2nd edn, 1996, London: Butterworths.

2 *Stein v Gonzales* (1985) 14 DLR (4th) 263, p 267; *Hickey v Electric Reduction Co of Canada Ltd* (1970) 21 DLR (3d) 368; *Ricket v Metropolitan Rly Co* (1867) LR 2 HL 175.

3 *Southport Corp v Esso Petroleum Co Ltd* [1954] 2 All ER 561, p 570, per Lord Denning; *Metropolitan Board of Works v McCarthy* (1874) LR 7 HL 243, p 263, per Lord Penzance; *Walsh v Ervin* [1952] VLR 361, p 366, per Scholl J. See Kodilinye, G (1986) 6 LS 182, pp 189, 190.

special damage in the sense of actual pecuniary loss,<sup>4</sup> but also general damage, such as delay or inconvenience, provided that it is substantial.<sup>5</sup>

In *Chandat v Reynolds Guyana Mines Ltd*,<sup>6</sup> the plaintiff farmers adduced evidence that their crops had been damaged by dust escaping from the defendants' bauxite works, but they were unable to recover damages under public nuisance individually, because none could show 'particular damage'. George J stated that 'before a nuisance can be a public one, it must affect the reasonable comfort and convenience of a class of the citizenry', and he found that 'whether one uses the yardstick of a class of citizenry affected by the nuisance complained of or its effect and widespread range, the only reasonable conclusion which can be arrived at in this case is that the nuisance complained of must be a public nuisance'. He continued:

Despite the fact that the nuisance which the plaintiffs complain of is a public nuisance, it is well settled that if they or any of them suffer direct and substantial injury or damage 'other and greater' than that which is common to all, they or those who so suffer have a remedy both at law and in equity.

The expression used in the case of *Benjamin v Storr*<sup>7</sup> is 'injury...other and greater than that which is common to the Queen's subjects', that is, the body or group of persons affected by the nuisance. In the present case, the plaintiffs, who are all farmers, complain of the same type of nuisance which affects them all to the same degree. And in my opinion they are a sufficiently large number of persons to constitute a class of the citizenry. Indeed...the nuisance complained of is sufficiently widespread in its range and indiscriminate in its effect as to warrant action by the community at large rather than individuals. None of them can claim to have suffered any damage, loss or inconvenience which can be said to be greater in quality than the others.

Examples where 'particular damage' was established are:

- (a) where the defendant wrongfully obstructed a public navigable creek by mooring his barge there, thus compelling the plaintiff to unload his boats and transport his cargo by land at great expense;<sup>8</sup>
- (b) where the plaintiff intended to let rooms in her house to persons wishing to watch a procession, and the defendants unlawfully created a structure in the public street which obstructed the view from the rooms, thus reducing their letting value;<sup>9</sup>
- (c) where the plaintiff's sleep was disturbed by the noise of the defendant's vehicles, and the paintwork of his car, which was parked in the street, was damaged by acid smuts from the defendant's factory;<sup>10</sup>
- (d) where the plaintiff, a taxi driver, was struck and blinded in one eye by a golf ball driven from the defendant's golf course situated next to the highway;<sup>11</sup>

4 Eg, where a shopkeeper loses customers.

5 *Walsh v Ervin* [1952] VLR 361.

6 (1973) High Court, Guyana, No 249 of 1969 (unreported).

7 (1874) LR 9 CP 400.

8 *Rose v Miles* (1815) 105 ER 773.

9 *Campbell v Paddington Corp* [1911] 1 KB 869.

10 *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

11 *Castle v St Augustine's Links Ltd* (1922) 38 TLR 615.

- (e) where a telecommunications company allowed a broken telegraph pole, with cable attached, to overhang a public road, with the result that a motorist collided with it and sustained damage.<sup>12</sup>

On the other hand, no particular damage was proved where, in an action for obstructing a public way, the plaintiff proved no damage peculiar to himself other than being delayed on several occasions in passing along the way and being obliged, in common with everyone else who attempted to use it, either to take another route or to remove the obstruction.<sup>13</sup>

### Private nuisance

The rationale and origins of private nuisance are quite different from those of public nuisance. Whereas public nuisance involves injury to the public at large, and the rights of the private individual receive protection in tort where he can prove particular damage to himself, irrespective of his ownership or occupation of land, the law of private nuisance is designed to protect the individual owner or occupier of land from substantial interference with his enjoyment thereof. Therefore, the main differences between the two species of nuisance are these:

- (a) public nuisance is a crime, and is a tort where particular damage is proved. Private nuisance is a tort only;
- (b) to succeed in private nuisance, the plaintiff must have an interest in land.<sup>14</sup> In public nuisance, there is no such requirement;<sup>15</sup>
- (c) damages for personal injuries can be recovered in public nuisance.<sup>16</sup> Whether such a claim will lie in private nuisance is doubtful.<sup>17</sup>

Notwithstanding these basic differences, there may be occasions where the facts of a particular case will give rise to liability in both public and private nuisance, for example, where large scale pollution of the atmosphere causes particular damage to the plaintiff's property. Furthermore, the two causes of action share some common principles. For instance, in both public and private nuisance, the interference complained of must be substantial and unreasonable, and 'the law of give and take' applies to both.

### *Categories of private nuisance*

Private nuisance falls into three categories:

- (a) physical injury to the plaintiff's property, for example, where the plaintiff's crops are destroyed by fumes from the defendant's factory, or where vibrations

<sup>12</sup> *Norman v Telecommunication Services of Trinidad and Tobago Ltd* (1996) High Court, Trinidad and Tobago, No S 1668 of 1992 (unreported).

<sup>13</sup> *Winterbottom v Derby* (1867) LR 2 Ex 316.

<sup>14</sup> *Malone v Laskey* [1907] 2 KB 141. But this restriction was not applied in the Canadian case of *Devon Lumber Co Ltd v MacNeill* (1988) 45 DLR (4th) 300, where the child of an occupier recovered damages for private nuisance (below, p 178); nor in *Khorasandjian v Bush* [1993] 3 All ER 669, where a person who had no proprietary interest in land was granted an injunction to restrain unwanted telephone calls.

<sup>15</sup> Brazier, M, *Street on Torts*, 9th edn, 1993, London: Butterworths, p 347.

<sup>16</sup> See, eg, *Castle v St Augustine Links Ltd* (1922) 38 TLR 615.

<sup>17</sup> *Op cit*, Brazier, fn 15, p 363. Damages for personal injuries were recovered in *Devon Lumber Co Ltd v MacNeill* (1988) 45 DLR (4th) 300.

- from the defendant's building operations cause structural damage to the plaintiff's house;
- (b) substantial interference with the plaintiff's user and enjoyment of his land, for example, where the plaintiff is subjected to unreasonable noise or smells emanating from the defendant's neighbouring land;
  - (c) interference with easements and rights of access, for example, where the defendant wrongfully obstructs the plaintiff's right of way, right to light or right of access to his property.

### *Basis of liability in private nuisance*

The main problem in the law of private nuisance is in striking a balance between the right of the defendant to use his land as he wishes and the right of the plaintiff to be protected from interference with his enjoyment of his land. In order to strike this balance, two main requirements have been developed:

- (a) the injury or interference complained of will not be actionable unless it is (i) sensible (in the case of material damage to land); or (ii) substantial (in the case of interference with enjoyment of land);
- (b) the defendant will not be held liable unless his conduct was unreasonable in the circumstances.

### **Sensible material damage**

'Sensible material damage' means damage:

- (a) which is not merely trifling or minimal; and
- (b) which causes a reduction in the value of the plaintiff's property<sup>18</sup>

It is easier for a plaintiff to succeed in nuisance where he can show material damage to his property than where he complains of interference with his enjoyment of land, since tangible damage can be more easily observed and measured than personal discomfort or inconvenience arising from, for example, noise or smells. The leading English case on sensible material damage is *St Helens Smelting Co v Tipping*,<sup>19</sup> where the plaintiff, who lived in an industrial area, proved that his trees and shrubs had been damaged by fumes from the defendant's copper-smelting works. It was held by the House of Lords that the plaintiff's action in nuisance succeeded, since there

<sup>18</sup> *Op cit*, Brazier, fn 15, p 350.

<sup>19</sup> (1865) 11 ER 1483. This case was followed in *Alcoa Minerals of Jamaica Inc v Broderick* (1996) Court of Appeal, Jamaica, Civ App No 15 of 1995 (unreported) (damage to roof of plaintiff's house caused by emissions from defendants' aluminium plant). The decision was upheld by the Privy Council ((2000) *The Times*, 22 March), which also held that, where a plaintiff was unable to pay immediately for repair damage caused to his property by the defendant's nuisance and, owing to rampant inflation, the cost of repairs had quadrupled between the date on which the damage occurred and the date of judgment, the plaintiff was entitled to recover as damages the cost of repair at the date of judgment. The principle in *Liesbosch Dredger v SS Edison* [1933] AC 449 (above, p 111) had no application in the instant case, since, in *The Liesbosch*, the cost of hiring was a separate head of damage from the cost of replacing the dredger, the cost of hiring being due to a separate cause, namely, the plaintiff's impecuniosity. In the present case, there was only one head of damage, namely, the cost of repairing the building, and the increase in that cost was due to runaway inflation and the fall in the value of the Jamaican dollar. Further, in the circumstances, the plaintiff was not in breach of his duty to mitigate his loss. See also *Cargo Consolidation Agency Ltd v Tarmac Construction (Caribbean) Ltd* (2000) High Court, Trinidad and Tobago, No S 889 of 1996 (unreported). And see, generally, Kodilinye, V (2000) 10 Carib LR 75.

had been sensible material damage to his property. In the course of his judgment, Lord Westbury drew an important distinction between cases of material injury and cases of interference with enjoyment of land. He stated<sup>20</sup> that where there is an interference with enjoyment of land, the nature of the locality is a factor to be taken into account in deciding whether the acts complained of are actionable, so that a person who chooses to live in the heart of an industrial town or in a densely populated part of a large city is not entitled to expect such a high degree of peace and quiet as one who lives in a residential area. Where there is material damage to property, however, the nature of the locality is irrelevant and the defendant cannot escape liability by pleading that his activities were carried on in an industrial district.

### **Substantial interference with enjoyment of land**

Where an action in nuisance is founded on interference with enjoyment of land, such as where the plaintiff complains of inconvenience, annoyance or discomfort caused by the defendant's conduct, the interference must be shown to be substantial. The classic formulation of the rule is that of Luxmoore J in *Vanderpant v May fair Hotel Co Ltd*:<sup>21</sup>

Every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him; and, in deciding whether, in any particular case, his right has been interfered with and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people.

#### *Reasonableness of defendant's conduct*

Whether the plaintiff claims in respect of injury to property or in respect of interference with enjoyment of land, the primary question in any action for private nuisance is: 'Was the defendant's activity reasonable according to the ordinary usages of mankind living in...a particular society?'<sup>22</sup> There are no precise criteria for determining this question; all depends upon the circumstances of the individual case. However, a number of factors have been taken into account in determining this issue, and these must now be examined briefly.

### **Locality**

As we have seen,<sup>23</sup> the nature of the locality where the acts complained of have occurred may be taken into account in cases of interference with enjoyment of land, but not in cases of physical injury to property.

### **Utility of the defendant's conduct**

In general, the court will not find for the defendant merely because he shows that his conduct was beneficial or useful to the community, for that would compel the plaintiff 'to bear the burden alone of an activity from which many others will

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20 *St Helens Smelting Co v Tipping* (1865) 11 ER 1483, p 1486.

21 [1929] All ER 296, p 308.

22 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, p 903, *per* Lord Wright.

23 See above, p 161.

benefit'.<sup>24</sup> Thus, in one case, an injunction was granted in a nuisance action against a cement company, the effect of which was to close down its cement factory for three months. The court was unmoved by the defendants' argument that their production of cement was vital to the public interest at a time of expansion in house building, and that they were the only producers of cement in the country;<sup>25</sup> and in *Miller v Jackson*,<sup>26</sup> it was held that the playing of cricket on a particular ground had for many years been a benefit to the whole community, but that it had become a nuisance to the owners of houses built close to the ground because it interfered substantially with the use and enjoyment of the houses.

On the other hand, the utility of the defendant's activity may be relevant, in the sense that if such an activity is carried out *not* for any useful purpose but merely for the purpose of annoying or spiting the plaintiff, it will be actionable in nuisance.<sup>27</sup> Secondly, there is no doubt that 'some consideration will be given to the fact that the offensive enterprise is essential and unavoidable in the particular locality, like a coal mine, quarry or some public utility or service'.<sup>28</sup> Thirdly, since an injunction is a discretionary remedy, the court may refuse to grant it even though the plaintiff has established that the tort of nuisance has been committed.<sup>29</sup>

### Plaintiff's abnormal sensitivity

If the plaintiff suffered damage only because he or his property was abnormally delicate or sensitive, and he would not otherwise have been harmed, the defendant will not be liable in nuisance, for the law expects a person to conform to a reasonable standard of conduct, not to some unusually high standard which the plaintiff seeks to impose. Thus, for example, a plaintiff who has an unduly sensitive nose cannot complain of smells which would not have disturbed a normal person. The leading case concerning abnormal sensitivity is *Robinson v Kilvert*.<sup>30</sup> Here, the defendant, the occupant of a cellar, heated the cellar to a temperature of about 27°C. The heat damaged some unusually sensitive paper which was being stored by the plaintiff in adjoining premises. The plaintiff's claim in nuisance failed, because ordinary paper would have been unaffected by the heat.

On the other hand, if the ordinary use of land would have been affected by the defendant's activities, the claim may succeed. Thus, in *McKinnon Industries v Walker*,<sup>31</sup> where a crop of delicate orchids was damaged by smoke from neighbouring premises, the plaintiff succeeded in a nuisance action, despite the fact that the flowers were unusually delicate, because ordinary flowers would have been similarly affected.

At first sight, the rule in *Robinson v Kilvert* might appear to be contrary to the 'egg-shell skull' rule in negligence,<sup>32</sup> under which abnormally sensitive plaintiffs

24 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 500.

25 *Bellew v Cement Co Ltd* [1948] IR 61.

26 [1977] QB 966. See Buckley, RA (1978) 41 MLR 334.

27 See below, p 163.

28 *Op cit*, Fleming, fn 1, p 390.

29 See *Miller v Jackson* [1977] QB 966.

30 (1889) 41 Ch D 88.

31 [1951] 3 DLR 577.

32 See above, pp 109, 110.

can recover damage for the full extent of their loss, whether such loss was foreseeable or not. However, the rule in nuisance is not really inconsistent with the egg-shell skull principle, since the *McKinnon* case shows that, once the defendant's conduct is found to be unreasonable, the plaintiff can recover for the full amount of his loss, including damage to abnormally sensitive or delicate property.<sup>33</sup> Thus, abnormal sensitivity is relevant only to the initial question: 'was the defendant's conduct reasonable?' If that question is answered in the negative, the egg-shell skull rule will be applied.

### Defendant's malice

That the defendant carried on his activity with the sole or main purpose of causing harm or annoyance to the plaintiff is a factor to be taken into account in deciding whether his conduct was reasonable. 'Malice' in this context means 'spite', 'ill-will' or 'evil motive'. Thus, where, out of spite, the defendant fired guns on his land close to the boundary of the plaintiff's land during breeding time in order to cause the plaintiff's silver foxes to miscarry, he was held liable in nuisance for the damage to the foxes, since harmful conduct cannot be reasonable where it is motivated by malice.<sup>34</sup> And where, in retaliation for the noise made by the plaintiff's music lessons in an adjoining house, the defendant persistently whistled, shouted and beat trays against the party wall, it was held that the conduct of the defendant was an actionable nuisance and would be restrained by an injunction, since its purpose was malicious, whereas the plaintiff's conduct was reasonable and, therefore, not actionable.<sup>35</sup> (A Caribbean example is *Outar v Sookram* (see below, pp 171–73).)

### Duration of the harm

The question of the duration of the harm complained of may arise in two contexts:

- (a) It has been said that the essence of nuisance is a continuing state of affairs on the defendant's land which causes damage to the plaintiff,<sup>36</sup> for example, a factory emitting constant noise and fumes, or a golf course or cricket pitch so sited that balls are frequently struck on to the plaintiff's adjacent land. The actual damage to the plaintiff's property may arise from a single isolated occurrence (such as where, owing to defective electrical wiring in the defendant's house, a fire broke out which destroyed the plaintiff's neighbouring house),<sup>37</sup> but the essence of the nuisance is the continuing state of affairs (in this latter example, the faulty wiring).
- (b) A relevant factor in determining the reasonableness of the defendant's conduct is whether it is temporary or permanent. Thus, a mere temporary inconvenience, such as noise and dust from demolition or building work on the defendant's land, may not be unreasonable, whereas a permanent inconvenience, such as noise and smoke emanating from the defendant's

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33 *McKinnon Industries Ltd v Walker* [1951] 3 DLR 577, p 581.

34 *Hollywood Silver Fox Farm Ltd v Emmett* [1936] 2 KB 468.

35 *Christie v Davey* [1893] 1 Ch 316.

36 *Bolton v Stone* [1950] 1 KB 201, p 213.

37 *Spicer v Smee* [1946] 1 All ER 489.

factory, is more likely to be held unreasonable and, therefore, actionable. Furthermore, it is a well established principle of equity that an injunction will not be granted to restrain a nuisance which is merely temporary, except in extreme cases,<sup>38</sup> and the plaintiff will thus be confined to seeking damages.

*Private nuisance in the Commonwealth Caribbean*

Some of the factors relating to reasonableness in nuisance actions which may be taken into account by courts in the Caribbean were discussed in *Greenidge v Barbados Light and Power Co Ltd*, *Sheppard v Griffith*, *Dehandschutter v Parkhill Holdings Ltd* and *Outar v Sookram*.

**Greenidge v Barbados Light and Power Co Ltd (1975) 27 WIR 22,  
High Court, Barbados**

The plaintiff owned a number of apartments, two of which he and his family occupied and the remainder of which he let out to tourists. He complained that the defendant's power station discharged offensive fumes and smoke over his property and caused excessive noise in and about the apartments. He claimed that annoyance and discomfort were being caused to himself, his family and his tenants, and that he had suffered loss in the business of letting his apartments. He called three visitors to the island as witnesses in support of his allegations.

*Held*, in determining whether or not an actionable nuisance existed, the court was to apply the standards of the ordinary, reasonable resident of the particular district. Since there was no evidence that such persons were inconvenienced by the defendant's activities, the defendant was not liable in nuisance.<sup>39</sup> Williams J said:

The law of nuisance undoubtedly is elastic, as was stated by Lord Halsbury in *Colls v Home and Colonial Stores Ltd*.<sup>[40]</sup> He said:

What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings; and yet an excess of smoke, smell and noise may give a cause of action; but in each of such cases it becomes a question of degree, and the question is in each case whether it amounts to a nuisance which will give a right of action. This is a question of fact.

The following is a much quoted passage from the judgment of Luxmoore J in *Vanderpant v Mayfair Hotel Co Ltd*:<sup>[41]</sup>

Apart from any right which may have been acquired against him by contract, grant or prescription, every person is entitled as against his neighbour to the comfortable and healthy enjoyment of the premises occupied by him, and, in deciding whether in any particular case his right has been interfered with and

38 *De Keyser's Royal Hotel Ltd v Spicer Bros Ltd* (1914) 30 TLR 257.

39 Compare *St Lawrence Apartments Ltd v Downes* (1995) High Court, Barbados, No 428 of 1993 (unreported), where a number of local residents gave evidence that they had been disturbed by excessive noise from the defendant's night club. The plaintiff's claim in nuisance was successful. See below, p 179.

40 [1904] AC 179, p 185.

41 [1929] All ER 296, p 308.

a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions obtaining among the English people... It is also necessary to take into account the circumstances and character of the locality in which the complainant is living. The making or causing of such a noise as materially interferes with the comfort of a neighbour, when judged by the standard to which I have just referred, constitutes an actionable nuisance, and it is no answer to say that the best known means have been taken to reduce or prevent the noise complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Again, the question of the existence of a nuisance is one of degree, and depends on the circumstances of the case.

The present case is concerned with nuisance by noise, smell and smoke. As the passages cited above amply show, such nuisance is something to which no absolute standard can be applied and it is always a question of degree whether the interference with comfort or convenience is so substantial as to constitute a nuisance. In determining whether or not a nuisance exists, all relevant circumstances must be taken into account. The character of the neighbourhood is an important one of these considerations and the test to be applied is an objective one to accord with the standard of the ordinary reasonable and responsible person living in the locality.

The premises of the defendant company are situated in an area zoned for industrial development. There are oil installations in the same area. The premises of the West Indian Rum Refinery are there and so also is an undertaking at which gas imported in bulk is put into cylinders. There is a fish shed at which persons assemble to buy fish when the boats bring them in. In the Physical Development Plan for the Island, which, according to Mr Luther Bourne, was completed in 1967 and published in 1970, 35 acres were set aside for an industrial zone... It would clearly be a grave matter for those living in the Island if the defendant company had to shut down its generating plant at Spring Garden even for a day. But the court, though it would grieve to have to impose such a hardship on the Island's inhabitants, can only apply the law of the land, and the law has always insisted that an owner of property cannot use his property unreasonably, and it is an unreasonable use of property to cause substantial damage to another.

The law of nuisance does not allow as a defence that the place is a convenient or suitable one for committing the nuisance or that the business or operations causing the nuisance is useful to persons generally in spite of its annoyance to the plaintiff. It is likewise no defence to say that the best known means have been taken to reduce or prevent the nuisance complained of, or that the cause of the nuisance is the exercise of a business or trade in a reasonable and proper manner. Moreover, the fact that an area is an industrial one does not rule out the possibility of an actionable nuisance on the ground of excessive noise. In *Rushmer v Polsue and Alfieri Ltd*, Cozens-Hardy LJ said:<sup>42</sup>

It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door, and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer that the steam-hammer is of the most modern approved pattern and is reasonably worked.

In this case, therefore, the defendant cannot simply point to the fact that its operations are in an industrial area or that the plaintiff chose to put up his apartments next to this area, and claim immunity from action.

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42 [1906] 1 Ch 234, p 250.

On the other hand, the plaintiff cannot put up his apartments next to an industrial area and expect to apply standards of noise, smoke and smell which are alien to that locality. As I said earlier, the standard in respect of discomfort and inconvenience from noise, smoke and smell that I have to apply is that of the ordinary reasonable and responsible person who lives in the Spring Garden locality. As Veale J said in *Halsey v Esso Petroleum Co Ltd*,<sup>43</sup> this is not necessarily the same as the standard which the plaintiff chooses to set up for himself. Neither, I may add, is it the standard which tourists and visitors to the Island expect or seek to demand. It is, as Veale J said in the same case:<sup>44</sup>

...the standard of the ordinary man, who may well like peace and quiet, but will not complain, for instance, of the noise of traffic if he chooses to live on a main street in an urban centre, nor of the reasonable noises of industry if he chooses to live alongside a factory.

The plaintiff gave evidence himself and reinforced this by the testimony of three visitors to the Island. In doing so, he gave the court the unenviable task of determining whether the standard of the ordinary, reasonable and responsible local has been breached, by an evaluation of evidence given by visitors from other countries who do not live in comparable settings and whose standards may be vastly different from those of the ordinary Spring Garden local, and who furthermore are here on vacation and may well be expecting their surroundings to match their mood.

This difficulty is a real one. I have not the slightest doubt that there is noise, and at times there is smoke and smell, emanating from the defendant's premises. But whether or not the interference with comfort and convenience has reached the stage at which it constitutes the tort of nuisance is a matter of degree. And it depends on what the locals who live there think. There is evidence that there are about 15 chattel houses in the vicinity of the defendant's premises—some even nearer to those premises than the plaintiff's apartments. People live in these houses. I have not had the benefit of the views and experience of any of these persons...

In my view, the crucial evidence in this case is that of the plaintiff himself, and the success or failure of his case depends on whether or not I can conclude from his testimony that the defendant has interfered in a substantial way with the comfort and convenience of the ordinary, reasonable and responsible resident of the district. As indicated earlier, this depends essentially on whether or not I can regard the plaintiff as speaking as such a person, or whether, in testifying about the excessive noise and the offensive smoke and smell, he is applying standards alien to the locality. His evidence must be carefully evaluated.

(Williams J evaluated this evidence and concluded that it was unsatisfactory. He therefore found for the defendant.)

### **Sheppard v Griffith (1973) High Court, Guyana, No 320 of 1971 (unreported)**

The defendant operated a hotel in New Amsterdam, Berbice. The plaintiff lived in an adjacent house situated only about two metres from the hotel. The plaintiff complained of noise from a juke box which was played in the hotel at all hours, especially between midnight and 4 am every night, and from 'dancing, clapping and loud talking' and the pelting of glasses and bottles. The plaintiff alleged that he was compelled to move from his bedroom, which was near to the hotel boundary, and sleep on the floor in another part of the house. The plaintiff protested to the defendant but his protests were ignored.

43 [1961] 2 All ER 145, p 151.

44 *Ibid*, pp 151–52.

*Held*, the defendant's conduct amounted to an unreasonable interference with the plaintiff's enjoyment of his land and constituted an actionable nuisance. The plaintiff was entitled to damages and an injunction restraining the defendant from playing the juke box after midnight.<sup>45</sup> Massiah J said:

The issue for determination is whether or not that situation constitutes a nuisance to the plaintiff. In my judgment, it does. Generally speaking, a nuisance is an interference with a person's use or enjoyment of land or of some right connected with it but such interference must, of course, be substantial if the plaintiff is to succeed.

One cannot define what degree of noise in terms of decibels constitutes a nuisance. The circumstances of each case must be closely examined and the position determined thereby, and not by an abstract consideration of the particular offending act *per se*. I had to weigh up and consider, therefore, all the circumstances of this matter, including the respective interests of the parties, bearing in mind the fact that the defendant runs an hotel and that music must obviously be good for his business. It may well be that many of the hotel's patrons who are devotees of music and with whom this nightly playing seems to have become almost a cult, would not go there if there were not a coin operated juke box on the premises. The defendant said that he requires a juke box for his business, and I believe him.

But this does not give the defendant the right to make as much noise as he cares. The juke box has to be played with due consideration for the peace and quiet to which the defendant's neighbours are entitled. That is not to say that the plaintiff must expect to enjoy absolute and permanent stillness as if living in a classic void; he would have to bear a reasonable degree of noise from the hotel, occasioned by the juke box and the patrons for whom the hotel caters, but he must not be made to suffer the nightly torment of loud noise which persists until almost dawn.

It appears to me that it is in this civilised balancing of the competing and divergent interests of the respective parties that the tort of nuisance has its jurisprudential roots. For though it is true that one has freedom to make noise, one does not have an absolute right to make as much noise as one pleases. The restraint which the law in its wisdom accordingly imposes was explained with admirable felicity by Lord Watson in *Allen v Flood*. He said as follows:<sup>[46]</sup>

No proprietor has an absolute right to create noise upon his own land, because any right which the law gives him is qualified by the condition that it must not be exercised to the nuisance of his neighbours or of the public. If he violates that condition, he commits a legal wrong.

I regard that as a correct statement of the law and I would adopt it.

This question is discussed in *Halsbury's Laws of England*, 3rd edn, Vol 28, p 136, under the heading 'General Principles'. The passage reads thus:

Apart from any limit to the enjoyment of his property which may have been acquired against him by contract, grant, or prescription, every person is entitled, as against his neighbour, to the comfortable and healthful enjoyment of the premises owned or occupied by him, whether for pleasure or business. In deciding whether in any particular case this right has been invaded and a nuisance thereby caused, it is necessary to determine whether the act complained of is an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions...

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45 See also *Calliste v Spronk* (2000) High Court, Grenada, No 559 of 1997 (unreported).

46 [1898] AC 1, p 101.

The next passage on the same page, under the heading ‘Noise and Vibration’, reads thus:

The making or causing to be made of such a noise or vibration as materially interferes with the ordinary comfort of the neighbouring inhabitants, when judged by the standard previously stated, is an actionable nuisance, and one for which an injunction will be granted.

In my view, the noise of which complaint is made materially interferes with the ordinary comfort of the plaintiff. In reaching that conclusion, I addressed my mind generally to the circumstances of the case and, in particular, to the following factors, that is to say, the nearness of the buildings to each other, the time when the noise is made, the frequency of the noise, the nature and degree of the noise and the effect produced by the noise. I shall deal briefly with each of those heads.

#### *Nearness of the buildings*

The Fountain’ is about eight feet north of the plaintiff’s house and is separated from it by a fence 10 ft high. The fence does not appear to reduce the noise very much, if at all.

#### *Time when noise is made*

The plaintiff’s evidence is that the coin operated juke box is ‘mostly played after cinema hours, from about 12 midnight until 4 am next day’. That bit of evidence weighed very heavily with me. Night is meant for sleep, and although one’s neighbour would have to endure some noise during the night, and perhaps even up to midnight, it is wrong to expect him to put up with loud noise after midnight and up to 4 am. (In *Christie v Davey*,<sup>[47]</sup> the court expressed the view that a neighbour should cease playing a cello at 11 pm—houses separated by a party wall.)

#### *Frequency of noise*

The plaintiff’s evidence is that the noise from the juke box is heard every day; Simon said ‘almost every night’. This continuous situation is clearly an interference with the comfort to which the plaintiff is entitled.

#### *Nature and degree of noise*

The noise comes from a juke box and is very loud. Loud music, even when euphonious, can be disturbing. But quite apart from that, the plaintiff had to cope with clapping, noisy talking and, sometimes, crashing bottles and drinking glasses.

The noise produced by those collective sources in the early hours of the morning must be quite unbearable.

#### *Effect of the noise*

The noise prevents the plaintiff from listening to his radio and makes normal conversation in his home impossible. But, much worse than that, it affects his sleep and has forced him, for three years now, to give up the comfort of his bedroom and sleep on the floor in a southern gallery. This situation appears to be permanent...

Counsel for the defendant urged on me that ‘unless there is malice or motive to disturb, then the defendant’s intention must be considered as well as his conduct’. He was no doubt referring to the principle that a degree of noise not otherwise actionable may be regarded as an actionable nuisance if it is caused maliciously—see

47 [1893] 1 Ch 316, pp 326, 327.

48 *Ibid.*

49 [1936] 2 KB 468, pp 474–76.

*Christie v Davey*,<sup>[48]</sup> *Hollywood Silver Fox Farm Ltd v Emmett*<sup>[49]</sup>—and was asserting that in this case the defendant was not acting maliciously. Counsel stressed that the defendant obtained police permission to hold the dances and that the plaintiff did not oppose the defendant's application for an hotel licence or for its renewal.

The true position is that if there is no malice, the test for nuisance by noise is one of degree. Lord Selborne put it this way in *Gaunt v Fynney*:<sup>[50]</sup>

A nuisance by noise (supposing malice to be out of the question) is emphatically a question of degree. If my neighbour builds a house against a party wall next to my own, and I hear through the wall more than is agreeable to me of the sounds from his nursery or music room, it does not follow (even if I am nervously sensitive or in infirm health) that I can bring an action to obtain an injunction. Such things, to offend against the law, must be done in a manner which beyond fair controversy *ought to be regarded as exceptional and unreasonable*.

On this aspect of the matter, the words of Lord Loreburn LC in *Polsue and Alfieri Ltd v Rushmer*<sup>[51]</sup> are worth repeating. He was dealing with a complaint that noise from a printing works situated in an industrial environment specially devoted to the printing trade amounted to a nuisance to the plaintiff who lived next door. The court at first instance found for the plaintiff and the House of Lords affirmed that decision. Lord Loreburn said:<sup>[52]</sup>

The law of nuisance undoubtedly is elastic, as was stated by Lord Halsbury in the case of *Colls v Home and Colonial Stores Ltd*. He said:<sup>[53]</sup>

What may be called the uncertainty of the test may also be described as its elasticity. A dweller in towns cannot expect to have as pure air, as free from smoke, smell and noise as if he lived in the country, and distant from other dwellings; and yet an excess of smoke, smell and noise may give a cause of action; but in each of such cases *it becomes a question of degree*, and the question is in each case whether it amounts to a nuisance which will give a right of action. This is a question of fact.

And later, on the same page, he said as follows:

I agree with Cozens-Hardy LJ when he says: It does not follow that because I live, say, in the manufacturing part of Sheffield, I cannot complain if a steam-hammer is introduced next door and so worked as to render sleep at night almost impossible, although previously to its introduction my house was a reasonably comfortable abode, having regard to the local standard; and it would be no answer to say that the steam-hammer is of the most modern approved pattern and is reasonably worked.'

I accept that the defendant obtained police permission for the dances he used to hold and no one questions that his premises are properly licensed, but it cannot be too strongly emphasised that the defendant cannot with justification play his juke box and make noise of *an unreasonable and excessive degree* to the detriment of his neighbour, although this is done in pursuance of his business. To think otherwise is to misconceive the legal position. I agree with the opinion expressed by Blackburn J in *Scott v Firth*. He said as follows:<sup>[54]</sup>

A further point has been raised by the plea that the grievances complained of were caused by the defendant in the reasonable and proper exercise of his trade in a reasonable and proper place. My opinion is that, in law, that is no answer to the action. I think that that cannot be a reasonable and proper exercise of a trade which has caused such injury to the plaintiff as she complained of.

50 (1873) 37 JP 100.

51 [1907] AC 121.

52 *Ibid*, p 123.

53 [1904] AC 179, p 195.

54 (1864) 176 ER 505, p 506.

In that case, the plaintiff complained that the defendant had built a mill near to her cottages and fitted it with steam-hammers, the vibration and noise from which had caused her tenants to abandon the cottages. The evidence was that the vibration had cracked the cottage walls. (See, also, *Ball v Ray*,<sup>[55]</sup> where a stable keeper was restrained from using his stable in such a way as to be a nuisance to the plaintiff; and *Thorpe v Leacock*,<sup>[56]</sup> where loud noises were caused by hammering and welding machines in the defendant's workshop.)

It is true that in this matter the question of malice did not arise and that the juke box is an important facet of the defendant's business, but I found, for reasons already stated, that the degree of noise was excessive and unreasonable, and disturbing to the plaintiff's comfort and enjoyment of his premises.

### **Dehandschutter v Parkhill Holdings Ltd (1982) High Court, Barbados, No 655 of 1980 (unreported)**

The plaintiff sought damages for nuisance arising out of the construction by the defendant of a block of apartments at St Lawrence Gap, Christ Church, Barbados. The plaintiff lived in a house adjacent to the land on which the building operations were carried out. The works lasted for a period of about 10 months. The plaintiff complained of, *inter alia*, noise, dust, smells from burning tyres, and the projection of a bright light into her bedroom. There was evidence of animosity between the defendant's manager, E, and the plaintiff, who had from the beginning objected to the construction of the apartment block next to her premises.

*Held*, on the evidence, nuisance had been established and the plaintiff was entitled to damages. Williams J said:

Bearing in mind that from the start [the plaintiff] opposed the project as it was planned, I must take care to see that her complaints about nuisance do not really mask an intention to get back at Mr Edghill for having failed to have his project modified to suit her wishes. In other words, if I am to give damages to the plaintiff for any nuisance, the whole of the evidence must be considered and not the mere word of the plaintiff. Noise there was, dust there was, and no doubt some smoke and some smell, but what I must always seek to determine is whether the noise, dust, smoke or smell interfered in a substantial measure with the comfort, convenience and enjoyment by the plaintiff of her residence.

I wish to refer to two passages from the judgment of Sir Wilfred Greene MR in *Andreae v Selfridge and Co Ltd*. He said:<sup>[57]</sup>

The judge's views on those matters came into the reasoning of his judgment in this way. He found that, by reason of all three operations, there was a substantial interference with the comfort of the plaintiff in the reasonable occupation and use of her house, such that, assuming damage to be established, an actionable nuisance would be constituted. But it was said that when one is dealing with temporary operations, such as demolition and rebuilding, everybody has to put up with a certain amount of discomfort, because operations of that kind cannot be carried on at all without a certain amount of noise and a certain amount of dust. Therefore, the rule with regard to interference must be read subject to this qualification, and there can be no dispute about it, that in respect

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55 (1873) 37 JP 500.

56 (1965) 9 WIR 176.

57 [1938] 1 Ch 1, p 5.

of operations of this character, such as demolition and building, if they are reasonably carried on and all proper and reasonable steps are taken to ensure that no undue inconvenience is caused to neighbours, whether from noise, dust or other reasons, the neighbours must put up with it.

The other passage, on which counsel for the plaintiff relies heavily, is as follows:<sup>[58]</sup>

I desire here to make one or two general observations on this class of case. Those who say that their interference with the comfort of their neighbours is justified because their operations are normal and usual and conducted with proper care and skill are under a specific duty, if they wish to make good their defence, to use that reasonable and proper care and skill. It is not a correct attitude to take to say: 'We will go on and do what we like until somebody complains.' That is not their duty to their neighbours. Their duty is to take proper precautions, and to see that the nuisance is reduced to a minimum. It is no answer for them to say: 'But this would mean that we should have to do the work more slowly than we would like to do it, or it would involve putting us to some extra expense.' All those questions are matters of common sense and degree, and quite clearly it would be unreasonable to expect people to conduct their work so slowly or so expensively, for the purpose of preventing a transient inconvenience, that the cost and trouble would be prohibitive. It is all a question of fact and degree, and must necessarily be so.

Williams J then reviewed the evidence and concluded that there was substance in the plaintiff's complaints. He continued:

In my opinion, the very close proximity of the plaintiff's dwelling made it imperative on the defendant to exercise care and take proper steps to see that its activities on the site did not cause undue and unreasonable discomfort or disturbance to the plaintiff in the enjoyment of her dwelling. In my judgment, Mr Edghill never addressed his mind to these matters. The consideration uppermost in his mind was the meeting of the deadline set for opening. And he never gave a thought to any adjustment or modification of the operations he had planned. After a while he came to regard the plaintiff as a nuisance and this explains the actions which he took to annoy her; the placing of the tyres on the fire and directing the light on her bedroom.

The plaintiff's most severe discomfort came from the noise. She was only a matter of a few yards away from it on the occasions when the machines were working in the late evening. It was only occasional, but it cannot be ignored. The dust would have caused inconvenience and some discomfort. The light would have interrupted her sleeping habits. She presumably would have done as Mrs Mitchell did and sought her rest in a part of the house away from the light. The discomfort from the smoke and smell caused by the burning of the tyres would have been of a transient character.

### **Outar v Sookram [1953] LRBG 51, Supreme Court, British Guiana**

The lower flat of a two storey building was let by the defendant to the plaintiff. The defendant occupied the upper flat and, during the continuance of the tenancy, the plaintiff complained of various acts of annoyance emanating from the defendant's premises, such as excessive noise and the dripping of water and/or urine from the upper flat to the apartment below. There was some evidence that the defendant wished the plaintiff to vacate the lower flat so that the defendant could use it in expanding her business, and that the plaintiff was unwilling to move.

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58 *Ibid*, pp 9, 10.

*Held*, the acts of the defendant, if isolated, would not amount to a nuisance, but the cumulative effect was such that a nuisance was established, especially since they were done maliciously. Stoby J said:

The authorities are clear that, in the absence of motive, the question of noise as a nuisance is one of degree; see *Christie v Davey*.<sup>[59]</sup>

Putting the plaintiff's evidence at its highest, I could not regard the hammering on the night of 18 April as by itself constituting a nuisance.

The occupier of a house in a busy village area cannot expect the quietude associated with residence in a lonely country district, where the silence of night is unbroken save for the noises expected in tropical parts.

A neighbour who selects the night time to repair his signboard is being inconsiderate of the welfare of his fellow citizens, but he is not necessarily thereby committing a nuisance. I said 'not necessarily' because his conduct must be examined in the light of past and subsequent events.

I turn now to the subsequent events of 27 April, 7 May and 9 July. I say at once that the occupier of the lower flat of premises should not be over-sensitive in relation to the behaviour of the occupants of the upper flat. This type of dwelling house in this colony is not soundproof, nor is the flooring of the average house waterproof. The accidental upsetting of a vase or water jug, causing water to percolate below, ought to be overlooked by a reasonable tenant, but this does not mean that conduct which, if isolated, would not be actionable does not become actionable when repeated and the cumulative effect thereof is considered. Believing as I do that it was urine and not water which descended into the plaintiff's quarters on the dates abovementioned, and bearing in mind the conduct of the defendant's husband when remonstrated with on the first occasion, I have come to the conclusion that the dripping of urine was no mere domestic misfortune but deliberately done to annoy and inconvenience the plaintiff.

Taking this view of these acts, the hammering of 18 April is placed in its true perspective and was done, I have no doubt, with a malicious motive.

In coming to the conclusion that the defendant's conduct was actuated by malice, I have taken note of the condition of the premises as seen by me when I visited at the request of the defendant's counsel. An extension of the lower portion of the building was in progress. This extension, according to the defendant, was for the purpose of letting it, when completed, as a parlour. The plaintiff carries on a parlour, and if there is no enmity between him and the defendant, then it is an extraordinary act of friendship to install a competitor next to him in the same building. The more plausible explanation is that the defendant is intent on expanding her own business, and the plaintiff's reluctance to move is delaying this expansion.

I have endeavoured to show that while the acts of the defendant, her servants or agents, if isolated, may not be treated as a nuisance, yet the cumulative effect of those acts causes me to so regard them. I have also found that there was malice within the principle of such cases as *Christie v Davey* and *Hollywood Silver Fox Farm Ltd v Emmett*.<sup>[60]</sup>

On these findings, I conceive that the defendant would also be liable in negligence. In *Abelson v Brockman*,<sup>[61]</sup> the plaintiff occupied the ground floor and the defendant the third and fourth floors of the same building. The defendant's employees, without his knowledge, were in the habit of emptying tea leaves into a sink leading from his premises to a pipe, and in consequence the pipe was choked and an overflow of water ensued. The water came through the ceiling of the plaintiff's rooms and did

59 [1893] 1 Ch 316.

60 [1936] 2 KB 468.

61 (1890) 54 JP 119.

damage to certain goods. It was held that the plaintiff was entitled to recover, as a duty was cast upon the defendant to prevent an overflow, which duty he had failed to discharge.

The defendant owed a duty to the plaintiff to prevent water or urine going through the plaintiff's ceiling. The acts which took place were not the malicious acts of strangers, nor were they due to latent defects.

### *Interference with rights of access*

This is an aspect of the law of nuisance which has been before courts in the Commonwealth Caribbean on a number of occasions. Where an obstruction on the highway prevents the owner or occupier of property adjoining the highway from gaining access to his property, the person responsible for the obstruction may be held liable in public nuisance (on the ground that the owner or occupier has suffered particular damage over and above that suffered by the general public) or in private nuisance (for interference with a private right).

In *Boxill v Grant*,<sup>62</sup> the plaintiff complained that access from the public road to his workshop was being blocked by the defendant's parking of vehicles in such a way as to prevent the plaintiff and his customers from entering and leaving the plaintiff's premises with their vehicles. In considering the applicable principles of law, Williams CJ (Ag) said:<sup>63</sup>

I can hardly do any better than quote from the judgment of Lord Hanworth MR in *Harper v GN Haden and Sons Ltd* where, after examining the authorities, he set out the propositions which the cases established:<sup>64</sup>

- (1) A temporary obstruction to the use of the highway or to the enjoyment of adjoining premises does not give rise to a legal remedy where such obstruction is reasonable in quantum and duration.
- (2) If either of those limitations is exceeded, so that a nuisance to the public is created, the obstruction is wrongful, and an indictment to abate it will lie.
- (3) If an individual can establish (a) a particular injury to himself beyond that which is suffered by the rest of the public; (b) that the injury is directly and immediately the consequence of the wrongful act; (c) that the injury is of a substantial character, not fleeting or evanescent, he can bring his action and recover damages for the injury he has suffered.

These propositions had earlier been stated in similar terms by Brett LJ in *Benjamin v Storr*.<sup>65</sup>

In *Fritz v Hobson*,<sup>66</sup> Fry J considered not only those principles which are applicable when an individual suffers private injury from a public nuisance, but he also considered the principles applicable where there is interference with the private right of entrance from the highway to adjoining property. He stated:<sup>67</sup>

62 (1978) 13 Barb LR 72 (High Court, Barbados).

63 *Ibid*, p 75.

64 [1933] Ch 298, p 304.

65 (1874) LR 9 CB 400.

66 (1880) 14 Ch D 542.

67 *Ibid*, pp 553–54.

Where the private right of the owner of land of access to a highway is unlawfully interfered with, he may recover damages from the wrongdoer to the extent of his loss of profits in his business carried on at the place.

Williams CJ (Ag) held that, in the present case, 'a nuisance to the public was created, but on the evidence the plaintiff can point to nothing constituting an injury to his business... The access to his premises was obstructed for a short while, but the plaintiff has not shown any way in which his business would have suffered. If indeed there was injury, there can be no escape from the conclusion that it would not have been of a substantial character'. The plaintiff's claim therefore failed.

Another example of this type of case is *Hall v Jamaica Omnibus Services Ltd*, where the claim in nuisance succeeded.

### **Hall v Jamaica Omnibus Services Ltd (1966) 9 JLR 355, Court of Appeal, Jamaica**

The appellant erected a wall along the boundary of his premises adjacent to a public sidewalk in Kingston, for the purpose of providing advertising spaces for rent. Shortly afterwards, the respondents erected a bus shelter on the sidewalk immediately in front of the main advertising space of the appellant's wall, despite the appellant's objections. The bus stop was placed about 8 cm from the wall and was so close that it not only prevented the appellant from displaying and advertising material, but deprived him of access to the wall for the purposes of cleaning and painting it.

*Held*, the appellant had a right of access to his wall and he had been denied this right by reason of the bus shelter. The respondents were therefore liable for damages in private nuisance. Duffus P said:

I am of the view that Rowlatt J in *Cobb v Saxby*<sup>[68]</sup> stated the law quite correctly when he said that the owner of land adjoining a highway has the right of passing from his premises on to the highway, and if that right is obstructed he is a person who has a cause of action by reason of the interference with or obstruction to his private right, and similarly, I agree with him that the owner of a wall on his land has the right (subject, of course, to various statutory restrictions) to do anything he likes to the wall, for example, to display advertisements thereon; but I think that the learned judge went too far when he stated that if anyone prevented the public from gazing at the advertisements on the wall, the rights of the owner of the wall were invaded. To my mind, if this were so, it would mean that the owner of land would be entitled to a right of view from his land which Hardwicke LC (in *AG v Doughty*)<sup>[69]</sup> and Chelmsford LC (in *Butt v Imperial Gas Co*)<sup>[70]</sup> have stated clearly is not the law, and so, *a fortiori*, it surely cannot be the law that the owner has a right for the public passing along the public highway to view his land.

On the facts established by the appellant in the instant case, it seems quite clear, however, that the appellant has been denied the right of access to his wall by reason of the bus shelter. It is quite clear that the shelter is so constructed and is placed so close to the plaintiff's wall that he is prevented not only from placing advertisements thereon, but from cleaning, painting or repairing the wall, and this would be a clear negation of his right of access thereto.

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68 [1914] 3 KB 822, p 825.

69 (1752) 28 ER 290.

70 (1866) 2 Ch App 150.

### *Overhanging trees*

Where the branches of trees growing on the defendant's land overhang neighbouring land, the owner or occupier of the latter property has the right to abate the (private) nuisance by cutting off the overhanging branches; and if the overhanging trees cause damage to crops on the neighbouring land, the owner of the latter may also recover damages for the harm suffered.<sup>71</sup> And where trees overhang the highway and cause injury or damage to a person on the highway, the occupier will be liable in public nuisance, on the ground that the person injured has suffered 'particular damage' over and above that suffered by the general public. In the Caribbean, *Somairsingh v Harpaulsingh* is an example of the former case and *Charles v Charles* is an example of the latter. Further, *Titus v Duke* is authority for the proposition that no action lies in private nuisance in respect of damage suffered by a person in occupation of the same premises on which the nuisance arose—in this case, damage from a falling sapodilla tree.

#### **Somairsingh v Harpaulsingh [1942] LRBG 82, Full Court, British Guiana**

S was the tenant of a room on certain premises over the yard of which hung the branches of a breadfruit tree growing on the adjoining premises occupied by H. S cut down the overhanging branches of the tree, and the question was whether he had a right to do so by way of abatement of nuisance. H argued, *inter alia*, that S was not entitled to abatement, since he was not the owner of the premises affected by the nuisance, but was only a tenant of one room situated on the premises. Verity CJ said:

There does not appear to be anything in the authorities...which limits the right to abate a nuisance to the legal owner of the premises... We are of the opinion that the rights of the tenant or occupier do not differ in this matter either in kind or degree from those of the owner.

The question then arises as to whether or not the overhanging branches constituted a nuisance in fact at the time when the appellant cut them, even though there is no evidence that at that time they were actually dropping leaves or fruit in the premises occupied by the appellant. It appears from the opinion of the Lord Chancellor in *Lemmon v Webb*<sup>72</sup> that the mere fact that branches overhang the adjoining land gives the owner of that land a right to cut them, though his Lordship expressed the view that 'it may be and probably is generally a very unneighbourly act to cut down the branches of overhanging trees unless they are really doing some substantial harm'... If the branch was a nuisance by the mere fact of its overhanging, which is so, and if the appellant had the right to cut it in order to abate that nuisance, which he had, then his motive in doing so is immaterial.

#### **Charles v Charles (1973) High Court, West Indies Associated States, St Vincent Circuit, No 153A of 1967 (unreported)**

The plaintiff, a police constable, was walking along a public highway when a coconut fell from one of the defendant's trees, which was overhanging the highway, and fractured his shoulder. On two previous occasions, persons on the highway

<sup>71</sup> *Smosher v Carryl* [1921] LRBG 45 (Supreme Court, British Guiana).

<sup>72</sup> [1895] AC 1.

had been struck by coconuts falling from the defendant's trees and the defendant had been informed of this but had done nothing about it. She had been served with a notice by the Public Works Department requiring her to have her overhanging trees cut, but she had failed to comply.

*Held*, the defendant was liable in both negligence and nuisance. Peterkin JA said:

To those who live in colder climates, there is nothing quite so capable of conjuring up a picture of seventh heaven as a tropical strand fringed with coconut palms. The tree is seldom ever associated with harm. The ensuing facts, however, bear testimony that in other given circumstances it is capable of causing considerable hurt. They stand uncontroverted, and are as follows... [Peterkin JA narrated the facts and continued]

...

There is little authority on the question of liability for accidents caused by trees overhanging the highway from adjoining property. The matter, however, is of importance to all persons who have land with trees growing upon that land close to the road.

It has been contended on behalf of the defendant that in this case there was a natural user of the land, and that the plaintiff, having become aware of the danger, ought to have avoided it. With regard to user, it is conceded that the principle in *Rylands v Fletcher*<sup>[73]</sup> has no application to the present case. Coconut trees are a usual and normal incident of the West Indian countryside. To grow such a tree is one of the natural uses of the soil. On the question of avoidance, the plaintiff does admit in the course of his evidence that he was aware that the trees were overhanging the highway, and that it was within his knowledge that two people had previously been struck in passing, namely, his mother, and one Durrant. However, he went on to explain that, on the day he was struck, he did not know that there were dry coconuts on the trees overhanging the highway. According to plaintiff's witness, Arthur King, the road was 12 ft wide, and the trees were overhanging to such an extent that to avoid any risk one would have had to walk alongside the drain on either side. We know, then, that to have avoided being struck, the plaintiff could have used the drains, trespassed on adjoining soil, or even perhaps have run the proverbial gauntlet. But all this is, to my thinking, beside the point. The fact is that the plaintiff was exercising his common law right in relation to the highway of passing and repassing.

Now, what is the law in those circumstances? The plaintiff has sued in nuisance, or alternatively in negligence, but what has to be determined in this case is the same thing: whether the claim is in nuisance or in negligence. The plaintiff has to show that the defendant was guilty of the neglect of some duty in allowing such a position to have arisen and continued, having become aware of it.

As to negligence, the law, as I see it, is that the owner of land which has trees upon it adjoining the highway, and which are found to be dangerous, has a duty cast upon him to have them removed if there is a danger of their causing harm to anyone who is lawfully upon the roadway.

As to nuisance, the law is laid down in the case of *Noble v Harrison*<sup>[74]</sup> and approved in the case of *Cunliffe v Bankes*.<sup>[75]</sup> It is as follows:

A person is liable for a nuisance constituted by the state of his property:

- (a) if he causes it;
- (b) if, by the neglect of some duty, he allows it to arise; and
- (c) if, when it has arisen without his own act or default, he omits to remedy it within a reasonable time after he did or ought to have become aware of it.

73 (1866) LR 1 Exch 265. See below, Chapter 8.

74 [1926] 2 KB 332.

75 [1945] 1 All ER 459.

As Singleton J puts it in the case of *Cunliffe v Bankes*,<sup>176</sup> those who have property of this kind have to realise there is a duty to the public. In the instant case, the danger was made manifest to the defendant, and she has failed lamentably in her duty to remedy it.

**Titus v Duke (1963) 6 WIR 135, Court of Appeal,  
Trinidad and Tobago**

The defendants/appellants let a dwelling house to the plaintiff/respondent. On the premises, at the back of the house, there was a large sapodilla tree whose branches overhung a shed which the respondent had erected for use as a garage for his car. The respondent alerted the appellants to the fact that the tree had become affected by wood ants and that there was a danger that a branch would fall and cause damage, but the appellants retorted that the respondent should leave the tree as it was and that, if he was not satisfied with the situation, he should quit the premises. Later, a branch suddenly snapped and fell, wrecking the shed and damaging the respondent's car which was parked there. The respondent brought an action against the appellants for, *inter alia*, nuisance.

*Held*, the appellants were not liable in nuisance, since the respondent was the occupier of the very premises from which the nuisance arose. Wooding CJ said:

The learned petty civil court judge who tried the action held the appellants liable in nuisance and awarded the respondent damages in the sum of \$175 together with his costs of suit. In so doing, he appears not to have appreciated that, in effect, the respondent's claim was for damage suffered upon premises occupied by him, which was attributed to a nuisance proceeding from the self-same premises. The essence of a private nuisance, which is the allegation in the instant case, is that there has been some wrongful interference with the use or enjoyment of land or premises by the continuance of a state of things, notwithstanding awareness of the danger thereby threatened, upon other premises in the occupation or, it may be in some cases, in the ownership of the person to whom it is sought to attach liability. Thus, in *Sedleigh-Denfield v O'Callaghan*,<sup>177</sup> Lord Atkin stated that, for the purpose of ascertaining whether the plaintiff therein could establish a private nuisance:

...nuisance is sufficiently defined as a wrongful interference with another's enjoyment of his land or premises by the use of land or premises either occupied or in some cases owned by oneself.

As there must, therefore, be offending premises separately occupied from the premises affected by the alleged nuisance, no question of nuisance can properly arise herein.

## WHO CAN SUE?

### Private nuisance

Since private nuisance is essentially an interference with the use and enjoyment of land, the traditional view is that only a person who has an interest in the land affected is entitled to bring an action.<sup>78</sup> Thus, an owner in fee simple or a lessee under a lease will have a sufficient interest in the land to maintain an action. A

<sup>76</sup> *Ibid.*

<sup>77</sup> [1940] AC 880, pp 896–97.

<sup>78</sup> *Malone v Laskey* [1907] 2 KB 141.

person having no legal or equitable interest in the property, such as a guest, a lodger or a member of the owner's family, cannot sue for private nuisance;<sup>79</sup> their only course will be to sue in negligence in respect of any damage they may have suffered personally. A departure from this rule occurred in Canada, where the Court of Appeal of New Brunswick held in *Devon Lumber Co Ltd v MacNeill*<sup>80</sup> that an occupier's children, who had no legal or equitable interest in the family home, could nevertheless maintain an action in nuisance for interference with their enjoyment of the property by reason of dust emanating from the defendant's cedar mill; but the rule has been emphatically re-affirmed by the House of Lords in *Hunter v Canary Wharf Ltd*,<sup>81</sup> where it was held that the tort of nuisance is concerned with the plaintiff's enjoyment of his rights over land, and only a person with a right to exclusive possession of the land affected, such as a freeholder, a tenant in possession or a licensee with exclusive possession, can sue.

Even a person who has an interest in the land cannot sue if he is not in possession but has only a reversionary interest. Thus, where property is let to a tenant having exclusive possession, the landlord cannot maintain an action in nuisance in respect of any activity of the defendant which occurs during the tenancy,<sup>82</sup> unless he can show that the activity has caused or is likely to cause permanent damage to the property, for example, damage due to vibrations set up on the defendant's land,<sup>83</sup> which will injure his reversionary interest.

It is uncertain whether even a plaintiff who has an interest in land can recover damages for harm to chattels or for personal injuries. Damages have been awarded in some cases of harm to chattels<sup>84</sup> and refused in others.<sup>85</sup> It appears that there is no English case in which damages for personal injuries have been recovered in private, as opposed to public, nuisance, though the Canadian courts have allowed such claims.<sup>86</sup> It seems that, once the plaintiff has established an interference with his user of land, he should be able to recover by way of consequential damages for harm to his chattels and for personal injury. Thus, for example, the owner of land who proves a nuisance caused by noxious fumes from the defendant's factory should be able to recover damages for any illness he has suffered thereby. However, in *Hunter v Canary Wharf Ltd*, Lord Lloyd appeared to deny this possibility. He said:<sup>87</sup>

The essence of private nuisance is easy enough to identify...namely, interference with land or the enjoyment of land... The effect of smoke from a neighbouring factory is to reduce the value of the land. There may be no diminution in the market value. But there will certainly be loss of amenity value so long as the nuisance lasts... If the occupier of land suffers personal injury as a result of inhaling the smoke, he may have a cause of action in negligence, but he does not have a cause of action in nuisance for his personal injury, nor for interference with his personal enjoyment. It follows that the question of damages in private nuisance does not depend on the number of those enjoying the land in question. It also follows that the only persons entitled to

79 *Ibid.*

80 (1988) 45 DLR (4th) 300. See Kodilinye, G (1989) 9 LS 284.

81 [1997] 2 All ER 426.

82 *Cooper v Crabtree* (1882) 20 Ch D 589.

83 *Colwell v St Pancras BC* [1904] Ch 707.

84 *Eg, Midwood v Manchester Corp* [1905] 2 KB 597; *Halsey v Esso Petroleum Co Ltd* [1961] 2 All ER 145.

85 *Cunard v Antifyre Ltd* [1933] 1 KB 551.

86 *Devon Lumber Co Ltd v MacNeill* (1988) 45 DLR (4th) 300.

87 [1997] 2 All ER 426, p 442.

sue for loss in amenity value of the land are the owner or the occupier with the right to exclusive possession.

In the Barbadian case of *St Lawrence Apartments Ltd v Downes*,<sup>88</sup> the plaintiff company brought an action in nuisance, complaining that the nightly playing of excessively loud music in the defendant's nearby night club seriously interfered with its business—an apartment hotel catering to tourists—and had caused loss of profits. The defendant argued that, as a limited liability company, the plaintiff was not competent to bring the action, as it was incapable of residing in property and of suffering the sensation of discomfort from noise. King J rejected this contention, holding that a company may sue in nuisance by, *inter alia*, noise, provided that it pleads occupation of the premises affected and can show that its property has diminished in value or has suffered loss through interference with its business.<sup>89</sup> He continued:

Occupation by a company must be different from that by an individual, about whom Lush J said in *R v St Pancras Assessment Committee*:<sup>90</sup> 'If however, he furnishes it and keeps it ready for habitation whenever he pleases to go to it, he is an occupier, although he may reside in it one day a year.'

A company may furnish a place and keep it ready for habitation, but it cannot ever reside as an individual can. Occupation must, therefore, be based on different criteria. I would think that if a company carries on its business at a place, keeps staff there and through them provides services for its clients, it is in occupation. I hold that the plaintiff herein, by owning the hotel, carrying on its business there and maintaining its staff there over a 24 hour period to provide services for its guests, is in occupation.

## Public nuisance

As we have seen, any person who can show that he has suffered particular damage over and above that suffered by the general public can sue for public nuisance.<sup>91</sup> Particular damage includes, *inter alia*, injury to land and chattels and personal injuries. The range of persons who may sue for public nuisance is, therefore, wider than that of private nuisance, in that in public nuisance:

- (a) the plaintiff need not have an interest in land; and
- (b) the plaintiff can recover damages for personal injuries.

In *Castle v St Augustine's Links Ltd*,<sup>92</sup> for example, a taxi driver was driving his taxi along a public highway when he was hit in the eye by a golf ball which was struck from the defendants' nearby golf course. His action for damages for the loss of the eye succeeded on the ground that the positioning of the golf course so close to the highway as to endanger passersby constituted a public nuisance, and the plaintiff had suffered particular damage. No action in private nuisance would have been possible, since the plaintiff had no interest in land and he had suffered only personal injuries.

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88 (1995) High Court, Barbados, No 428 of 1993 (unreported).

89 Following *St James Estates Ltd v Sunset Crest Rentals* (1977) 29 WIR 18 (High Court, Barbados), p 20, *per* Douglas CJ.

90 (1877) 2 QBD 381.

91 See above, pp 157, 158.

92 (1922) 38 TLR 615.

## WHO CAN BE SUED?

The proper defendant in an action for public or private nuisance is the person who bears 'some degree of personal responsibility'<sup>93</sup> for it. He may be:

- (a) the creator of the nuisance;
- (b) the occupier of the premises from where the nuisance emanates; or
- (c) in certain circumstances, the landlord who is out of occupation of such premises.

### The creator

Whoever creates a nuisance may be sued for it, whether or not he is in occupation of the land from which it emanates.<sup>94</sup> The example commonly given of liability of the creator of a nuisance is that of the builder of a house which obstructs the neighbouring landowner's easement of light or easement of way.<sup>95</sup> The liability is a continuing one, including not merely the wrongful act itself, but the continuance of the wrongful state of affairs which results from it; and it has been held that it is no defence that the creator of the nuisance has no power to remove it without committing a trespass because the land from which the nuisance emanates is in the occupation of a third party.<sup>96</sup>

### The occupier

Usually, the occupier of the land from which the nuisance emanates will be liable for it. 'Occupier', as is usual in the law of torts, means the person having control of premises, whether personally or through his servants or agents. In most cases, the occupier will also be the creator of the nuisance (for example, where he causes unreasonable noise or noxious fumes to be emitted from his factory; or where he builds a wall on his land which collapses and damages the plaintiff's adjoining property), but that will not necessarily be so. Where the occupier is not also the creator, the following principles will apply:

- (a) if the nuisance is created by the occupier's servant acting in the course of his employment, the occupier will be liable on ordinary principles of vicarious liability;
- (b) if it is created by an independent contractor engaged by the occupier, the latter will generally not be liable. But where the contractor is employed to do a job which involves special risk of nuisance, for example, construction work on or near the highway, the occupier will be under a 'non-delegable' duty to ensure that care is taken,<sup>97</sup> and if the contractor creates a nuisance, the occupier will be liable for it;

93 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880, p 897, per Lord Atkin.

94 *Op cit*, Winfield and Jolowicz, fn 24, p 514.

95 See Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 68.

96 *Thompson v Gibson* [1835-42] All ER Rep 623.

97 *Matania v National Provincial Bank* [1936] 2 All ER 633.

- (c) if it is created by a licensee of the occupier, for example, the occupier's guest, lodger or visiting relative, the occupier will not be liable unless he knew or ought to have known of the nuisance and failed to take steps to control the licensee;<sup>98</sup>
- (d) if it is created by a trespasser (over whom the occupier has no control) or results from an act of nature, the occupier will not be liable, unless:
- he does or ought to know of its existence; and
  - he 'adopts' the nuisance by using the state of affairs for his own purposes, or 'continues' the nuisance by failing to take reasonably prompt and effective steps to abate it;<sup>99</sup>
- (e) if the nuisance existed before the occupier acquired the property, he will not be liable unless he knew or ought to have known of its existence and failed to take reasonable steps to abate it;<sup>100</sup>
- (f) in all of the above cases, the creator of the nuisance<sup>101</sup> will himself be liable;
- (g) if the nuisance is created by natural forces, for example, by storm or landslide, the occupier will be liable if he fails to take reasonable steps to abate it and damage is caused thereby.<sup>102</sup> Thus, in the Trinidadian case of *Hernandez v Alta Garcia Quarry Ltd*,<sup>103</sup> the defendant was held liable in nuisance where, as a result of heavy rains and flooding, silt and rubble were brought down from the defendant's quarry and settled on the plaintiff's cocoa and avocado pear trees. Des Des J considered that the working of the quarry was a hazard and that some damage was foreseeable.

### The landlord

Where land is let to a tenant, he has exclusive possession and, generally, it is he, and not the landlord, who can be sued for any nuisance occurring during the period of the tenancy<sup>104</sup> But a landlord can be sued where:

- (a) he expressly or impliedly authorised the tenant to create the nuisance, for example, where L let premises to T for a purpose which both parties knew would cause unreasonable noise;<sup>105</sup>
- (b) he let land on which there was already a nuisance for which he was himself responsible, and he knew or ought to have known of the existence of the nuisance before he let the land;<sup>106</sup> or

98 *White v Jamieson* (1874) LR 18 Eq 303.

99 *Sedleigh-Denfield v O'Callaghan* [1940] AC 880.

100 *St Anne's Well Brewery Co Ltd v Roberts* [1928] All ER Rep 28.

101 Ie, the servant, the independent contractor, the licensee or the trespasser.

102 *Goldman v Hargrave* [1966] 2 All ER 989; *Leakey v National Trust* [1980] 1 All ER 17; *Cudjoe v AG* (1982) High Court, Trinidad and Tobago, No 683 of 1972 (unreported).

103 (1981) High Court, Trinidad and Tobago, No 2298 of 1979 (unreported). Cf *Wheatley v Coder* (1999) High Court, Trinidad and Tobago, No 1498 of 1992 (unreported) (defendant liable in negligence for damage caused by a tall coconut tree falling onto plaintiff's neighbouring property, as the defendant should have been aware of the dangerous state of the tree and had taken no steps to remove or give warning of the danger).

104 *Cheetham v Hampson* (1791) 100 ER 1041.

105 *Harris v James* [1874–80] All ER Rep 1142; *St Lawrence Apartments Ltd v Downes* (1995) High Court, Barbados, No 428 of 1993 (unreported).

106 *St Anne's Well Brewery Co Ltd v Roberts* [1928] All ER Rep 28.

- (c) in the case of a nuisance arising from failure to repair, where he covenanted in the lease to repair, or he reserved to himself a right to enter and repair, or he had an implied right to enter and repair.<sup>107</sup>

### Nuisance and strict liability

A question which has long been debated is whether or not private nuisance is a tort of strict liability. Put in another way, must the plaintiff prove fault on the defendant's part in order to succeed in a nuisance action? This question was given an authoritative answer by Lord Goff in *Cambridge Water Co v Eastern Counties Leather plc*.<sup>108</sup> Lord Goff's analysis may be summarised thus:

- (a) in cases where an injunction is claimed, fault is irrelevant because the sole issue is whether future conduct should be restrained, not whether the defendant is to be made liable for what has happened in the past;
- (b) in cases where nuisances arise from natural causes or the acts of third parties, liability in effect depends on negligence on the defendant's part, and so, proof of fault is necessary;
- (c) in cases where the defendant or his servant or agent is the creator of the nuisance, liability is strict, in the sense that the fact that the defendant has taken all reasonable care is not in itself a defence. If the defendant's use of his land is unreasonable and interferes with his neighbour's enjoyment of his land, he will be liable for the harm, however carefully he may have tried to avoid it.

### *The rule in Wringe v Cohen*

Under the rule in *Wringe v Cohen*:<sup>109</sup>

If, owing to want of repair, premises on a highway become dangerous and, therefore, a nuisance, and a passerby or an adjoining owner suffers damage by their collapse, the occupier, or the owner if he has undertaken the duty of repair, is answerable, whether he knew or ought to have known of the danger or not.

This principle was applied by Fox JA in the Jamaican Court of Appeal in *Malabre v Gordon*.<sup>110</sup> In this case, the plaintiff/respondent was walking on the sidewalk of a public highway when a sign board, which was affixed to the wall of a two storey building, fell on him and caused injury. Luckhoo and Graham-Perkins JJA found for the defendant on other grounds, but Fox JA, dissenting, took the view that the rule in *Wringe v Cohen* was applicable and that the landlord of the building, of which part had been let to a tenant, was liable to the plaintiff. He explained the position thus:<sup>111</sup>

[The *dictum* in *Wringe v Cohen*] is *obiter* because the case was concerned with the liability of the owner of tenanted premises for damages in nuisance caused by the fall of a projection, a decayed gable-end, onto the roof of an adjoining shop; the case had nothing to do with the fall of a projection over a highway. The actual decision has

<sup>107</sup> See *op cit*, Winfield and Jolowicz, fn 24, p 521.

<sup>108</sup> [1994] 1 All ER 53.

<sup>109</sup> [1940] 1 KB 229.

<sup>110</sup> (1974) 12 JLR 1407.

<sup>111</sup> *Ibid*, p 1416.

been the subject of adverse comment (see notes in (1940) 56 LQR pp 1–5; 140–144). In excluding negligence from the liability for artificial projections over the highway, and in making liability in that special category of nuisance nearly as strict as the rule in *Rylands v Fletcher*, the dictum in *Wringe v Cohen* runs counter to the trend in recent cases towards subsuming the tort of nuisance under the general standard of care denoted by liability for negligence. This trend was intensified in *The Wagon Mound (No 2)*<sup>[112]</sup> when Lord Reid said in a sentence ranked as an example of judicial legislation based on policy rather than upon reason, logic or precedent:<sup>[113]</sup>

It could not be right to discriminate between different cases of nuisance so as to make foreseeability a necessary element in determining damages in those cases where it is a necessary element in determining liability, but not in others. So the choice is between it being a necessary element in all cases of nuisance or in none.

Just before these observations,<sup>[114]</sup> Lord Reid had noticed *Wringe v Cohen* with neither approval nor denial. Perhaps Lord Reid recognised that where the safety of the general public was at stake, particularly when artificial projections on premises adjacent to a highway collapsed, there was substance in the proposition that the liability of the owner or occupier of the building to a person on the highway who was injured as a result of the collapse, should be gauged not in terms of fault, or of a lapse from the standards of the reasonable man, but by the resolution of opposing interests and needs in order that the lesser in social value is made to give way before the greater.

### Abatement of nuisance

The normal judicial remedies for nuisance are damages and/or an injunction to restrain continuance. There is also the ancient extra-judicial remedy of abatement, an example of which is the right of an occupier of land to cut off the branches of a neighbour's tree which overhang his property.<sup>115</sup> Another example of the availability of the remedy in the Caribbean occurred in *Gobin v Lutchmansingh*.<sup>116</sup> There, a wall on G's land, near to the boundary with L's land, collapsed, depositing rubble and dirt on L's property. It was held that L had the right to abate the nuisance by entering G's property and excavating a portion of land on the common boundary in order to remove the debris. Davis J explained the nature of the remedy thus:

*Halsbury's Laws of England*, 3rd edn, Vol 28, para 202, p 150, lays down what is meant by abatement. It provides as follows:

Abatement means the summary removal or remedy of a nuisance by the party injured without having recourse to legal proceedings. It is not a remedy which the law favours and is not usually advisable. There is authority for saying that its exercise destroys any right of action in respect of the nuisance.

Normally, notice of abatement ought to be given, but this is subject to the exception that, in case of emergency, a nuisance may be abated without notice in order to protect life or property. Further, abatement without notice may be justified, although involving entry on the land of another, where [that other] is the original wrongdoer bringing into existence the nuisance... The exercise of the right of abatement destroys any right of action in respect of the nuisance...

112 [1966] 2 All ER 709.

113 *Ibid*, p 717.

114 *Ibid*, p 716.

115 See above, p 175.

116 (1987) High Court, Trinidad and Tobago, No MO 5361 of 1986 (unreported).

It seems to me that the principles I have set out above apply in the circumstances of this case, having regard to the facts as I have found them. In other words, the defendant in my view had a right which he exercised to abate a nuisance. The question is, did he do more damage than was necessary? If he did more damage than necessary, he would be liable in trespass.

Davis J concluded on the evidence that the defendant had not done more damage than was necessary.

## DAMAGES

Nuisance is derived from an action on the case and not from trespass, and so is not actionable *per se*: damage must normally be proved by the plaintiff. Thus, as we have seen, in public nuisance the plaintiff must prove that he has suffered some particular damage over and above that suffered by the general public; and in private nuisance he must show sensible material injury to his property or substantial interference with his enjoyment of his land. But there are three classes of case where damage need not be proved. They are:

- (a) where, on the facts, damage can be readily presumed. For example, where the defendant built a house so that one of the cornices projected over the plaintiff's adjoining land, the court presumed that damage would be caused by rain water dripping from the cornice on to the plaintiff's land;<sup>117</sup>
- (b) where the defendant interferes with an easement or right of access of the plaintiff;<sup>118</sup>
- (c) where harm to the plaintiff is reasonably feared to be imminent though none has actually occurred, then an injunction may be granted in a *quia timet* action.<sup>119</sup>

## DEFENCES

Certain general defences are available to defendants in nuisance actions, though most are somewhat restricted in their application. For instance, it seems that contributory negligence can be invoked only where the nuisance complained of is based on negligent conduct, and not where it is the intended result of an intentional act of the defendant;<sup>120</sup> *volenti non fit injuria* may be available, provided that there is no negligence on the defendant's part;<sup>121</sup> and 'act of a stranger' will be a defence only where the defendant was not at fault in failing to notice the nuisance or in failing to take steps to abate it. Another possible defence is necessity, which lies where, in order to avoid an imminent peril to himself, the defendant takes some action which unavoidably causes damage to the plaintiff. For example, it has been held that a landowner whose property is threatened by an incursion of flood water

117 *Fay v Prentice* (1845) 135 ER 789.

118 *Nicholls v Ely Beet Sugar Factory Ltd* [1936] Ch 343.

119 *AG v Manchester Corp* [1893] 2 Ch 87.

120 See *op cit*, Brazier, fn 15, p 371. Winfield and Jolowicz (*op cit*, fn 24, p 527) assume that the defence of contributory negligence is available in private nuisance; Salmond and Heuston (*op cit*, Heuston and Buckley, fn 95, p 70) suggest that the defence is available in public nuisance, but not in private nuisance.

121 *Kiddle v Business Properties Ltd* [1942] 1 KB 269.

is entitled to erect barricades on his land, even if the foreseeable result is the flooding of his neighbour's property by the diverted water.<sup>122</sup>

### Statutory authority

An important defence to liability in nuisance is statutory authority. In modern times, legislatures frequently impose duties upon or give powers to public authorities to perform certain functions for the public benefit, such as the supply of water and electricity or the disposal of sewage. Where a nuisance is caused in the course of carrying out such duties or powers, the public authority may sometimes escape liability by pleading statutory authority. The rule seems to be that, where a statute authorises the doing of a particular act which will inevitably cause a nuisance, any resulting harm will not be actionable, provided that all reasonable care and skill, according to the current state of scientific knowledge, has been taken.<sup>123</sup>

A distinction is drawn between statutory provisions which are *mandatory* (that is, impose a mandatory obligation upon a public authority to supply a service) and those which are merely *permissive* (that is, give the authority a discretion as to whether to execute the authorised works). Where damage is caused in the course of carrying out a mandatory obligation, the authority will not be liable in nuisance<sup>124</sup> or under the rule in *Rylands v Fletcher*,<sup>125</sup> provided that it was not negligent. In Lord Sumner's words, 'if the legislature has directed and required the undertaker to do that which caused the damage, his liability must rest upon negligence in his way of doing it, and not upon the act itself'.<sup>126</sup> This is so even where the statute contains a 'nuisance clause', that is, a clause to the effect that nothing in the statute should exonerate the undertaker from liability in nuisance,<sup>127</sup> for, as Sellers LJ pointed out, gas, electricity and water are all capable of doing damage, and a strict or absolute liability for any damage done by them would convert the undertakers of these services into insurers.<sup>128</sup> In the case of permissive powers, on the other hand, 'the fair inference is that the legislature intended the discretion to be exercised in strict conformity with private rights'.<sup>129</sup> This means that, in carrying out a permissive power, the undertaker may be strictly liable in nuisance or under *Rylands v Fletcher* for any harm caused, whether it has been negligent or not, at least where there is a nuisance clause.

122 *Nield v London and North Western Rly* (1874) LR 10 Ex 4, p 7. But in *Vaccianna v Bacchus* (1964) 8 JLR 497 (Court of Appeal, Jamaica), it was held that the defendant must not do more than is reasonably necessary for the protection of his land. Thus, where the defendant did not merely dig a drain on his own land, leading water off his land, but also dug a drain from a pond on adjacent land, which caused excessive flooding of the plaintiff's property, he was liable in nuisance.

123 *Manchester Corp v Farnworth* [1930] AC 171; *Hinsey v Bahamas Electricity Corp* (2001) Supreme Court, The Bahamas, No 1146 of 1996 (unreported). See Kodilinye, G (1990) 19 Anglo-Am LR 72.

124 *Department of Transport v North-West Water Authority* [1984] 1 AC 336.

125 *Green v Chelsea Waterworks Co* (1894) 70 LT 547; *Martins v L King and Sons Ltd* (1978) High Court, Guyana, No 1881 of 1977 (unreported).

126 *Charing Cross Electricity Supply Co v Hydraulic Power Co* [1914] 3 KB 772, pp 782, 783.

127 *Dunne v North Western Gas Board* [1963] 3 All ER 916.

128 *Ibid*, p 922.

129 *Metropolitan Asylum District v Hill* (1881) 6 App Cas 193, p 213, per Lord Watson.

However, the question as to whether statutory authority is a defence in a given case depends upon a construction of the particular statute.

In *East Demerara Water Conservancy Board v Saliman*,<sup>130</sup> the appellant was under a mandatory statutory duty to construct and manage an artificial reservoir (the 'conservancy') for the supply of water to the general public. A breach occurred in the dam and, owing to the appellant's negligence, a large volume of water escaped and caused damage to the respondents' rice cultivation and livestock. Luckhoo JA, in the Court of Appeal of Guyana, held that the appellant could not be liable for any damage not caused by its negligence:

On a construction of the provisions of the Act, I would hold that the legislature did not intend to impose a liability on the appellant for a thing which no reasonable care and skill could obviate, and, as the whole question depends upon the construction of the particular Act, I could find nothing in the wording of the Act to indicate...strict liability.

However, since the evidence showed negligence on the part of the appellant, it was liable for the damage.

### Ineffectual defences

We have already seen that it is no defence to an action in nuisance that the activity complained of was for the benefit of the community;<sup>131</sup> nor is it a defence that the defendant exercised all care and skill in carrying out his activity,<sup>132</sup> though this is a factor which may be taken into account in determining whether his conduct was reasonable or not. It has also been established that it is no defence that the plaintiff 'came to' the nuisance. Thus, where a plaintiff bought a house close to a noisy and smoky factory, he was held to be entitled to succeed in nuisance, and it was no defence that the factory had been in existence for three years before the plaintiff arrived, since he 'came to the house...with all the rights which the common law affords, and one of them is a right to wholesome air'.<sup>133</sup> This, however, is subject to the principle already mentioned that, where interference with enjoyment of land is complained of, the character of the district must be taken into account. Thus, a plaintiff who chooses to live in an industrial or manufacturing district must put up with the discomfort which the average inhabitant of that district might reasonably expect. In other words, the plaintiff has no right to expect more than the 'local standard' of the district. Thus, in Barbados, for example, what would be a nuisance in Paradise Heights would not necessarily be so in Baxter's Road.

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130 (1976) Court of Appeal, Guyana, Civ App No 69 of 1973 (unreported). Cf *Guerra v AG* (1994) High Court, Trinidad and Tobago, No 2208 of 1986 (unreported) (Ministry of Agriculture held liable for negligent exercise of statutory power to carry out water works to prevent flooding).

131 See above, pp 161, 162.

132 See *op cit*, Heuston and Buckley, fn 95, p 72.

133 *Bliss v Hall* (1838) 132 ER 758.

## CHAPTER 8

### THE RULE IN *RYLANDS v FLETCHER*

#### INTRODUCTION

Traditionally, the rule in *Rylands v Fletcher*<sup>1</sup> has been regarded as a rule of strict liability. Liability is strict in cases where the defendant is liable for damage caused by his act, irrespective of any fault on his part, or, as it has been expressed, ‘where a man acts at his peril and is responsible for accidental harm, independently of the existence of either wrongful intent or negligence’.<sup>2</sup>

In *Rylands*, the defendants employed independent contractors to build a reservoir on their land. The contractors carelessly omitted to block up some disused shafts on the site which communicated with the plaintiffs’ coal mine beneath the reservoir, so that, when the reservoir was filled, water escaped down the shafts and flooded the plaintiffs’ mine. The defendants’ conduct did not appear to come within the scope of any existing tort: they were not liable for trespass, because the damage was not direct and immediate; or for nuisance, because the damage was not due to any recurrent condition or state of affairs on their land; or for negligence, because they had not been careless, and they were not liable for the negligence of their independent contractors.<sup>3</sup> However, they were held strictly liable for the damage on the basis of the following rule propounded by Blackburn J, which is now known as the rule in *Rylands v Fletcher*.<sup>4</sup>

The person who for his own purposes [and in the course of a *non-natural* user of his land]<sup>5</sup> brings on his land and *collects and keeps there* anything likely to do mischief if it *escapes*, must keep it at his peril and if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape.<sup>6</sup>

The rule in *Rylands v Fletcher* has some affinities with nuisance, and it has been said that ‘the law of nuisance and the rule in *Rylands v Fletcher* might in most cases be invoked indifferently’.<sup>7</sup> It is certainly true that the same facts may easily give rise to liability in both causes of action,<sup>8</sup> but there are some fundamental differences:

- (a) *Rylands v Fletcher* liability is confined to the accumulation of *physical objects* which escape and do damage; nuisance is not so confined and covers interference caused by intangibles such as noise and smells;

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1 (1866) LR 1 Exch 265, affirmed (1868) LR 3 HL 330.

2 Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 307.

3 The case was decided before the emergence of the principle that an employer may be liable for the negligence of his independent contractor where ultra-hazardous activities are involved. See below, pp 350 *et seq*.

4 (1866) LR 1 Exch 265, p 279, 280.

5 This requirement was added by Lord Cairns in the House of Lords, which affirmed the decision of Blackburn J in the lower court.

6 Emphasis added.

7 *Read v Lyons* [1947] AC 156, p 183, *per* Lord Simonds.

8 See, eg, *Midwood v Manchester Corp* [1905] 2 KB 597. Cf *Spicer v Smee* [1946] 1 All ER 489.

- (b) in *Rylands v Fletcher* liability, there must be an accumulation of things, such as water, gas, chemicals or explosives; in nuisance, there is no requirement of accumulation;
- (c) in *Rylands v Fletcher* cases, there must be an escape of the accumulated material from the defendant's land to a place outside that land; in nuisance, an escape is not necessary;
- (d) a plaintiff who is not an occupier of adjoining land may sue under *Rylands v Fletcher*, whereas such a person could not sue in private nuisance;
- (e) liability under *Rylands v Fletcher* is confined to cases of non-natural user of land; there is no such limitation in nuisance.

## FORESEEABILITY

The future of the rule in *Rylands v Fletcher* as a form of strict liability has been put in doubt by the decision of the House of Lords in *Cambridge Water Co v Eastern Counties Leather plc*,<sup>9</sup> in which it was established that the language of Blackburn J in *Rylands v Fletcher* implied that damage must be foreseeable ('the person who for his own purposes brings on his land...anything likely to do mischief if it escapes').<sup>10</sup> It was held that since *Rylands* was essentially an extension of nuisance to cases of isolated escape, the decision in *The Wagon Mound (No 2)*,<sup>11</sup> that foreseeability was essential for liability in nuisance, should also extend to liability under *Rylands*.

The facts of the *Cambridge Water Co* case illustrate the requirement of foreseeability. The defendants in this case were leather manufacturers. Some time before 1971, a chemical known as PCE was spilled on the concrete floor of the defendants' tannery. At that time, the only foreseeable harm from the spillage was that an employee might be overcome by fumes. The chemical seeped into the ground and eventually contaminated water in a borehole more than one mile away, from which the plaintiffs started drawing water in 1979. Following a European Community Directive in 1985, water containing PCE was declared unwholesome and could not lawfully be supplied as drinking water. The plaintiffs incurred expenditure of almost £1 million in developing a new source of water supply, and they claimed that the defendants were liable for this amount. The House of Lords, overruling the Court of Appeal, held that the defendants could not be liable for the loss under nuisance or *Rylands v Fletcher*, as it was unforeseeable.

It remains to be seen whether courts in the Commonwealth Caribbean will follow the principle in the *Cambridge Water Co* case. If past experience is any guide, it is very likely that, being a House of Lords decision, it will be followed. The development is regrettable, however, as public policy on protection of the environment would seem to demand some form of strict liability for ultra-hazardous activities. The House of Lords concluded by suggesting that strict liability was more appropriately imposed by the legislature than by the courts,

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9 [1994] 1 All ER 53.

10 (1866) LR 1 Exch 265, pp 279, 280.

11 [1966] 2 All ER 709.

particularly in the area of environmental pollution; and this may well be the route which Commonwealth Caribbean jurisdictions have to take.

## SCOPE OF THE RULE

### Things within the rule

According to Blackburn J, things within the rule include ‘anything likely to do mischief if it escapes’.<sup>12</sup> They therefore include not only inherently ‘dangerous’ materials such as explosives,<sup>13</sup> gas,<sup>14</sup> petrol<sup>15</sup> or chemicals,<sup>16</sup> but also relatively innocuous things which become hazardous only when accumulated in large quantities, such as water,<sup>17</sup> crude oil<sup>18</sup> and sewage.<sup>19</sup> There may also be liability under the rule for the escape of fire.<sup>20</sup>

### Bringing onto the land and accumulation

The defendant must have brought the thing onto his land and accumulated it there, for the rule applies only to ‘things artificially brought or kept upon the defendant’s land’.<sup>21</sup> Thus, for example, if water flows from the defendant’s underground tunnels into the plaintiff’s mines, whether by percolation or by force of gravity, the defendant will not be liable under the rule if the water is naturally on the defendant’s land and he has done nothing to accumulate it there.<sup>22</sup> But he will be liable if, as in *Rylands v Fletcher* itself, he accumulates the water on his land by constructing a reservoir. Again, the defendant will not be liable for damage caused by the escape of rocks, since they are naturally on the land,<sup>23</sup> but he will be liable if the rocks are thrown onto adjacent land by blasting with explosives.<sup>24</sup> In the case of vegetation, there will be no liability under *Rylands v Fletcher* for its escape if it grows naturally on the land in the form of weeds or other uncultivated growth,<sup>25</sup> but the defendant will be liable for the escape of anything which he plants on his land, since that will constitute an ‘accumulation’,<sup>26</sup> and he may be liable even for the escape of things growing

12 *Rylands v Fletcher* (1866) LR 1 Exch 265, p 279.

13 *Rainham Chemical Works Ltd v Belvedere Fish Guano Co* [1921] AC 465; *Kirton v Rogers* (1972) 19 WIR 191 (see above, p 137); *Darling v Heavy Equipment Construction Co Ltd* (1980) Supreme Court, The Bahamas, No 153 of 1976 (unreported).

14 *Batcheller v Tunbridge Wells Gas Co* (1901) 84 LT 765.

15 *Musgrove v Pandelis* [1919] 2 KB 43.

16 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 1 All ER 53.

17 *Rylands v Fletcher* (1866) LR 1 Exch 265.

18 *Mandraj v Texaco Trinidad Inc* (1969) 15 WIR 251 (see below, p 199).

19 *Humphries v Cousins* (1877) 2 CPD 239.

20 *Musgrove v Pandelis* [1919] 2 KB 43; *Synagogue Trust Ltd v Perry* (1988) 25 JLR 353 (see below, p 193).

21 *Bartlett v Tottenham* [1932] 1 Ch 114, p 131, *per* Lawrence J.

22 *Wilson v Waddell* (1876) 2 App Cas 95.

23 *Pontadawe Rural DC v Moore-Gwyn* [1929] 1 Ch 656.

24 Brazier, M, *Street on Torts*, 9th edn, 1993, London: Butterworths, p 383.

25 *Giles v Walker* (1890) 62 LT 933.

26 *Crowhurst v Amersham Burial Board* (1878) 4 Ex D 5.

naturally on the land in negligence or in nuisance if, knowing of the existence of the danger, he does nothing to abate it.<sup>27</sup>

### Escape

There must be an escape of the accumulated substance from the land where it is kept to a place outside. In the words of Lord Simon:<sup>28</sup> 'Escape, for the purpose of applying the proposition in *Rylands v Fletcher*, means escape from a place where the defendant has occupation or control over land to a place which is outside his occupation or control.' Thus, for instance, there was no escape and, therefore, no liability where the plaintiff, while carrying out her duties inside the defendant's factory, was injured by an explosion which occurred within the factory premises;<sup>29</sup> nor where a poisonous tree on the defendant's land caused the death of a horse which ate its leaves by reaching over from adjacent land, the tree never having extended beyond the defendant's boundary.<sup>30</sup> On the other hand, it was held that there was a sufficient escape where a piece of equipment was thrown from one part of a fairground to another, since each part was occupied by different persons.<sup>31</sup>

It seems that the actual damage caused by the escape need not be immediately caused by the thing accumulated. Thus, for example, where the defendant accumulates explosives for quarrying purposes, and later, during blasting operations, rocks are thrown on to the plaintiff's adjacent land, the plaintiff can recover under *Rylands v Fletcher* for damage caused by the rocks, even though they were not the things which were accumulated.<sup>32</sup>

### Non-natural user

The word 'natural' is used in two distinct senses in this tort. First, it means 'that which exists in or by nature and is not artificial'.<sup>33</sup> Thus, as we have seen, there is no liability for an escape of things naturally on the land, such as rocks. Secondly, it means 'that which is ordinary and usual, even though it may be artificial',<sup>34</sup> and it is in this latter sense that the term 'non-natural user' is generally understood. The best known definition of non-natural user is that of Lord Moulton: 'It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.'<sup>35</sup> It has also been emphasised that non-natural user is a question of fact and 'all the circumstances of time and practice of mankind must be taken into consideration, so that what may be regarded as dangerous or non-natural may vary according to the circumstances'.<sup>36</sup>

27 *Goldman v Hargrave* [1966] 2 All ER 989; *Leakey v National Trust* [1980] 1 All ER 17.

28 *Read v Lyons* [1947] AC 156, p 168.

29 *Ibid.*

30 *Ponting v Noakes* [1894] 2 QB 281.

31 *Hale v Jennings Bros* [1938] 1 All ER 579.

32 *Op cit*, Brazier, fn 24, p 267.

33 Newark, FH (1961) 24 MLR 557, p 561.

34 *Ibid.*

35 *Rickards v Lothian* [1913] AC 263, p 279.

36 *Read v Lyons* [1947] AC 156, p 176.

Thus, in deciding whether a particular user is non-natural, the court will look 'not only at the thing or activity in isolation, but also to the place and manner in which it is maintained and its relation to its surroundings'.<sup>37</sup>

One advantage of this flexible concept of non-natural user is that it can be adjusted to meet changing social needs. In recent times, it has been used by the courts to restrict the scope of the *Rylands v Fletcher* principle, on the ground that what may have been a non-natural user in 1900 would not necessarily be so in 1960 or 1990. For instance, it has been held that:

...the manufacturing of electrical and electronic components in the year 1964... cannot be adjudged to be a special use, nor can the bringing and storing on the premises of metal foil be a special use in itself... The metal foil was there for use in the manufacture of goods of a common type which at all material times were needed for the general benefit of the community.<sup>[38]</sup>

And as far back as 1947, the court hesitated 'to hold that in these days and in an industrial community it was a non-natural use of land to build a factory on it and conduct there the manufacture of explosives'.<sup>39</sup> On this view, even a case such as *Rylands v Fletcher* itself might have been decided differently, for it is arguable that the accumulation of water in a reservoir serving a large city or town is, at the present day, a sufficiently ordinary user of land and sufficiently beneficial to the community to be considered 'natural'.

The process of widening of the definition of 'natural user' was arrested and even put into reverse by the House of Lords in the case of *Cambridge Water Co v Eastern Counties Leather plc*.<sup>40</sup> In this case, the trial judge had held that the accumulation of chemicals by the defendants was a natural user of the land because the creation of employment in the defendants' tannery was for the benefit of the local community. Lord Goff did not accept that the creation of employment was in itself sufficient to make an activity a natural use of land; on the contrary, he considered that the storing of large quantities of industrial chemicals on industrial premises was a classic example of non-natural user. This suggests that Lord Moulton's definition of non-natural user must now be modified—in particular, the part which speaks of 'a use as is proper for the general benefit of the community'. Lord Goff's judgment also casts doubt on *Read v Lyons*, where it was suggested that the manufacture of explosives in wartime was a natural use of land, presumably because it was for the benefit of the community. Lord Goff concluded by suggesting that, since it is now settled that foreseeability of harm is required for liability under *Rylands*, the courts should be less inclined to give a wide definition to natural use.

### *Non-natural user in the Caribbean*

The question as to whether the defendant's user of his land was natural or non-natural has frequently arisen in Commonwealth Caribbean cases. In *Chandat v Reynolds Guyana Mines Ltd*,<sup>41</sup> as we have seen, the plaintiffs' crops were damaged

37 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 308.

38 *British Celanese Ltd v Hunt* [1969] 1 WLR 959, p 963.

39 *Read v Lyons* [1947] AC 156, p 174, per Lord Macmillan.

40 [1994] 1 All ER 53; Weir, T [1994] CLJ 216.

41 (1973) High Court, Guyana, No 249 of 1969 (unreported); see above, p 158.

by emissions of dust from the defendants' bauxite installation. As an alternative to the claim in public nuisance, the plaintiffs contended that the defendants' user of their land was non-natural and that they were liable under *Rylands v Fletcher*. George J seemed to have anticipated the approach of the House of Lords in the *Cambridge Water Co*<sup>42</sup> case when he said that he was not unmindful of the importance of the bauxite industry to the economy of Guyana, but this was not a sufficient reason for holding that the user of the land was natural. Having regard to the existing authorities, George J came to the conclusion that the setting up and operation of a plant for the drying of bauxite ore mined elsewhere was a non-natural user of land and the defendants were liable under *Rylands v Fletcher*.<sup>43</sup>

In the Commonwealth Caribbean, the artificial generation of electricity (notwithstanding that it is for 'the general benefit of the community') has been held to be a non-natural user of land,<sup>44</sup> similarly, the use of explosives for blasting in a quarry<sup>45</sup> or in construction works<sup>46</sup> is a non-natural user. But in *Bata Shoe Co (Jamaica) Ltd v Reid*,<sup>47</sup> it was held that the storage of a 100 lb butane gas cylinder for domestic use in a private house was not a non-natural user, and the occupiers of the property were not liable under *Rylands v Fletcher* for damage caused to neighbouring premises when the cylinder exploded. Campbell J explained the position thus:

The circumstances disclosed by the evidence would not bring into play the rule in *Rylands v Fletcher*. This is so because, even though gas is a dangerous thing, being inflammable and explosive, its supply and installation in quantities as in 100 lb cylinders or 25 lb cylinders on premises for domestic purposes do not constitute a non-natural user of such premises but rather a natural, normal and reasonable modern-day use of the premises. Cases such as *Dominion Natural Gas Co v Collins*<sup>[48]</sup> and *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd*<sup>[49]</sup> doubtlessly reaffirm the principle that persons who extract natural gas from gas-bearing strata, or otherwise accumulate gas in their works and mains for distribution through their mains to consumers as a commercial product, are *prima facie* within the principle of *Rylands v Fletcher*. The gas accumulated in such large quantities constitutes an extraordinary danger and, apart from being dangerous *per se*, represents a non-natural user of land. However, in *Rickards v Lothian*,<sup>[50]</sup> Lord Moulton re-echoed in substance certain words of Lord Cairns in *Rylands v Fletcher* in the House of Lords when he said:

It is not every use to which land is put that brings into play [the principle of *Rylands v Fletcher*]. It must be some special use bringing with it increased danger to others, and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community.

This case clearly affirms the fact that the principle of *Rylands v Fletcher* comes into play only when there is some special use of land, bringing with it increased dangers to others, and that the said principle cannot be invoked where the use to which the

42 *Cambridge Water Co v Eastern Counties Leather plc* [1994] 1 All ER 53.

43 But in *Bridgepaul v Reynolds Metal Co* [1969] LRG 265, Vieira J held that operating a bauxite plant was not a non-natural use of land in Guyana.

44 *Phillips v Barbados Light and Power Co Ltd* (1972) 7 Barb LR 154 (see below, pp 200–03).

45 *Kirton v Rogers* (1972) 19 WIR 191.

46 *Darling v Heavy Equipment Construction Co Ltd* (1980) Supreme Court, The Bahamas, No 153 of 1976 (unreported).

47 (1980) Supreme Court, Jamaica, No CL B-345 of 1976 (unreported).

48 [1909] AC 640.

49 [1936] AC 108.

50 [1913] AC 263, p 280.

land is put consists merely in the ordinary use, or is a use which is proper for the general benefit of the community. In that case, it was held that damage caused to the plaintiff, Lothian, a tenant on the second floor, by water overflowing from a lavatory basin installed by the defendant, Rickards, on the fourth floor of a multi-storey building let to different tenants, did not render Rickards liable under the rule in *Rylands v Fletcher*, since the installation of a proper supply of water to various parts of a house, together with such conveniences like wash hand basins, was a reasonable use of the premises in modern times. Such a use of premises carries with it some danger of leakage and overflow, but the fact of such danger does not make those who install and/or keep such conveniences do so at their peril. They will only be liable on the basis of negligence, even though the duty of care may be very high relative to the danger created.

In *Collingwood v Home and Colonial Stores Ltd*,<sup>[51]</sup> a fire originated in premises adjoining those of the plaintiff, due to some unknown defect in the electric wiring. The plaintiff's premises were damaged by the water used in extinguishing the fire. It was held that the doctrine of *Rylands v Fletcher* does not apply to the use of water, gas or electricity for ordinary domestic purposes, which must be distinguished from the handling of them in bulk in mains or reservoirs.

In *Synagogue Trust Ltd v Perry*, on the other hand, the term 'natural use' was treated as referring to something which existed by nature, so that 'non-natural user' meant the artificial creation of a dangerous state of affairs which did not 'occur according to nature'.

### **Synagogue Trust Ltd v Perry (1988) 25 JLR 353, Supreme Court, Jamaica**

The defendant had lit a bonfire on his land for the purpose of burning dry mango limbs and other debris. The flames were fanned by the wind and quickly spread to the plaintiff's adjoining land, where they destroyed the plaintiff's building and its contents.

*Held*, the defendant was liable under the rule in *Rylands v Fletcher*. There had been an escape of fire, which was a dangerous thing, from the defendant's land in the course of a non-natural user of that land. Morgan J said:

It was not denied that there was a fire or that it got out of control. Fire by itself is a dangerous thing. There was no denial that it was brought on to the land to set fire to leaves and trimmings to burn them. The evidence is that it escaped and did damage to the plaintiff's building. The defendant, however, averred in his defence that 'the use of the fire constituted a natural, ordinary and reasonable use of the defendant's premises'.

The rule of Blackburn J in the case whose name the rule bears is well known:

A person who for his own purpose brings on his land and collects and keeps there anything likely to do mischief if it escapes must keep it at his peril, and if he does not do so he is *prima facie* answerable for all the damage which is the natural consequence of its escape.

It was Lord Cairns, at the hearing in the House of Lords, who introduced the restriction that the rule must apply only to circumstances where the defendant had made a non-natural use of the land.

The fact of what is a non-natural use elicited much argument from counsel for the defence. Indeed, there is no authoritative determination of what a non-natural user of land may be, and so it has become a question of fact for the judge to determine in

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51 [1936] 3 All ER 200.

each case. This has spurred defence counsel to submit that, in making a decision, consideration must be given to all the circumstances of the time and place and that ordinary domestic use does not constitute 'non-natural use' of land. He argued that the burning of bush in Jamaica in one's backyard is so prevalent that it becomes a natural use, and should be considered as a natural, ordinary, domestic use of the land, exempting the occupier of land from strict liability, should damage occur.

Fire is one of the elements like water which is legally regarded as a dangerous thing, and consequently, the principle of *Rylands v Fletcher* applies. (See *Clerk and Lindsell on Torts*, 14th edn, para 1511.)

The tort book speaks of fire in the context of the English situation where, because of climatic conditions, fires are lit inside houses and, following the rule, fire can in certain circumstances be called 'natural use'. As Lord Goddard said in a case where fire escaped from an open fireplace and did damage:

There was an ordinary, natural, proper, everyday use of a fireplace in a room. The fireplace was there to be used.<sup>[52]</sup>

Jamaica happily does not enjoy the climatic changes which England enjoys, and so the use of fire for any such situations as the case above would rarely, if at all, arise. But fire is classified as a dangerous thing in England even though an open fire is a natural use in a house. It is the statute which modifies its strict liability by making available the defence of accident in certain cases. The English Act is the Fires Prevention Metropolis Act 1774. Jamaica has no equivalent statute. This brings me to the very point—if fire which is used ordinarily in England is classified as 'a dangerous thing', what classification ought to be used in Jamaica where fire is not in ordinary use as it is there?

'Natural use of land' means use according to nature, or provided by nature. So leaves falling on the ground littering the land and put in a heap is indeed a 'natural use', that being 'things occurring according to nature', things happening naturally on the land. If, then, the breeze blows and scatters the leaves and fills the neighbour's swimming pool, thereby causing damage to it, that action would undoubtedly in my view be one of 'natural use' and it would escape the strict liability rule. The non-natural use commences only when fire (which is not naturally there) is placed in the heap and the wind blows and the sparks fly and injury results to the roof by setting it on fire.

As was said by Lord Moulton, to make the rule applicable:<sup>[53]</sup>

It must be some special use, bringing with it increased danger to others, and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community.

Following that language, I would say that lighting a fire in an open backyard is a 'special use' which has its dangers in the wind blowing and causing sparks to fly, or danger by way of the fire getting out of hand and travelling to the neighbour's land. Can it be said that it is not a special use of an open fire lit in an area where dwelling houses are situated?

I concur with counsel that fire is commonly used to burn leaves and twigs in the city. True enough, the authorities who are responsible for removing garbage do not regard leaves and trimmings as garbage. The garbage trucks do not remove them from our

52 *Sochaki v Sas* [1947] 1 All ER 344.

53 *Rickards v Lothian* [1913] AC 263, p 280. Somewhat surprisingly, in the Guyanese case of *Martins v L King and Sons Ltd* (1978) High Court, Guyana, No 1881 of 1977 (unreported), it was held that the loading and unloading of cement for the purpose of sale by the defendant was 'some special use of the object...bringing with it increased danger to others'.

dwellings, so alternative methods have to be initiated by householders which will not cause harm to the neighbours. Some persons dig holes and bury them, some heap them in a corner or dry them out and use them as mulch, some more affluent persons use incinerators, and there are other alternatives which, though not numerous, are available. Prevalence or common use could never be a standard by which natural use is judged, and so, an open fire, for whatever purpose, however often it is done, by whatever number of households, must be looked at in the same context of what is a non-natural use. The act of setting fire is not something of nature; it is by itself dangerous and it is being used in a manner which exposes someone or something to harm if it escapes.

Indeed, as defence counsel said, consideration must be given to all the circumstances of time and place. Circumstances differ and the difference and consideration given to the specific cases may well be because of an absence of an authoritative principle. Jamaica has a tropical climate, and the scenic beauty which our visitors enjoy comes from the abundance of flora and vegetation with which we are blessed and also as an island surrounded by the sea. From the sea, gusts of wind are forever blowing and prevalent in every nook and cranny of our island. To set fire to your land and allow it to escape by the sea wind or land wind or wind from the trees can be nothing less than a non-natural use of the land. It matters not whether it is a fire heap in your backyard or a fire set on open land. It is my finding that, in this case, it was a non-natural use and strict liability applies.

It is my view that the 'bold approach' which counsel urged with respect to this aspect of the case is not appropriate to these circumstances.

## DEFENCES

It has been rightly said that there are so many defences and exceptions to liability under the *Rylands v Fletcher* principle that it is 'doubtful whether there is much left of the rationale of strict liability as originally contemplated in 1866'.<sup>54</sup> These defences are described briefly below.

### Consent of the plaintiff

Where the plaintiff has expressly or impliedly consented to the presence of the source of danger, the defendant is not liable unless he has been negligent.<sup>55</sup> This is merely an application of the maxim *volenti non fit injuria*. The defence is most often applied in cases where a tenant in an apartment building suffers damage as a result of water escaping from an upper floor; where, for example, a pipe connected to the mains supply bursts, or where a rat gnaws a hole in a tank on the roof.<sup>56</sup>

The rationale behind this rule is that the water has been brought to the building and collected there for the mutual benefit of both parties and with their express or implied consent; therefore, there is 'no sufficient reason why the risk of accident should lie upon the upper rather than the lower occupant, and the only duty is one of reasonable care'.<sup>57</sup>

<sup>54</sup> *Op cit*, Fleming, fn 37, p 314.

<sup>55</sup> *Carstairs v Taylor* (1871) LR 6 Ex 217.

<sup>56</sup> *Ibid*.

<sup>57</sup> *Op cit*, Heuston and Buckley, fn 2, p 316. An additional ground which will exonerate the defendant in such a case is that the user of the land is natural.

Although, in such cases, the plaintiff is denied the benefit of strict liability, he will succeed if he can prove lack of care on the defendant's part. For example, he will not be deemed to have consented to a flood caused by carelessness in forgetting to turn off a tap,<sup>58</sup> or in blocking up a drain with tea leaves.<sup>59</sup> And if the escape was caused by the act of a stranger, the defendant will be excused only if he was not careless in failing to guard against such act.

### Default of the plaintiff

It was suggested in *Rylands v Fletcher* itself that there would be no liability under the rule if the escape were due to the plaintiff's own default.<sup>60</sup> Thus, in a later case, where the plaintiffs worked a mine under the defendant's canal and were indifferent to the risks of flooding, the defendant was not liable for the escape of water from the canal and the consequent inundation of the mine, since 'the plaintiffs saw the danger and may be said to have courted it'.<sup>61</sup> Alternatively, where the plaintiff's conduct amounts to contributory negligence, the statutory apportionment rule will apply and the damages will be reduced. Another aspect of this defence is that, by analogy with nuisance,<sup>62</sup> there will be no liability if the damage would not have occurred but for the abnormal sensitivity of the plaintiff's property or the use to which it was put. Thus, where the plaintiffs complained that an escape of electricity stored on the defendant's premises interfered with the sending of messages by the plaintiffs through their submarine cables, the action failed, since 'a man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure'.<sup>63</sup> It has been held, however, that, where the plaintiff complains that vibrations from pile-driving on the defendant's land have caused damage to his building, it is no defence to an action under *Rylands v Fletcher* that the plaintiff's building was old and, therefore, abnormally vulnerable to damage from vibrations,<sup>64</sup> since the plaintiff in such a case has not put his property to any special or unusually sensitive use.

### Act of God<sup>65</sup>

Where the escape is the result of 'the operation of natural forces, free from human intervention',<sup>66</sup> the defence of Act of God may be available. Thus, for example, an escape caused by an extraordinarily violent storm, wind or tide, or by an earthquake, may not be actionable. However, the courts have kept this defence within a very narrow compass, and there appears to be only one reported case in which it has been allowed. In this case, *Nichols v Marsland*,<sup>67</sup> the defendant had, for

58 *Ruddiman and Co v Smith* (1889) 60 LT 708.

59 *Abelson v Brockman* (1890) 54 JP 119.

60 (1866) LR 1 Exch 265, p 279.

61 *Dunn v Birmingham Canal Co* (1872) LR 7 QB 244, p 260.

62 See above, pp 162, 163.

63 *Eastern and South African Telegraph Co v Cape Town Tramways Co* [1902] AC 381, p 393.

64 *Hoare and Co Ltd v McAlpine* [1923] 1 Ch 167.

65 See, generally, Hall, CJ (1993) 13 JLS 227.

66 *Op cit*, Fleming, fn 37, p 316.

67 (1876) 2 Ex D 1.

many years, been in possession of some artificial pools formed by damming a natural stream. An extraordinary rainfall, 'greater and more violent than any within the memory of witnesses', broke down the embankments, and the rush of escaping water swept away the plaintiff's bridges. It was held that the defendant was not liable for the damage to the bridges because there had been no negligence on his part and the accident was due directly to an Act of God. The defendant was not to be made liable for an extraordinary act of nature which she could not reasonably have anticipated. Since this case was decided, however, a more stringent test has been formulated. It seems that it is now no longer sufficient to show that the occurrence could not reasonably have been anticipated; it must be shown that human foresight and prudence could not reasonably have recognised the *possibility* of such an event.<sup>68</sup> Or, in the more colourful language of Lord Blanesburgh, there must have been 'an irresistible and unsearchable Providence nullifying all human effort'.<sup>69</sup>

The defence of Act of God was pleaded in the Jamaican case of *Synagogue Trust Ltd v Perry*.<sup>70</sup> There, it was argued that the spread of a fire by wind was an act of God for which the defendant was not liable. Not surprisingly, the contention was rejected by Morgan J. She said:

To avail the defendant, the act must be something which no human foresight could provide against, and something which human prudence was not bound to recognise as possible. A windy day in our fair island is something everyone is bound to recognise, and which every citizen expects and can guard against or take precautions ... That windy day clearly did not fall within what can be determined as an Act of God.

Similarly, in *Brown v AG*,<sup>71</sup> where the deceased had been electrocuted when she came into contact with a live electric wire which had fallen to the ground, the defendant's contention that the blowing down of the wire by the wind was an Act of God was rejected. Hewlett J said:<sup>72</sup>

Act of God is only a defence if it is impossible to provide against the occurrence, and in this case the evidence is that there were some strong winds in Nevis on the night of 8 March 1977. But there is nothing so unusual about occasional strong gusts in the Caribbean. In fact, we are in a hurricane zone, and we know to prepare against hurricanes every year, so it cannot be true to say that strong winds could not reasonably be anticipated.

### Act of a stranger

It is a defence to liability under *Rylands v Fletcher* that the escape complained of was caused by the deliberate act of a stranger which could not reasonably have been anticipated by the defendant. For example, the owner of a vehicle was not liable for damage caused by the act of mischievous children in throwing a lighted match into the petrol tank;<sup>73</sup> nor were the owners of a reservoir liable for the flooding

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68 *Greenock Corp v Caledonian Rly* [1917] AC 556.

69 *The Mostyn* [1928] AC 57, p 93.

70 (1988) 25 JLR 353 (see above, pp 193–95).

71 (1978) 2 OECSLR 331 (High Court, St Christopher/Nevis).

72 *Ibid*, p 333.

73 *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154.

of neighbouring land caused by the deliberate act of a third party in emptying his own reservoir into theirs.<sup>74</sup>

It has been said that for the defence to lie, the stranger's act must have been 'mischievous, deliberate and conscious'.<sup>75</sup> According to this view, merely negligent acts of strangers are not within the defence. This restriction has been rightly criticised on the ground that the basis of the defence is the absence of any control by the defendant over the unforeseeable acts of a stranger on his land, and it ought to be irrelevant whether the stranger's act was deliberate or negligent.<sup>76</sup>

Where, in the circumstances, the defendant should reasonably have anticipated and guarded against the act of the stranger, and yet has failed to do so, he will have no defence and will be liable for his failure to take reasonable care.<sup>77</sup> It is at this point that the torts of *Rylands v Fletcher* and negligence merge, for it seems that 'the ordinary negligence test applies in determining whether, and what, measures of protection against outside interference should appropriately be taken'.<sup>78</sup> Moreover, it seems that a defendant in a *Rylands v Fletcher* situation who fails to take reasonable care to guard against the foreseeable act of a stranger is liable not under *Rylands v Fletcher* but in negligence. Thus, a public utility company which carried natural gas at high pressure under the streets of a city was held liable in negligence for the destruction of the plaintiff's hotel due to an escape of gas and consequent explosion caused by the activities of a third party in constructing an underground sewer in the vicinity. The defendants were liable because the risk involved in their operation was so great that a high degree of care was expected of them; and in failing to guard against the conspicuous activities of the third party, they had failed to discharge their duty of care.<sup>79</sup>

The class of 'strangers' clearly includes trespassers,<sup>80</sup> but there is no clear authority as to which other persons are included. The occupier will be vicariously liable for the defaults of his servants and, in this tort, for those of his independent contractors;<sup>81</sup> and it has been held that the occupier of a fairground was liable for the act of a lawful visitor in tampering with equipment provided for the entertainment of customers.<sup>82</sup> The status of other visitors, however, such as members of the occupier's family, guests, lodgers and casual visitors (for example, messengers delivering messages), is uncertain. Probably the correct view is that the occupier will be liable for the defaults of any such person, unless it is shown that, in the circumstances, he had no control over that person's conduct.<sup>83</sup>

The defence of act of a stranger has succeeded in two Commonwealth Caribbean cases: *Mandraj v Texaco Trinidad Inc*, where the stranger's act was deliberate and

74 *Box v Jubb* (1879) 4 Ex D 76.

75 *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154, p 157, per Singleton LJ.

76 *Ibid*, p 160, per Jenkins LJ.

77 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 552.

78 *Op cit*, Fleming, fn 37, p 318.

79 *Northwestern Utilities Ltd v London Guarantee and Accident Co Ltd* [1936] AC 108.

80 *Mandraj v Texaco Trinidad Inc* (1969) 15 WIR 251 (see below, p 199).

81 *Balfour v Barty-King* [1956] 2 All ER 555.

82 *Hale v Jennings Bros* [1938] 1 All ER 579.

83 *Perry v Kendricks Transport Ltd* [1956] 1 All ER 154.

mischievous; and *Phillips v Barbados Light and Power Co Ltd*, where the act was negligent.

**Mandraj v Texaco Trinidad Inc (1969) 15 WIR 251,  
Court of Appeal, Trinidad and Tobago**

The appellants occupied land at Penal, on which they cultivated rice and reared cattle. The respondents' trunk oil pipeline passed through the Penal area and crossed a watercourse which flowed close to the appellants' land. An oil leak occurred in the pipeline at the point where it crossed the watercourse (which, at the time, was in flood), with the result that a large quantity of oil became deposited on the appellants' land, causing damage both to their cattle and their rice cultivation. The leakage was found to have been caused by an unknown person's deliberately drilling a hole in the pipeline. The respondents promptly stopped the leakage by affixing a metal screw clamp over the hole, but two months later a second leakage occurred. It was discovered that the metal clamp had been removed, again by an unidentified person. The respondents again promptly stopped the leakage, but not before further damage had been caused to the appellants' property.

*Held*, the facts were within the rule in *Rylands v Fletcher*, but the respondents were entitled to rely on the defence of 'act of a stranger' over whom the respondents had no control. De la Bastide JA said:

It was conceded by counsel that the legal liability of the respondent company was *prima facie* governed by the rule in *Rylands v Fletcher*, in which the House of Lords affirmed the decision of the Court of Exchequer Chamber, speaking for whom Blackburn J formulated the rule as follows:<sup>[84]</sup>

The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless while it remains there, will naturally do mischief if it escapes out of his land? It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbours: but the question arises whether the duty which the law casts upon him under such circumstances is an absolute duty to keep it at his peril or is, as the majority of the Court of Exchequer Chamber have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more...

We think that the true rule of law is that the person who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is *prima facie* answerable for all the damage which is the natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or, perhaps, that the escape was the consequence of *vis major* or an Act of God; but, as nothing of the sort exists here, it is unnecessary to inquire what excuse would be sufficient.

It has long been recognised that the deliberate act of a stranger ousts the application of the rule in *Rylands v Fletcher*. In *Rickards v Lothian*, Lord Moulton, delivering the judgment of the Judicial Committee of the Privy Council, after reviewing the relevant authorities, said:<sup>[85]</sup>

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84 (1866) LR 1 Exch 265, p 297.

85 [1913] AC 263, p 279.

Their Lordships...are of opinion that a defendant is not liable on the principle of *Rylands v Fletcher* for damage done by the wrongful act of third persons.

This principle is expressed in 28 *Halsbury's Laws*, 3rd edn, para 196, as follows:

[The rule] also does not apply if the escape was due to the act of a stranger over whose acts the defendant had no control and which was not an act which the defendant ought reasonably to have anticipated and guarded against. It is not material that the stranger was incapable of deliberate volition. The onus of proof that the event causing damage was due to the subsequent deliberate act of a stranger, where the defendants would be liable unless it were so caused, is on them.

**Phillips v Barbados Light and Power Co Ltd (1972) 7 Barb LR 154,  
High Court, Barbados**

A tractor, being driven by B, was ploughing a field when it struck a stay-wire fixed in the ground. The stay-wire was part of the defendant's installation, erected for the purpose of supplying electricity to the district, and the wire was connected to a pole bearing the transmission lines. P, who was standing nearby, was struck by the wire and electrocuted. P's widow brought an action on behalf of P's estate, relying on the rule in *Rylands v Fletcher*.

*Held*: (a) the artificial generation of electricity was a non-natural user of land and the escape of electric energy of a lethal voltage was within the rule; (b) an action in respect of personal injuries was within the rule; but (c) the harm was caused by the unforeseeable act of a stranger and the defendant was, therefore, not liable. Douglas CJ said:

Mr Dear's [counsel for the defendant's] first submission is that the transmission of electricity is not a non-natural user of land. He refers to *Collingwood v Home and Colonial Stores Ltd*,<sup>[86]</sup> where it was held that the domestic use of electrical installations is an ordinary and natural user of land. In the Privy Council decision of *Eastern and South African Telegraph Co v Cape Town Tramways Co*,<sup>[87]</sup> the escape of electricity from the tramway company's system was held to be *prima facie* actionable. In giving the advice of the Board, Lord Robertson said:<sup>[88]</sup>

Electricity (in the quantity which we are now dealing with) is capable, when uncontrolled, of producing injury to life and limb and to property; and in the present instance it was artificially generated in such quantity, and it escaped from the respondents' premises and control. So far as the respondents are concerned, it appears to their Lordships that, given resulting injury such as is postulated in *Rylands v Fletcher*, the principle would apply.

In the instant case, it appears to me that the escape of electricity energy of a lethal voltage from the company's system would come *prima facie* within the rule in *Rylands v Fletcher*...

Mr Dear submits that the entire cause of the accident is to be found in the actions of the tractor driver, Martin Brathwaite, and the deceased; or, put in another way, the effective cause of the accident was the act of a stranger over whom the company had no control and whose act could not reasonably have been foreseen by it.

86 [1936] 3 All ER 200.

87 [1902] AC 381.

88 *Ibid*, p 392.

Counsel cited *Prosser (A) and Son Ltd v Levy*,<sup>[89]</sup> in which the plaintiffs suffered damage when, in circumstances unknown, the stop tap of a redundant pipe was left turned on and water seeped into their shop. The Court of Appeal held that the principle in *Rylands v Fletcher* applied because the owners, being in occupation and control of the passageway where the redundant pipe was situated, and knowing or having the means of knowing of its existence and condition, which rendered it a potential source of danger, were guilty of negligence in failing to take reasonable steps to prevent the escape of water in the event of the stop tap being accidentally turned on. In *Perry v Kendrick's Transport Ltd*<sup>[90]</sup> the plaintiff suffered injury by an explosion of petrol fumes from the tank of a disused coach. The explosion was caused by the act of a stranger, and the Court of Appeal held that the defendants were not liable under the rule unless the plaintiff could show that the act which caused the escape was of a kind which the defendants could reasonably anticipate and guard against.

Mr St John [counsel for the plaintiff] submits that the company ought to have foreseen there would be agricultural activity in close proximity to the stay-wire, and that people might interfere with it. Mr St John's further submission is that the fact that the plaintiff was a trespasser is irrelevant. He cites *Buckland v Guildford Gas, Light and Coke Co.*<sup>[91]</sup> In that case a girl aged 13 was electrocuted when, in climbing a large oak tree, she came into contact with high voltage wires which, because of the density of the foliage, could not easily be seen from beneath the tree. On the submission that the girl was a trespasser on that land, the court held that, even assuming that she was a trespasser on the land, the defendant's liability arose from his duty to take reasonable care while maintaining highly dangerous overhead wires, and from the fact that they ought to have known that it was dangerous to have their high voltage wires above a tree which could easily be climbed. Mr St John draws particular attention to the distinction drawn between the girl being a trespasser vis à vis the defendant and being a trespasser vis à vis the occupier of the land and submits that in the instant case, in regard to the company, the deceased was not a trespasser.

I think this latter issue can be disposed of shortly by reference to *British Rlys Board v Herrington*. Lord Morris<sup>[92]</sup> adopted the following statement of the law by Windeyer J in *Rlys Comr (NSW) v Cardy*:<sup>[93]</sup>

No man has a duty to make his land safe for trespassers. But if he has made it dangerous and the danger he has created is not apparent, he may have a duty to warn people who might come there of the danger of doing so. Whether there be such a duty in a particular case must depend upon the circumstances, including the likelihood of people coming there. But if they would be likely to come, the duty does not, in my view, disappear because in coming they would be trespassing. It is a duty owed to likely comers; to those who would be intruders as to those who would be welcome.

Here, the stay-wire was a few feet from the highway in an open field, and was part of a system in which electricity was transmitted by wires raised on poles erected along a public road. In these circumstances, I accept Mr St John's submission that the deceased was not a trespasser vis à vis the company and was entitled to the benefit of whatever duty the company was under to take care of likely comers.

All the cases show that the degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled. As Dixon CJ pointed out in *Cardy's* case, which, like *Buckland's* case and *Herrington's*

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89 [1955] 3 All ER 577.

90 [1956] 1 All ER 154.

91 [1948] 2 All ER 1086.

92 [1972] 1 All ER 749, p 768.

93 (1961) 104 CLR 274.

case, involved child trespassers, that duty may be sufficiently discharged by warning of the danger, by taking steps to exclude the intruder, or by removal or reduction of the danger.

In the circumstances of this case, the placing of the transmission wires on poles serves both to warn the public that it would be dangerous to come into contact with them and to exclude the intruder. The provision of earth wires and insulators removes any danger that would otherwise exist for persons coming into contact with stay-wires in the installation. I cannot see that in the company's system there was any need for warning signs to be placed on the stay-wire, as is suggested on behalf of the plaintiff. There was no danger that would require such a course of action. The company's system complied with the requirements of the statutes regulating electrical undertakings, and the Government Electrical Inspector describes it as a normal or standard installation, and I find that it was a safe system. I also find that the accident was caused solely by the interference with that system by the tractor driver, placing such tremendous pressure on the stay-wire in an attempt to free his plough as to cause the stay-pole to lean from the vertical, and thus causing a live wire to touch and momentarily energise that portion of the stay-wire beyond the insulator.

The only question remaining on this part of the case is whether any electrical undertaker, mindful of his duty towards likely comers, would foresee and guard against this sort of interference with his system. In this I derive some assistance from *The Wagon Mound (No 2)*, where Lord Reid<sup>[94]</sup> restated the general principle that a person must be regarded as negligent if he does not take steps to eliminate a risk which he knows or ought to know is a real risk and not a mere possibility which would never influence the mind of a reasonable man.

In my judgment, it would be unreasonable to expect any electrical undertaker to guard against the concatenation of events which took place at Leard on the day the deceased was electrocuted. These events were, in my view, so unlikely that even the most careful and cautious electrical engineer would not have foreseen them. As to guarding against the possibility of it happening, the suggestion is that the stay-wire should have been fenced around to prevent agricultural activity taking place too near to it. I do not think that the law would demand that any such measure be taken. If an undertaker had to guard against interference with the poles supporting the system, he would have to construct protective works to prevent damage to the system as a result, for example, of motor vehicles colliding with any part of it—in my view, a clearly impossible burden.

### Statutory authority

Sometimes, public authorities charged with providing a particular public service, for example, the collection and disposal of sewage, or the supply of electricity,<sup>95</sup> are exempted from liability by statute, provided that they have not been negligent.<sup>96</sup>

94 [1966] 2 All ER 709, p 718.

95 See *Trinidad and Tobago Electricity Commission v Sookram* (1999) 57 WIR 473 and *Morrison v Trinidad and Tobago Electricity Commission* (1999) High Court, Trinidad and Tobago, No 1272 of 1995 (unreported), where the effect of ss 49(3), 96 and 97 of the Trinidad and Tobago Electricity Commission Act, Cap 54:70 was considered.

96 It was emphasised by de la Bastide CJ in *Trinidad and Tobago Electricity Commission v Sookram*, *ibid*, pp 484, 485, that the burden of proving negligence lay on the plaintiff. However, cf *Manchester Corp v Farnworth* [1930] AC 171, where it was held that where a nuisance had been created by the emission of poisonous fumes, the onus of proving that all reasonable care had been taken to prevent the nuisance lay on the defendant. See above, p 185.

As in the case of nuisance,<sup>97</sup> it is a question of construction of the statute in question as to whether, and to what extent, liability under *Rylands v Fletcher* has been excluded. This defence is examined above, Chapter 7.

## DAMAGES

The rule in *Rylands v Fletcher* is not a tort actionable *per se*, and so damage must be proved. As to what types of injury are compensable, the harm primarily protected by the tort is damage to land, buildings and fixtures thereon. The plaintiff may also recover for harm to his chattels.<sup>98</sup> Whether damages are recoverable for personal injuries is more doubtful. Despite *dicta* to the contrary,<sup>99</sup> it seems to be settled that a person having an interest in land can recover for personal injuries. It has even been suggested that a non-occupier can recover for injuries to his person,<sup>100</sup> and this view was implicitly accepted by Douglas CJ in *Phillips v Barbados Light and Power Co Ltd*,<sup>101</sup> where, as we have seen, a bystander was electrocuted by a high voltage electricity wire. The learned Chief Justice said:<sup>102</sup>

For the company it is further submitted that the rule in *Rylands v Fletcher* does not apply to cases of personal injuries. Attention is drawn to *Read v Lyons*.<sup>[103]</sup> In that case, an inspector of munitions was injured in the defendants' munitions factory by the explosion of a shell. In the absence of negligence, it was held that the rule did not apply because there had been no escape of any dangerous thing from the premises. Lord Macmillan's *dictum* that the rule in *Rylands v Fletcher* had nothing to do with personal injuries is, therefore, purely *obiter*. The view was expressed by Parker LJ in *Perry v Kendricks Transport Ltd*<sup>[104]</sup> that the Court of Appeal in England is bound by one of its own decisions granting relief for personal injuries under the rule, and that the matter will have to be decided by the House of Lords when the issue arises there. On this question, it is worthy of note that the High Court of Australia, whose decisions are accorded such great respect in all common law countries, held in the case of *Benning v Wong*<sup>[105]</sup> that the damages for which a defendant is liable in an action based on the rule in *Rylands v Fletcher* include damages for personal injuries. Barwick CJ could discover no reason why personal injuries should not be included in damages awarded in a case based on *Rylands v Fletcher*.

In my judgment, it is too late in the day to limit the rule in *Rylands v Fletcher* in the way suggested by Lord Macmillan in *Read v Lyons*.

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97 See above, pp 185, 186.

98 *Jones v Festiniog Rly* (1868) LR 3 QB 733.

99 *Read v Lyons* [1947] AC 156, p 182, *per* Lord Macmillan.

100 *Shiffman v Order of St John* [1936] 1 All ER 557, p 561.

101 (1972) 7 Barb LR 154 (see above, pp 200–02).

102 *Ibid*, p 161.

103 [1947] AC 156.

104 [1956] 1 All ER 154.

105 (1969) 122 CLR 249.



## CHAPTER 9

### LIABILITY FOR ANIMALS

#### INTRODUCTION

Tortious liability for animals may be classified thus:

- (a) liability for cattle trespass;
- (b) liability for dangerous animals (the '*scienter* action');
- (c) liability for dogs;
- (d) liability in negligence.

In the Caribbean, the common law principles have been modified by statute in certain jurisdictions. For instance, the Animals (Civil Liability) Act 1980, Cap 194A (Barbados) has codified much of the law relating to liability for animals, using as its model the Animals Act 1971 of England and Wales; and the Trespass Act, Cap 392 (Jamaica) has amended the law relating to cattle trespass in that country. Also, legislation imposing strict liability for harm by dogs has been introduced in some jurisdictions.<sup>1</sup>

Apart from the main heads of liability for animals enumerated above, there are several ways in which a person may incur tortious liability through the instrumentality of his animals. For instance, the keeper of pigs or goats may be liable in private nuisance if the stench from the animals unreasonably interferes with his neighbour's enjoyment of his land;<sup>2</sup> or he may be liable in public nuisance if his animals are allowed to obstruct the highway and thereby cause particular damage to the plaintiff. And one who deliberately sets his dog upon a person will be as liable for battery as if he had struck the person a blow with his fist. It has even been suggested that one who trains his parrot to defame someone may be liable for slander.<sup>3</sup>

#### LIABILITY FOR CATTLE TRESPASS

This, one of the most ancient causes of action known to the common law, lies where cattle in the possession or control of the defendant are either intentionally driven on to the plaintiff's land or stray on to such land independently. The essence of the tort has been expressed thus:

If I am the owner of an animal in which, by law, the right of property can exist, I am bound to take care that it does not stray onto the land of my neighbour; and I am liable for any trespass it may commit, and for the ordinary consequences of that trespass; whether or not the escape of the animal is due to my negligence is altogether immaterial.<sup>4</sup>

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1 Eg, Dogs Act, Cap 71:05, s 3 (Guyana); Dogs (Liability for Injuries by) Act, s 2 (Jamaica); Animals (Civil Liability) Act, Cap 194A, s 8 (Barbados); Dogs (Injury to Persons, Cattle and Poultry) Act, Cap 238, s 3 (British Virgin Islands).

2 *Walwyn v Brookes* (1993) High Court, St Christopher and Nevis, No 34 of 1992 (unreported).

3 Winfield and Jolowicz, *Tort*, 13th edn, 1989, London: Sweet & Maxwell, p 456.

4 *Cox v Burbidge* (1863) 143 ER 171, p 174, *per* Williams J.

Thus, the owner of cattle (which, at common law, includes not only cows and bulls, but also horses, donkeys, sheep, pigs, goats and poultry)<sup>5</sup> is strictly liable for all damage done by such cattle when trespassing on the land of another.<sup>6</sup> Damages are recoverable not only for harm to the plaintiff's land and crops caused by the trespass, but also for injury to his animals<sup>7</sup> and chattels<sup>8</sup> and for any injuries inflicted upon the plaintiff himself.<sup>9</sup> The principle is illustrated by *East Coast Estates Ltd v Singh*.

**East Coast Estates Ltd v Singh [1964] LRBG 202, Supreme Court,  
British Guiana**

Cattle belonging to the defendant strayed onto the plaintiffs' land and damaged 'pangola grass' which the plaintiffs were cultivating. The defendant alleged that, as he was driving his cattle along the road, rain began to fall and he was forced to drive the cattle into a nearby common whence, through no fault on his part, they strayed onto the plaintiffs' land.

*Held*, liability in cattle trespass is strict, and the defendant was liable irrespective of any intention or negligence on his part. Crane J said:

The cattle trespass principle is a species of strict liability—one of the oldest grounds of liability in English law... It is clear from his defence that Thakur Singh is urging that he did not deliberately depasture his cattle in area 'J' and that the trespass is not attributable to any wrongful act of his... On both principle and authority it seems to me that this defence cannot be sustained, for the law is that a defendant is liable for any damage done to another's land by his straying cattle... irrespective of any intention or negligence on his part.

Assuming what Thakur Singh has stated about rain putting him in a dilemma to be the truth, he would, it seems, still be liable to the plaintiff for trespass by animals escaping, not from the roadway to area 'J', but from the field where they were driven by him.

There is no analogy, as counsel for the first defendant seems to think, between the facts of his client's case and those in *Goodwin v Cheveley*.<sup>[10]</sup> Counsel's argument is that his client acted reasonably by driving his cattle during the rainstorm to the common from which they escaped to area 'J', before going in search of the one which had escaped into area 'I'. Though I agree it might have been reasonable for the first defendant to have done so, the fact remains that the trespassing cattle escaped, not directly from the roadway to the plaintiffs' 'pangola pasture', but thereto from the common where the defendant had driven them—which fact makes all the difference and serves to distinguish this case from *Goodwin's*, where the animals strayed into the defendant's close directly from the roadway along which they were being driven; for it is a defence to an action for cattle trespass that the animals strayed from the roadway where they were being driven, into an adjacent close.<sup>[11]</sup>

5 At common law, 'cattle' does not include dogs (*Tallents v Bell* [1944] 2 All ER 474) or cats (*Buckle v Holmes* [1926] 2 KB 125).

6 In Barbados, liability for cattle trespass is governed by s 5 of the Animals (Civil Liability) Act, Cap 194A, which has preserved strict liability.

7 *Ellis v Loftus Iron Co* (1874) LR 10 CP 10. See *Carrington v Montrose Poultry Farms Ltd* (1997) High Court, Barbados, No 1308 of 1986 (unreported).

8 *Cooper v Rly Executive* [1953] 1 All ER 477.

9 *Wormald v Cole* [1954] 1 All ER 683.

10 (1859) 28 LJ Ex 298.

11 *Tillett v Ward* (1882) 10 QBD 17. See below, p 209.

## Statutory defence

Section 14 of the Trespass Act (Jamaica) provides a defence for the owner of trespassing livestock who has properly fenced his land:

If in any action brought to recover any damages under this Act, the owner of the stock shall prove that his land is enclosed by good and sufficient fences, and that he has adopted all other reasonable and proper precautions for the confinement of his stock, and that they have nevertheless, through some cause or accident beyond his control and which he could not reasonably have provided against, escaped from his land, the party complaining shall not be entitled to recover any sum unless he can show that he has fenced his land with a fence sufficient to keep out ordinary tame cattle and horsekind.

This section provides a wider defence to cattle trespass than the defences at common law, and shows that liability under the Act is far from strict. At common law, in Salmond's view,<sup>12</sup> the only established defences are *volenti non fit injuria*, plaintiff's own default in failing to perform a duty to fence imposed by law or by prescription, and Act of God; and the weight of authority is against admitting act of a third party and other forms of inevitable accident as defences.

The statutory defence does not apply where the plaintiff 'can show that he has fenced his land with a fence sufficient to keep out ordinary tame cattle and horsekind'. This was, no doubt, designed to encourage farmers to fence their land not only to protect themselves against the straying cattle of others, but also to prevent their own cattle from escaping.

In *West v Reynolds Metal Co*,<sup>13</sup> it was held that where the defendant's land bordered on the plaintiff's on two sides, north and east, and both were 'enclosed by good and sufficient fences', this was not sufficient to bring him within the protection of the section when his cattle escaped on to the plaintiff's land, since the defendant's land was not enclosed on all sides.

## Parties to an action in cattle trespass

As in other forms of trespass to land, the right to sue arises from occupation of land and only a person with an interest in the land can sue.

In *Aziz v Singh*,<sup>14</sup> the defendant's steers had trespassed upon Y's land, where the plaintiff's steers were tethered with Y's permission, and there inflicted fatal injuries upon the plaintiff's animals. The plaintiff's action succeeded on the ground of *scienter* but, as regards cattle trespass, Verity CJ held that:

...the mere acquisition of permission to tie animals upon the land of another confers upon the holder no interest in or right to possession of the land sufficient to ground an action in cattle trespass, nor could the plaintiff plead that he was entitled to damages for the harm he had sustained as a consequence of a trespass on the land of a third party.

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12 See *Salmond on Torts*, 13th edn, 1961, London: Sweet & Maxwell, pp 620, 621.

13 [1968] Gleaner LR 63.

14 [1944] LRBG 104 (Supreme Court, British Guiana).

It appears, however, that under the Trespass Act (Jamaica), the right to sue for cattle trespass may not be restricted to a person having an interest in the land upon which the offending cattle have trespassed, for s 12 gives a right of action in respect of 'any injury done by stock trespassing on to the land of other persons', which would be wide enough to include injury to non-occupiers and their property.

The question as to who is the proper defendant in an action in cattle trespass was discussed in a trilogy of Jamaican cases in which liability both at common law and under the Trespass Act was mentioned. Section 12 of the Act (formerly, 'Law') provides that:

It shall be the duty of the proprietor of any stock to take proper and effective measures to prevent such stock from trespassing on to the land of other persons, and subject to the provisions hereinafter contained, such proprietor shall be responsible in damages in respect of any injury done by such stock trespassing on to the land of other persons.

In the majority of cases, the owner of cattle will also be in possession and control of them; but where the owner of cattle has depastured them on another person's land whence they stray and cause damage, the question will arise as to whether the owner of the cattle or the owner of the land, as the person in control, is to be held responsible. In *Sinclair v Lindsay*<sup>15</sup> the Jamaican Court of Appeal held that under s 12, liability was imposed on 'the proprietor', which meant the owner of cattle, and that the lower court had been in error in placing liability on the person who was in possession and control but who was not the owner. In *Thompson v AG*,<sup>16</sup> however, where cattle owned by X and Y were depastured on an estate belonging to and in the possession of the Ministry of Agriculture and Lands under a 'revolving herd' scheme, whence they trespassed upon the plaintiff's land and caused damage, Eccleston JA held that, in the circumstances, 'the unqualified duty of keeping [the cows] from straying rested upon the owner or occupant of the land, which is the Government, on which they were with consent to be *levant* and *couchant*'. In coming to this conclusion, the learned judge relied on a passage from another Jamaican case, *Hendricks v Singh*:<sup>17</sup>

At the conclusion of the hearing of this case, the Court was inclined to think that the test of unqualified liability for cattle trespass is an affirmative finding that the defendant was at the time of such trespass in possession and control of animals whose habit it is to go in pursuit of herbage. Subsequent reflection has, however, satisfied us that this view is incorrect. *Cox v Burbidge*<sup>18</sup> and other authorities show that the unqualified duty of keeping cattle from straying rests upon the owner or occupant of the land on which they happen with his consent to be *levant* and *couchant*, or detained for any time.

In *Thompson's* case,<sup>19</sup> it was clear that the Jamaican Court of Appeal regarded liability under the Trespass Act as being based, in this respect, on the same principle as liability at common law, so that, in appropriate circumstances, a person in possession or control who is not the owner of the cattle may be liable; and such possessor will normally be the occupier of the land on which the cattle are placed and from which they have strayed.

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15 [1968] Gleaner LR 22.

16 Civ App No 73 of 1969 (unreported).

17 [1917-32] Clark's Rep 252.

18 (1863) 143 ER 171.

19 Civ App No 73 of 1969 (unreported).

### Trespass from the highway

At common law, there is no liability in cattle trespass where animals lawfully on the highway, without negligence on the part of the person bringing them there, stray therefrom on to the plaintiff's land and do damage.<sup>20</sup> The rationale behind the rule is that the owner of land abutting on a public road is deemed to have consented to run the risk of the dangers incident to the ordinary, non-negligent use of the highway

Section 13 of the Trespass Act (Jamaica) reproduces this rule in statutory form, with the modifications that:

- (a) the immunity does not apply where the plaintiff has fenced his land to keep out livestock; and
- (b) the onus is on the defendant to show that his stock were being lawfully driven along the highway, and not on the plaintiff to show the unlawfulness of the defendant's conduct.

Section 13 is worded:

No person in occupation of any land abutting on a public road shall be entitled to recover any damages in respect of any trespass on such land by any stock while the same are being lawfully driven on such road, under proper care and control, unless such land is secured by a fence along such road sufficient to keep out ordinary stock of the class of animals committing the trespass.

The onus of showing that any stock were being so driven as aforesaid shall lie on the owner of the stock.

### LIABILITY FOR DANGEROUS ANIMALS (THE *SCIENTER* ACTION)

In this area, the common law classifies animals into two categories:

- (a) animals *ferae naturae*, that is, those belonging to a naturally fierce, wild or dangerous species, such as lions, tigers, gorillas, bears and elephants; and
- (b) animals *mansuetae naturae*, that is, those belonging to a naturally tame, harmless and, in most cases, domesticated species, such as horses, donkeys, cows, sheep, goats, cats and dogs.

The owner or keeper of an animal *ferae naturae* is strictly liable for any harm which it causes, and it is irrelevant whether or not the particular animal has shown a propensity for that kind of harm in the past. Thus, for example, the keepers of a 'tame' elephant in a circus were held liable when the animal, without any aggression, knocked down and injured the plaintiff.<sup>21</sup>

20 *Tillett v Ward* (1882) 10 QBD 17. Section 22 of the Cattle Trespass Act, 1982, Cap 22, of Antigua and Barbuda, has introduced a novel head of liability for damage to any person or thing resulting from cattle straying 'in any public place, square, quay, wharf or highway', unless the owner or person in charge of the cattle can prove he did not know or had no reason to suspect that his cattle had strayed, and that he had taken all reasonable precautions to prevent the straying. See *James v Knowles* (1999) High Court, Antigua and Barbuda, No 225 of 1994 (unreported).

21 *Behrens v Bertram Mills Circus* [1957] 2 QB 1.

The owner or keeper of an animal *mansuetae naturae*, however, is liable for harm caused by the animal only if:

- (a) the particular animal has shown a propensity in the past to do harm of that kind; and
- (b) the owner or keeper is proved to have had knowledge of such propensity.

Proof of knowledge of an animal's vicious propensity, the onus of which is on the plaintiff, is called '*scienter*', a term derived from an ancient form of declaration charging the defendant with knowingly keeping a dangerous animal. In its origin, the *scienter* action was one of negligence, but later, 'by somewhat dubious legal reasoning', liability became strict. Instead of saying that the defendant was liable for negligence, the mere keeping of a dangerous animal being negligent, it was said that the defendant was liable without proof of negligence, the obligation being to keep the animal safe 'at his peril'.<sup>22</sup>

The following principles of liability under the *scienter* action have been established by the cases:

- (a) Whether a species of animal is to be classified as *ferae* or *mansuetae naturae* is a question of law for the judge, to be decided either on the basis of judicial notice or on expert evidence.<sup>23</sup>
- (b) The requisite knowledge of an animal's vicious propensity must relate to the particular propensity that caused the damage. For instance, if a dog attacks a man, it must be shown that the animal had a propensity to attack humans: it would not be sufficient to show a propensity to attack other animals.<sup>24</sup>
- (c) In establishing *scienter*, it is not necessary to show that the animal had actually *done* the particular type of damage on a previous occasion: it is sufficient to prove that it had exhibited a *tendency* to do that kind of harm.<sup>25</sup> For instance, in proving a dog's propensity to attack humans, it is sufficient to show that it habitually rushed out of its kennel, where it was chained, and attempted to bite passersby.<sup>26</sup> Thus, the common saying that 'every dog is allowed one free bite' is not accurate,<sup>27</sup> though, if the plaintiff can show that the animal did on

22 Williams and Hepple, *Foundations of the Law of Torts*, 2nd edn, 1984, London: Sweet & Maxwell, p 111; *Williams v Martins* [1920] LRBG 169 (Petty Debt Court, British Guiana), p 171; *Brown v Fung Kee Fung* [1921] LRBG 5 (Petty Debt Court, British Guiana), p 6. In Barbados, liability for dangerous animals is governed by ss 3 and 4 of the Animals (Civil Liability) Act, Cap 194A, which is modelled on s 2 of the Animals Act 1971 (UK). For the application of the latter section, see *Curtis v Betts* [1990] 1 All ER 769; *Wallace v Newton* [1982] 1 WLR 375. See also *Cummings v Granger* [1977] 1 All ER 104.

23 *McQuaker v Goddard* [1940] 1 KB 687, p 700. It was held by the Court of Appeal of the Eastern Caribbean States in *Williams v Murraine* (1987) 40 WIR 160 that bees were not *ferae naturae*.

24 *Glanville v Sutton* [1928] 1 KB 571.

25 *Barnes v Lucille* (1907) 96 LT 680; *Nurse v Haley* [1920] LRBG 174 (Petty Debt Court, British Guiana).

26 *Worth v Gilling* (1866) LR 2 CP 1. In *Nurse v Haley* [1920] LRBG 174 (Petty Debt Court, British Guiana), p 175, Douglas J (Ag) said that 'the mere fact that a man keeps a dog tied up is not in itself evidence of his knowledge of a savage disposition, but may become material when combined with other facts', such as where a dog is kept as a guard dog. On the other hand, in *Achama v Read* [1938] LRBG 183 (Supreme Court, British Guiana), p 184, Langley J held that the fact that a dog was kept chained for more than a year was evidence of the owner's knowledge of a vicious propensity because 'surely such an existence would not be inflicted on any animal unless he had shown signs of viciousness,' and 'after so prolonged an imprisonment, undoubtedly [the dog] would develop viciousness'.

a previous occasion actually cause the particular type of harm, then his case will presumably be stronger.

- (d) Knowledge of an animal's vicious propensity will be imputed to the defendant where it is acquired by someone to whom the defendant delegated full custody or control of the animal,<sup>28</sup> and, in certain other cases, it may be inferred that knowledge gained by a third party (for example, the wife of the keeper<sup>29</sup> or a servant in charge of premises where the animal is kept<sup>30</sup> had been communicated to the keeper.
- (e) For the purposes of the *scienter* action, it is immaterial where the animal's attack took place; whether, for example, on the plaintiff's land, on the defendant's premises, on the land of a third party, or on the highway or other public place.<sup>31</sup>
- (f) In the case of harm caused by an animal *mansuetae naturae*, the propensity of the animal must be shown to be vicious or hostile. The defendant will not be liable if the animal was merely indulging in a propensity towards playfulness or some other non-aggressive behaviour, especially where such propensity is common to most animals of that species, for instance, the frolicking of high spirited horses,<sup>32</sup> or dogs chasing each other or running across traffic.<sup>33</sup>

In a similar vein, it has been held in Jamaica that, in the case of an animal *mansuetae naturae*, there is no liability where, in causing harm, the animal was displaying a 'natural' as opposed to a 'mischievous' propensity. This is illustrated by *McIntosh v McIntosh*.

### **McIntosh v McIntosh (1963) 5 WIR 398, Court of Appeal, Jamaica**

The plaintiff was riding his jenny along a bridle track when the defendant's jackass jumped onto it in an attempt to serve it, causing injuries to both the plaintiff and the jenny. There was evidence that on a previous occasion the jackass had attempted to serve the jenny while it was in a lying position and had kicked it, and that the defendant knew about this.

*Held*, the defendant was not liable, since the jackass, in attempting to serve the jenny, was merely displaying a natural propensity. Lewis JA said:

The learned trial judge gave judgment for the defendant on the grounds that, first of all, the donkey was a domesticated animal, and secondly, that for a jack to try to serve a jenny was the mere exercise of a natural propensity; and that, even if this were held to be a mischievous propensity, there was no evidence that the jack was known to be in the habit of serving a jenny while it was being ridden.

Learned counsel for the plaintiff/appellant in this case has submitted that the learned trial judge, having found that the defendant was aware that the donkey had previously

27 *Sims v McKinney* (1989) Supreme Court, The Bahamas, No 996 of 1986 (unreported), *per* Georges CJ; *Nurse v Haley* [1920] LRBG 174.

28 *Baldwin v Casella* (1872) LR 7 Ex 325.

29 *Gladman v Johnson* (1867) 36 LJ CP 153.

30 *Appleby v Percy* (1874) LR 9 CP 647.

31 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 332.

32 *Fitzgerald v Cooke* [1964] 1 QB 249.

33 *Martignoni v Harris* (1971) 2 NSWLR 103.

tried to serve this jenny, ought to have held that this was evidence of *scienter* of a mischievous propensity and should have given judgment for the plaintiff; or that, alternatively, this court ought to allow an amendment to enable him to plead that the jenny had been attacked, and on the basis of the learned judge's finding the court should enter judgment for the plaintiff.

I agree with the [trial judge's] finding that for a jack to serve a jenny is a natural propensity. The damage which the plaintiff suffered as a result of the exercise of that natural propensity was merely incidental to what the jack was trying to do—endeavouring to serve the jenny. The donkey, as the learned judge has held, is a domesticated animal, and the authorities show that where a domesticated animal does something which is merely an exercise of its natural propensity, damage caused as a result is not recoverable.

Unlike under the *scienter* action, in an action for negligence in respect of harm caused by an animal, the owner or keeper will be liable for damage caused by the animal in following its natural propensities, since such damage will be foreseeable and not too remote. Conversely, if the animal exhibits an unnatural tendency and causes damage thereby, the defendant will not be liable, since the damage will then be too remote. Thus, in *Coley v James*,<sup>34</sup> Lewis JA said:<sup>35</sup>

If the animal avails itself of the opportunity created by the negligent act of the defendant's agent to do something which is in accordance with its nature and thereby causes damage, then the defendant is liable. But if it does something that is contrary to its nature, some spontaneous act which an animal of that class would not normally be expected to do, then the defendant is not liable.

### Who can be sued?

Liability under the *scienter* action rests on the person who harbours and controls the animal. In most cases, the owner of the animal will be its keeper, but this is not necessarily so. For instance, an occupier who took care of a vicious dog left on the premises by a previous tenant was held liable for injury caused by the animal.<sup>36</sup> However, the mere fact that an occupier has tolerated the presence of someone else's animal on his land does not fix him with responsibility for its mischief. Thus, for example, a father was not liable for an injury inflicted by a dog owned and fed by his 11 year old daughter;<sup>37</sup> and a school authority was not liable when a dog kept on school premises by the caretaker attacked and injured a cleaner.<sup>38</sup>

### Defences

It seems that the only well recognised defences to liability under the *scienter* action are default of the plaintiff, contributory negligence and *volenti non fit injuria*.<sup>39</sup> With respect to the first, it is probably a good defence to show that the plaintiff, at the time he was injured by the animal, was trespassing on the defendant's land, unless

34 (1964) 6 WIR 259 (Court of Appeal, Jamaica).

35 *Ibid*, p 260.

36 *McKone v Wood* (1831) 172 ER 850.

37 *North v Wood* [1914] 1 KB 629.

38 *Knott v London CC* [1934] 1 KB 126.

39 *See op cit*, Fleming, fn 31, p 333.

the animal was kept with the deliberate intention of injuring, rather than of merely deterring, trespassers.<sup>40</sup> It is unlikely that the decision in *British Rlys Board v Herrington*<sup>41</sup> has affected the principle that 'every man has a right to keep a dog for the protection of his yard or house',<sup>42</sup> without being liable to a trespasser who enters and is there attacked. Default of the plaintiff will also be a defence where the plaintiff brings the injury upon himself by, for example, stroking a zebra at a zoo<sup>43</sup> or teasing a dog,<sup>44</sup> though it is not sufficient that the plaintiff merely walked close to the animal, unless this was in unreasonable disregard of obvious danger.<sup>45</sup> If the plaintiff were entirely responsible for his injury, his action would fail altogether; but if he were merely contributorily negligent, his damages would be reduced under the statutory apportionment provisions.<sup>46</sup>

*Volenti non fit injuria* may also afford a defence,<sup>47</sup> and will most often apply where persons whose livelihood it is to deal with dangerous animals, such as zoo keepers and animal trainers,<sup>48</sup> are injured in the course of their work.

There is no authority as to whether Act of God is a defence, and there is a conflict of authority as to the availability of the defence of act of a stranger. In one case,<sup>49</sup> it was held that the keeper of a fierce dog was not liable for injuries caused when a trespasser maliciously let the animal off its chain; but more recent cases<sup>50</sup> seem to have decided that act of a stranger is no defence to a claim in *scienter*, on the ground that the intervention of a stranger should be taken to be within the foreseeable risk created by the possession of a dangerous animal. In *Brown v Henry*,<sup>51</sup> the Jamaican Court of Appeal preferred the view of certain textbook writers that the defence of act of a stranger is available but qualified, and can succeed only if the evidence shows that the owner of the animal took all reasonable care to prevent third parties from meddling with it.

### **Scienter in the Caribbean**

There are relatively few examples of the *scienter* action in the Caribbean. This is no doubt due to the fact that liability for dogs, which are the animals most likely to cause harm by their aggressive behaviour, is now governed in several jurisdictions by statutory provisions imposing strict liability.<sup>52</sup> One example of a successful action in *scienter* is *Aziz v Singh*,<sup>53</sup> where the defendant was found to have had knowledge of the vicious propensity of his steers to attack other animals, and was therefore

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40 *Sarch v Blackburn* (1830) 172 ER 712; *Nurse v Haley* [1920] LRBG 174 (Petty Debt Court, British Guiana), p 175.

41 [1972] 1 All ER 749. See above, pp 136–39.

42 *Brock v Copeland* (1794) 170 ER 328, *per* Lord Kenyon.

43 *Marlor v Ball* (1900) 16 TLR 239.

44 *Sycamore v Ley* (1932) 147 LT 342.

45 *Filburn v People's Palace* (1890) 25 QBD 258.

46 See below, Chapter 13.

47 *Sylvester v Chapman* (1935) 79 SJ 777.

48 *Rands v McNeil* [1955] 1 QB 253.

49 *Fleeming v Orr* (1857) 2 Macq 14.

50 *Baker v Snell* [1908] 2 KB 825; *Behrens v Bertram Mills Circus* [1957] 2 QB 1.

51 (1947) 5 JLR 62.

52 See below, pp 214–21.

53 [1944] LRBG 104 (Supreme Court, British Guiana) (see above, p 207).

held liable for fatal injuries inflicted by them on the plaintiff's steers. And in another Guyanese case, *Williams v Martins*,<sup>54</sup> the owner of a horse who knew of its vicious propensity to attack other horses was held liable for injuries inflicted on the plaintiff's horse which had been pastured with it. On the other hand, a plea of *scienter* failed in *Sims v McKinney*.<sup>55</sup> There, the plaintiff, a visitor to the Bahamas, was walking down a public road when the defendant's two small mongrel dogs ('locally known as potcakes') rushed from the defendant's driveway and bit the plaintiff on the leg. On the plea of *scienter*, Georges CJ said:

I agree with the submission by Mrs Gibson [counsel for the plaintiff] that the popular belief that every dog is entitled to its first bite is not well grounded in law. An owner may be well aware that his dog is likely to attack persons and take effective precautions to prevent it from doing so. If on a particular occasion... the dog escapes and bites someone, the owner will certainly be liable even though it was the dog's first bite. It may well be, for example, that a sign on the owner's premises stating 'Beware of the dog' may be evidence of knowledge on the part of the owner that the dog is likely to bite.

In this case, however, there is no evidence that the defendant was aware, prior to 20 February 1985, that either of his dogs was of a vicious nature or was liable to bite anyone. Indeed, as the plaintiff herself testifies, his immediate reaction was to express surprise on the basis that his dogs did not behave that way. Mrs Gibson contends that this was a self serving statement, but it appears to me to be a spontaneous reaction to a complaint and for that reason likely to be true. A claim in this case cannot, therefore, be rested on the basis of damage due to a mischievous propensity known to the owner.

Similarly, in *Reid v Tyson*,<sup>56</sup> where the defendant's dog ran out of her shop and bit the plaintiff on her leg, it was held by the Court of Appeal of the Eastern Caribbean States that the defendant was not liable under the *scienter* principle in the absence of any evidence that the defendant knew of any propensity in her animal to attack people.

One successful *scienter* action concerning a dog was *Ambrose v Van Horn*,<sup>57</sup> a case from Trinidad and Tobago, where, as in The Bahamas and St Christopher and Nevis, there is no statutory provision imposing strict liability for harm by dogs. Here, the plaintiff's sow was attacked in its pen and killed by the defendant's boxer dog. There was evidence that, on at least three previous occasions, the dog had attacked other animals and that the defendant was aware of this. Accordingly, the Court of Appeal found the defendant liable for the value of the sow.

## LIABILITY FOR DOGS

There are several reasons why the law has treated the dog as a special type of animal *mansuetae naturae*. First, the dog population is very high (and this is no less so in the Caribbean); secondly, dogs are kept for a variety of purposes—as pets, guard dogs or hunters; thirdly, they are notoriously energetic and difficult to keep

54 [1920] LRBG 169; upheld on appeal [1921] LRBG 137.

55 (1989) Supreme Court, The Bahamas, No 996 of 1986 (unreported).

56 (1993) Court of Appeal, OECS, Mag App No 6 of 1993 (unreported). See also *Brown v Smith* (1994) Court of Appeal, Jamaica, Civ App No 11 of 1993 (unreported), where the plaintiff was bitten on her thigh by a pig.

57 (1967) Court of Appeal, Trinidad and Tobago, Civ App No 14 of 1967 (unreported), *per* Wooding CJ.

under restraint, and are therefore particularly prone to stray; and, fourthly, dogs are not within the definition of 'cattle' at common law, so that a defendant cannot be liable in cattle trespass for damage caused by his dog's straying on to the plaintiff's land.<sup>58</sup> It has long been apparent that the ordinary common law heads of liability were insufficient to deal with the special case of the dog, and legislation has been enacted in Australia, Canada and some Commonwealth Caribbean jurisdictions to provide for forms of strict liability for harm caused by dogs.<sup>59</sup>

For instance, s 2 of the Dogs (Liability for Injuries by) Act (formerly, 'Law') (Jamaica) provides:<sup>60</sup>

The owner of every dog shall be liable in damages for injury done to any person, or any cattle or sheep by his dog, and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner.

The effect of the section was considered in *Brown v Henry*, *Salmon v Stewart*, *Anderson v Ledgister*, *Smith v Gaynor* and *Wilson v Silvera*.

### **Brown v Henry (1947) 5 JLR 62, Court of Appeal, Jamaica**

The plaintiff, a 12 year old boy, brought an action to recover damages for injuries received as a result of an attack upon him by the defendant's dog. There was evidence that the dog had been set upon the plaintiff by two small boys as they were walking down a public road.

*Held*, strict liability was imposed by the Dog (Liability for Injuries by) Law. The defence of act of a stranger was available only where the owner of the dog had done everything he could have done to prevent third parties from meddling with it, which was not the case here. Savary J said:

The Liability for Injuries by Dogs Law, Cap 406 imposes a strict liability on the owner of a dog which causes injury to any person without proof of a previous mischievous propensity in the dog or of neglect on the part of the owner. This is a departure from the common law, where it was necessary to prove that the owner knew of its mischievous propensity in order to establish liability. It does not follow from what we have said that the provisions of our Law exclude the defence being raised by the owner of a dog that the damage caused by his dog was the result of the intervening act of a third party. But in our opinion it can be raised successfully only where the owner of a dog has done everything he reasonably could be expected to do to prevent third persons from meddling with it. In respect of this defence, we think that the owner of a dog in Jamaica, where liability is independent of *scienter*, is in the same position as the owner of a dog in England where *scienter* has been proved.

Two leading textbooks on the law of torts express the view that the defence of the act of a stranger, in the case of injury by a dog where *scienter* is proved, is in England qualified and can succeed only if the evidence establishes that the owner of the dog took all reasonable care to prevent it from doing mischief or, as we have said, has

58 *Buckle v Holmes* [1926] 2 KB 125.

59 See Kodilinye, G (1987) 16 Anglo-Am L Rev 174.

60 See also Animals (Civil Liability) Act, Cap 194A, s 8 (Barbados) (applied in *Edghill v Corbin* (1997) High Court, Barbados, No 794 of 1991 (unreported)); Dogs Act, Cap 71:05, s 3 (Guyana); Dogs (Injury to Persons, Cattle and Poultry) Act, Cap 238, s 3 (BVI).

done everything he reasonably could be expected to do to prevent third persons from meddling with it. We refer to *Salmond on Torts*, 10th edn, p 553 and *Winfield on Torts*, 3rd edn, p 519. Although *Baker v Snell*<sup>[61]</sup> indicates a contrary view, all the textbooks on torts express the opinion that the decision is unsatisfactory and should not be followed. We agree.

### **Salmon v Stewart (1950) 5 JLR 236, Court of Appeal, Jamaica**

The plaintiff was riding his bicycle along a public street when the defendant's dog, which was sitting on a wall beside the road, jumped on the plaintiff's knee and caused him to fall off his bicycle and fracture his foot. It was not known whether the dog intended to attack the plaintiff or whether it was acting in frolic.

*Held*, the defendant was strictly liable under the Liability for Injuries by Dogs Law. Carberry CJ (Ag) cited s 2 of the Law and continued:

The section does not merely relieve the plaintiff from the proof of *scienter*, that is, the knowledge of the defendant of the mischievous propensity of his dog, but the section goes on to relieve the plaintiff from proving negligence by the defendant, so that in this case the injured plaintiff need only prove that the defendant's dog caused him injury and liability attaches to the defendant.

In a judgment of this court delivered by Savary J...in the case of *Brown v Henry*,<sup>[62]</sup> this passage appears:

The Liability for Injuries by Dogs Law, Cap 406 imposes a strict liability on the owner of a dog which causes injury to any person without proof of a previous mischievous propensity in the dog or of neglect on the part of the owner. This is a departure from the common law, where it was necessary to prove that the owner knew of its mischievous propensity in order to establish liability.

In this case the plaintiff's dog jumped on the defendant, causing him to fall, and his resulting injuries were therefore done by the dog, and the section says such damages shall be recoverable in any court of competent jurisdiction by the person injured. Consequently the plaintiff is entitled to succeed.<sup>[63]</sup>

### **Anderson v Ledgister (1955) 6 JLR 358, Court of Appeal, Jamaica**

The respondent's dog entered the appellant's land and there killed the appellant's goats. There was no proof of any mischievous propensity in the dog.

*Held*, the respondent was strictly liable under s 2 of the Liability for Injuries by Dogs Law. The word 'cattle' as used in the section was wide enough to include goats. Rennie J said:

In *Wright v Pearson*,<sup>[64]</sup> the court construed the words 'cattle and sheep'...[used in ss 1, 28 and 29 of the Dog Act (Vict), Cap 60, which enacts that the owner of every dog

61 [1908] 2 KB 825.

62 (1947) 5 JLR 62. See above, p 215.

63 The courts in New South Wales, interpreting similarly worded legislation, have held dog owners liable for conduct such as a dog's dashing into the road and colliding with a passing vehicle as giving rise to strict liability, acknowledging that there would have been liability at common law for such conduct, as the animal would merely have been pursuing its natural propensities. On this view, statutes such as the Liability for Injuries by Dogs Act (Jamaica) and the Dog Act 1966 (NSW) have introduced a wider area of liability than under the *scienter* action at common law: see *Martignoni v Harris* (1971) 2 NSWLR 103.

64 (1868) 4 QB 582.

shall be liable in damages for injury done to any cattle or sheep by his dog without the necessity to show any previous mischievous propensity in such dog or the owner's knowledge of such previous propensity] to include horses and mares... The reason for the decision in *Wright v Pearson* is that the Act was a remedial one and horses are likely to be bitten by dogs. This view is strengthened by the judgment of Atkinson J in *Phillips v Bourne*.<sup>[65]</sup> He said:<sup>[66]</sup>

I have had a number of cases cited to me in which the word 'cattle' had to be construed, and in every one of them the narrow meaning was rejected and the wider meaning was adopted. I agree that they were all decisions on a particular Act, but they do establish that, in interpreting the word 'cattle' in an Act, one has to look at what is the evil aimed at—what it is that the section wishes to deal with. If one finds that the word 'cattle' must have been used in the wider sense, one must give effect to it. The conclusion to which I have come is that the word 'cattle' in this section does include pigs...

With these authorities to guide us, we have come to the conclusion that the words 'cattle or sheep' include goats. Cattle in its wider meaning includes goats, and goats are likely to be bitten by dogs. The Law in our view was designed to protect such animals as are reared for profit and are capable of coming within a definition of 'cattle'.

### Smith v Gaynor (1976) 14 JLR 132, Court of Appeal, Jamaica

It was alleged in this case that the defendant's dog had killed the plaintiff's pig. One of the main issues was whether pigs were within the definition of 'cattle' in s 2 of the Liability for Injuries by Dogs Act. Watkins JA considered a number of English cases in which 'cattle', as used in statutory provisions, was given a wide definition, and continued:

In *Anderson v Ledgister*<sup>[67]</sup>... Rennie J, expressing the unanimous decision of the Court [of Appeal] said: 'The law in our view was designed to protect such animals as are reared for profit and are capable of coming within the definition of "cattle". 'For the same reasons we can see no valid reason why the word 'cattle' as used in Jamaica in our local Dogs Act should not be construed in the wider sense to include pigs. These creatures have been known in the Caribbean from earliest times. Buccaneers for whom Port Royal was a haven in the 17th and early 18th centuries derived their name from the word 'boucan', by which the manner of curing the flesh of pigs was described. That these animals grew and increased in numbers over the succeeding years is witnessed by the legislative attention the subject attracted, as for example 21 VC 8 (1857), an Act to prevent hogs, dogs and goats from being at large in any town and for other purposes, 22 VC 17 (1858), an Act to repeal and amend 21 VC 8 relative to hogs, dogs and goats found at large in towns and for other purposes, and 36 VC 16 (1872), a Law to amend 22 VC 17 and to make better provisions respecting stray pigs and other animals. This latter law, it must be noticed, antedated by only five years the parent statute to our present Dogs (Liabilities for Injuries by) Act, namely, Law 2 of 1877, a Law defining liabilities for injuries done by dogs. It seems to us repugnant to reason and to history that the legislature of 1877, in providing a better remedy against canine ravages of 'cattle', could have meant to exclude from this protection swine which, no less than goats, were then obviously reared for profit and existed in such numbers as to call for legislative control. We are therefore of opinion that the word 'cattle' in the Dogs (Liabilities for Injuries by) Act includes pigs.

65 [1947] 1 All ER 373.

66 *Ibid.*, p 377.

67 (1955) 6 JLR 358 (Court of Appeal, Jamaica).

### Wilson v Silvera (1959) 2 WIR 40, Court of Appeal, Jamaica

One Christmas Day, the appellant called at the respondent's house to leave a present for a friend who resided there as a paying guest of the respondent. The gate to the premises was closed but the front door of the house was open. Having called out several times, the appellant entered, and while she was standing on the steps leading to the front door, she heard a voice say, 'Come in' or 'Coming'. Immediately, two dogs belonging to the respondent dashed through the open door and savagely attacked her, causing severe injuries. Three questions were to be determined:

- (a) whether the Liabilities for Injuries by Dogs Law created an absolute liability for injuries by dogs;
- (b) if it did not, whether the appellant was a trespasser, and if so, whether the respondent could rely on this as a defence;
- (c) whether the appellant was guilty of contributory negligence.

*Held:*

- (a) the Law did not create an absolute liability. It merely relieved a plaintiff from proof of *scienter* and negligence. Other defences, such as 'plaintiff a trespasser' and contributory negligence, could be raised, as at common law;
- (b) in the circumstances, the appellant was not a trespasser, nor was she guilty of contributory negligence.

MacGregor CJ said:

Professor Glanville Williams in his book, *Liability for Animals*, says:<sup>[68]</sup>

In New South Wales, on the construction of similar legislation that extends even to injuries to human beings, it has been held permissible to show that the plaintiff was a trespasser, and this was put upon the broad ground that all common law defences except lack of *scienter* applied.

There is an interesting footnote:

Otherwise a burglar could recover damages for injury to him by a watchdog. But the liability of owners of dogs has been considered recently in this court. In *Brown v Henry*, Savary J, delivering the judgment of the court, said:<sup>[69]</sup>

It does not follow...that the provisions of our Law exclude the defence being raised...that the damage caused by his dog was the result of the intervening act of a third party.

The court was there setting out that one of the common law defences was open to a defendant in certain circumstances, and was clearly laying down the proposition that there was no absolute liability.

In our judgment, the Dogs Law does not create an absolute liability. It relieves the plaintiff of proof of *scienter* and the proof of negligence. Other defences which are open at common law may still be raised.

We turn now to the second question: was the appellant, in the circumstances in which she entered, a trespasser?

In *Salmond on Torts*, 11th edn, p 581, the learned author states:

But it is sometimes difficult to distinguish between a trespasser and a person

68 Williams, *Liability for Animals*, 1939, Cambridge: CUP, p 356.

69 (1947) 5 JLR 62, p 63 (see above, pp 215, 216).

entering lawfully by the tacit permission of the occupier. Thus, the occupier tacitly invites and permits certain classes of persons to enter his garden gate and come to the front door. If his dog bites a person so entering, liability will depend on whether that person falls within the class of persons so tacitly invited; for otherwise he is a mere trespasser to whom no duty is owing. Who, then, are thus entitled to enter, and to complain of injuries received? What shall be said, for example, of hawkers, beggars, tract distributors, canvassers, strangers entering to ask their way? The only acceptable conclusion would seem to be that no person is to be accounted a trespasser who enters in order to hold any manner of communication with the occupier or any other person on the premises, unless he knows or ought to know that his entry is prohibited.

In *Winfield on Torts*, 6th edn, p 705, we read:

To the head of implied permission may perhaps be referred persons who call upon the occupier for purposes which may be described as of business interest to themselves and which they believe or hope may be of like interest to him, but which usually excite none in the occupier or may even be distasteful to him; for example, persons who canvass in the interest of trade, politics or religion, or who are ordinary beggars. It is quite true that many householders dislike tract distributors, pedlars and tramps, but common usage appears to sanction their visits except when they are expressly prohibited; for example, by a notice, 'No canvassers, hawkers or circulars'.

It is of interest to note that, in *Dunster v Abbott*,<sup>[70]</sup> a canvasser who called on the defendant to sell him advertising space and who had no appointment was held to be a licensee. The question of his being a trespasser did not arise and was not considered.

In *Fairman v Perpetual Investment BS*,<sup>[71]</sup> the plaintiff lodged with her sister in a flat on the fourth floor of a block of flats. She was injured when she fell when descending the common staircase. It was held that she was a licensee of the landlord.

In *Jacobs v London CC*,<sup>[72]</sup> the plaintiff, a pedestrian in a public street, in order to approach a shop stepped from the pavement to a forecourt between the shop and the pavement. Owing to the defective state of the forecourt she was injured. It was held that she was a licensee...

Do the facts in the instant case disclose an implied permission to enter? The evidence of the plaintiff is that when she was at the step and called out from there, the answer she received was either 'Come in' or 'Coming'. The answer was not one forbidding her entry or requiring her to leave.

In our view, the plaintiff in this case was not a trespasser. Whether she was a licensee or an invitee is of no matter, as counsel for the respondent admits that if she was not a trespasser, she was entitled to recover.

We turn now to the third question: was the plaintiff guilty of contributory negligence?

In his reasons for the judgment, the learned resident magistrate stated:

I find the defendant liable, but the plaintiff, by entering the defendant's premises in the manner she did, was guilty of contributory negligence.

Unfortunately, he did not state what it was about her entry that he found to be negligent. What are the facts that were proved and from which he could have found negligence?

- (1) The plaintiff had visited the premises before but had not previously entered.
- (2) She stood outside for about a minute, knocking, and received no reply.

70 [1953] 2 All ER 1572.

71 [1923] AC 74.

72 [1950] 1 All ER 737.

- (3) The gate was latched and the premises fenced.
- (4) After knocking and receiving no reply and waiting a minute, she pulled the latch and entered.
- (5) There was no notice on the gate, either to warn her to beware of the dogs or advising her not to enter.
- (6) The plaintiff did not state whether or not she knew that dogs were kept at the premises, but she did state in cross-examination that when she was at the gate and before she went in, the idea of dogs did not occur to her. We may infer, therefore, that she did not know of the presence of dogs at the premises.

It is to be noted that there was no finding of negligence in respect of anything she did after her entry.

Professor Glanville Williams, in *Liability For Animals*, states:<sup>[73]</sup>

Nowadays it is a familiar principle that the plaintiff cannot recover if he brought the injury upon himself wilfully or negligently; but reasonable conduct on his part does not affect the defendant's liability.

We desire to refer to the case of *Sarch v Blackburn*.<sup>[74]</sup> The plaintiff was a watchman employed in the neighbourhood of where the defendant carried on the business of a milkman. The dog was chained in a yard near a cowshed by a chain about four yards long. There was a painted notice—'Beware of the Dog'—but the plaintiff could not read. The plaintiff entered the defendant's premises by a way which might pass the dog in proceeding to the house. The plaintiff was bitten by the dog.

In reply to a submission of no case to go to the jury, Tindal CJ stated:<sup>[75]</sup>

The question I propose to leave to the jury is whether there was any negligence in the plaintiff in going where the dog was. If it was a way in which he might reasonably go to the house for a lawful purpose, then this action is maintainable, otherwise not.

Later, the learned Chief Justice said:

Undoubtedly, a man has a right to keep a fierce dog for the protection of his property, but he has no right to put the dog in such a situation, in the way of access to his house, that a person innocently coming for a lawful purpose may be injured by it. I think he has no right to place a dog so near to the door of his house that any person coming to ask for money, or on other business, might be bitten. And so with respect to a footpath, though it be a private one, a man has no right to put a dog with such a length of chain, and so near that path, that he could bite a person going along it.

It will be seen that the learned Chief Justice left two matters for the consideration of the jury. First, did the plaintiff have a justifiable and reasonable cause for being on the spot, as distinct from being a wrongdoer? And secondly, was there negligence on the part of the defendant?...

In *Brock v Copeland*,<sup>[76]</sup> Lord Kenyon CJ recognised that a man has a right to keep a dog for the protection of his yard or house, that the dog had been properly let loose at night, and that the plaintiff who had entered the yard after dark, with the knowledge where the dog was stationed, after the yard had been shut up and after the dog had been unchained, had entered incautiously and that the injury had arisen from his own fault.

We can see no difference in the principles laid down in these two cases...

<sup>73</sup> *Op cit*, Williams, fn 68, p 331.

<sup>74</sup> (1830) 172 ER 712.

<sup>75</sup> *Ibid*, p 713.

<sup>76</sup> (1794) 170 ER 328, p 329.

We have given very careful and serious consideration to this matter and cannot see on what evidence the learned resident magistrate came to the conclusion that the plaintiff was negligent in entering the defendant's premises.<sup>177</sup> In the words of Singleton J [in *Gould v McAuliffe*,<sup>178</sup> 'she was not bound to look and see whether or not there was a dangerous dog in the yard']. Why should she assume that the gate was closed because there were dangerous dogs in the yard, especially when there was no sign to that effect, and although she knocked for a minute, heard neither an answer from the occupants, nor a bark from any dog? We think that on this issue also the reply that she did receive when she entered is most significant. We can see no evidence to justify the decision of the learned resident magistrate that the plaintiff was guilty of any contributory negligence.

## LIABILITY FOR NEGLIGENCE

Quite apart from any liability in cattle trespass or under the *scienter* rule, the keeper of an animal owes a duty to take care that it does not become a source of harm to others.<sup>79</sup> In most cases, it will be unnecessary for a person harmed by an animal to establish negligence on the part of its keeper, but if, for any reason, an action under the *scienter* rule or in cattle trespass is not available, the plaintiff may still recover in negligence. For instance, where the plaintiff, an infant, was attacked and badly injured by a pack of Jack Russell terrier dogs which suddenly dashed out of the defendant's premises, the plaintiff could not recover in cattle trespass because dogs are not included within the definition of 'cattle'; nor under the *scienter* rule, because he could not prove that the defendant had knowledge of a vicious propensity on the part of any particular dog. He did succeed in negligence, however, on the ground that the defendant knew or ought to have known that Jack Russell terriers could be dangerous if allowed to roam about in packs, and yet he had taken no steps to fence them in or otherwise prevent them from escaping and doing damage.<sup>80</sup>

There are, however, limits to the liability in negligence. It has been stated that 'where no special circumstances exist, negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature'.<sup>81</sup> It seems, therefore, that the plaintiff will not succeed unless:

- (a) there is a special risk of injury to others; and
- (b) the particular kind of injury which occurred was foreseeable.<sup>82</sup>

With regard to the latter requirement, if, for example, a horse bit a human, it would not be sufficient for the victim to show that the horse was high spirited and,

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77 The Liability for Injuries by Dogs Act, s 3, provides: 'The occupier of any house or premises where any dog was kept or permitted to live or remain at the time of such injury shall be deemed to be the owner of such dog, and shall be liable as such, unless the said occupier can prove that he was not the owner of such dog at the time the injury complained of was committed, and that such dog was kept or permitted to live or remain in the said house or premises without his sanction or knowledge.' For an example of the application of the section, see *Thomas v Arscott* (1970) 11 JLR 496.

78 [1941] 1 All ER 515, p 520.

79 *Op cit*, Fleming, fn 31, p 334.

80 *Draper v Hodder* [1972] 2 All ER 210.

81 *Wright v Callwood* [1950] 2 KB 515.

82 *Op cit*, Fleming, fn 31, p 335.

therefore, likely to knock people down, for harm from a bite is of a totally different kind from harm by accidental collision.<sup>83</sup>

An important exclusion from liability in negligence is the rule in *Searle v Wallbank*,<sup>84</sup> which is to the effect that the occupier of premises adjoining a highway is under no duty to users of the highway to prevent his domestic animals, not known to be dangerous, from straying onto the highway and causing accidents there. Thus, at common law, there is no duty upon the owner of land to maintain a fence or other obstacle around the property to keep his animals in. In *Henry v Thompson*,<sup>85</sup> Patterson J, in the Grenadian High Court, explained the genesis of the rule thus:

The rule in *Searle v Wallbank* is steeped in medieval antiquity. The rule was formulated when commons were not enclosed; when there were tracks, not roads, leading from one community to another. Demarcating hedges and fences were unknown and domestic cattle roamed the terrain with unrestrained freedom and abandon. With the passage of time and the progress of civilisation into the industrial revolution and beyond, fences began to appear, roadmaking became a welcome part of community development and traffic thereon became faster and numerous; but the common law—that the owner of land abutting on to the highway incurred no liability to fence his land so as to prevent animals straying from it on to the road—stood remarkably still.

There are, however, two exceptions to this rule:

- (a) exceptional circumstances may require fencing; for example, where a dog dashed on to the road so often that it became ‘more like a missile than a dog’;<sup>86</sup>
- (b) if the defendant actually brings, leads or drives an animal on to the highway, he is under a duty to take reasonable care that it does not cause damage there.<sup>87</sup> What constitutes reasonable care is a question of fact in each case; for instance, greater care may need to be taken in an urban area than in the country.<sup>88</sup>

The second of these exceptions was applied by the Jamaican Court of Appeal in *Coley v James*,<sup>89</sup> where the defendant’s servant brought a cow onto a busy suburban highway and negligently left it unattended so that it trotted off home and, in the course of doing so, collided with and damaged the plaintiff’s car. The defendant was held liable in negligence. On the other hand, in another Jamaican case, *Blackwood v Chen*,<sup>90</sup> the appellant’s mule was being led along a road with a rope by the appellant’s servant. It was dark and, being startled by the lights of the respondent’s van, the animal reared up and struck and damaged the front of the van. It was held that the appellant was not liable, since his servant had made every effort to control the animal and was in no way negligent. Hallinan CJ said:<sup>91</sup>

In the circumstances of this case, the burden of proving that the appellant’s boy holding the mule was guilty of negligence was on the respondent. The respondent had to

83 *Aldham v United Dairies* [1940] 1 KB 507, p 511.

84 [1947] AC 341.

85 (1991) High Court, Grenada, No 439 of 1987 (unreported).

86 *Ellis v Johnstone* [1963] 2 QB 8, p 26.

87 *Deen v Davis* [1935] 2 KB 282.

88 *Gomberg v Smith* [1963] 1 QB 25.

89 (1964) 6 WIR 259.

90 (1958) 1 WIR 66.

91 *Ibid.*

establish that the appellant's agent, having brought an animal on to the highway, had not taken reasonable care to prevent it from doing damage to persons or property thereon. What constitutes reasonable care is a question of fact in each case and the standard of reasonable care may vary according to the circumstances.

An interesting example of liability in negligence for failure to control animals brought onto a public road is the Guyanese case of *Sattaur v Rapununi Development Co Ltd*.<sup>92</sup> In this case, the defendant's cattle were being driven along a busy public street in New Amsterdam when one of the steers suddenly rushed at the plaintiff and caused him injury. None of the cattle in the herd was restrained by a head rope and none was yoked. Bell CJ held that the drover in charge of the cattle was liable in negligence for failure to control the animals, pointing out that, unlike in England, where cattle were accustomed to being driven through the streets of busy market towns, in this case the cattle had been reared in remote parts of Guyana and were unaccustomed to crowds of people, 'the noise and bustle of human activity' and the sound of cars and motorcycles. Moreover, this herd had recently been released from the confinement of a river boat. The Chief Justice went on to say that the drover ought to have been aware that, in the circumstances, the cattle 'were very likely to stampede or run wildly about to the danger of persons lawfully using the Stelling Road'.

A straightforward example of the application in the Commonwealth Caribbean of the rule in *Searle v Wallbank* itself is the Barbadian case of *Thornhill v Williams*.<sup>93</sup> Here, the defendant left his cow in an unenclosed field adjacent to a busy public road. The plaintiff was driving his car along the road when the cow suddenly dashed across the road and collided with the car, damaging it. It was held that the defendant was not liable in negligence. Tulloch J (Ag) said:

The statement of claim alleges that the cow strayed on to the highway, colliding with the plaintiff's motor car; and that the collision was due to the defendant's negligence. At the close of the plaintiff's case the defendant submitted that there was no case to answer and relied on *Searle v Wallbank*<sup>[94]</sup> to show that there is no duty to prevent animals *mansuetae naturae* from straying on to the highway unless they were known to be vicious; he pointed out that there was no allegation of mischievous propensity. *Searle v Wallbank* is a House of Lords decision which, even though not binding, is of the highest persuasive authority and, although the subject of protests, has been acted upon for some time. *Salmond on Torts* (13th edn) records<sup>[95]</sup> that the rule is only one aspect of the principle that users of the highway must take it subject to ordinary risks, one of which is that domestic animals not known to be vicious might be found straying there. As Lord du Parc put it, 'the motorist must put up with the farmer's cattle; the farmer must endure the motorist'.

[Further, Lord du Parc pointed out that] where no special circumstances exist, negligence cannot be established merely by proof that a defendant has failed to provide against the possibility that a tame animal of mild disposition will do some dangerous act contrary to its ordinary nature; and, even if a defendant's omission to control or secure an animal is negligent, nothing done by the animal which is contrary to its ordinary nature can be regarded, in the absence of special circumstances, as being caused by such negligence.

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92 [1952] LRBG 113. See also *Hussain v East Coast Berbice Village Council* (1979) High Court, Guyana, No 308 of 1976 (unreported).

93 (1979) 35 WIR 61 (High Court, Barbados).

94 [1947] AC 341.

95 *Op cit*, Salmond, fn 12, p 624.

On the other hand, in the Grenadian case of *Henry v Thompson*,<sup>96</sup> where a cow with a chain around its neck ran through a gap in the fence on the defendant's adjacent land onto a busy highway, and there collided with and damaged the plaintiff's car, Patterson J held the defendant liable on the grounds that:

- (a) to keep cattle on land abutting a busy urban link road was a 'special circumstance', displacing the general rule that there was no duty to prevent the straying of domestic animals onto the highway; and
- (b) the fact that the defendant had invested this particular cow with a long chain around its neck was evidence of his knowledge of the animal's mischievous tendency to 'escape onto the highway with great speed'.

The obvious danger in modern times of large animals such as cows and bulls straying from unfenced land onto the highway and coming into contact with fast-moving vehicles has prompted some jurisdictions to abolish the rule in *Searle v Wallbank*. It has been pointed out that the effect of the rule under modern conditions is to subsidise the farmer at the expense of the motorist, and that the risk to the latter is disproportionately heavy compared with the burden on the former. In the Caribbean, it is a common practice for the owners of cows and bulls to depasture them on land adjacent to public roads, without having any interest in such land or any legal right to place their cattle there. In such circumstances, it would not be justifiable to require the owners or occupiers of the land to fence their land in order to prevent other persons' animals from straying onto the highway. On the other hand, in the Cayman Islands, s 31 of the Animals Act 1976 imposes strict liability on the *owner of livestock* for harm caused by their straying onto the highway:

It is the responsibility of the owner of any livestock<sup>[97]</sup> other than dogs, cats and honey bees, to take proper and effective measures to prevent such livestock from trespassing...onto any road...and, subject to the provisions of this law, such owner shall be responsible in damages for any injury done by such livestock in so trespassing.

In the Cayman case of *Bodden v McField*,<sup>98</sup> P was driving her car along the road when a cow approached her. In swerving to avoid the cow, she ran into another 'black bovine beast', later identified as a young bull belonging to D, resulting in damage to her vehicle. At the time of the collision, the bull was on the left hand side of the road and was untethered. The evidence was that the bull was normally tethered to a stake in the ground to prevent it from straying, but the stake was moved from time to time to fresh pasture. Summerfield CJ held that D was strictly liable under s 31 of the Animals Act 1976. The word 'injury' in the section was used in its wider sense, to include any loss or damage caused, and therefore included the damage to P's car.

96 (1991) High Court, Grenada, No 439 of 1987 (unreported).

97 'Livestock' is defined in s 2 as any domestic animal kept for profit.

98 [1986] CILR 204, Grand Court, Cayman Islands. The same approach was taken by Panton J in the Jamaican Supreme Court in *Clarke v Bayliss* (1992) 29 JLR 161, where it was held that the owner of a dog was liable under s 2 of the Dogs (Liability for Injuries by) Act for damage to a motorcycle caused by the dog's jumping onto the rider while the cycle was in motion.

Another example of the application of the principles relating to negligence in controlling animals is *Sims v McKinney*.<sup>99</sup> AS an alternative to the claim based on the *scienter* action, the plaintiff pleaded that the defendant was liable in negligence for failure to secure his premises to prevent the escape of his dogs onto the public road, and failure to restrict the freedom of movement of the dogs in the interests of safety. Georges CJ found for the defendant on both claims. He said:

Mrs Gibson [counsel for the plaintiff] conceded that the following passage in *Charlesworth on Negligence*<sup>[100]</sup> accurately stated the law in the Commonwealth of The Bahamas:

Under the common law, there was an important exception to the general principles of negligence. It was that, in the absence of special circumstances relating to the behaviour of an animal, which was known to the landowner, there was no duty to fence or maintain existing fences on land adjoining a highway so as to prevent an animal straying on to it.

By itself, therefore, it was not negligence on the part of the defendant...to fail to secure adequately or at all the premises owned by him so as to prevent the escape of the dogs therefrom...

Mrs Gibson quoted extensively from the case of *Draper v Hodder*.<sup>[101]</sup> The facts of that case are so different from those of this case that great care is needed in drawing analogies. In that case, the defendant bred Jack Russell terriers. He had 30 dogs on his premises, including puppies. A pack of seven terriers rushed through the ungated back yard of the defendant's premises across the lane to the ungated back yard of the house of the plaintiff's parents and severely injured the plaintiff, a child of three, who was playing there. A claim for damages based on *scienter* failed, but a claim in negligence succeeded.

Edmund-Davies LJ had doubts about the claim. He stated:<sup>[102]</sup>

I must confess that the question whether the conclusion at which the judge arrived was really justified on the evidence has troubled me a good deal. There was a complete absence of evidence of any previous misbehaviour on the part of any of the defendant's dogs, except perhaps of minor, and it would seem unimportant, snapping at the heels of Mrs Draper or her visitors...

The logical conclusion from the evidence of Mr Watson and Mr Webster would seem to be that, wherever two or more dogs are allowed out alone, the owner ought to foresee that they will or may do damage, including even an attack on mankind. For it is difficult for the non-expert to understand that, in this respect, there can be any difference between Jack Russells and any other dogs, for example alsatians, or, as in *Toogood v Wright*,<sup>[103]</sup> greyhounds or, as in *Tallents v Bell*,<sup>[104]</sup> other dogs. And the proposition that in all such cases the owner is or may be liable is somewhat surprising.

99 (1989) Supreme Court, The Bahamas, No 996 of 1986 (unreported) (see above, p 214). See also *Alleyn v Caroni Sugar Estates (Trinidad) Ltd* (1933) 7 Trin LR 102 (company's mule trotted out from trace and collided with bus on public road: no negligence on part or youths in charge of mule).

100 Charlesworth and Percy, *Charlesworth on Negligence*, 7th edn, 1983, London: Sweet & Maxwell, paras 14–42.

101 [1972] 2 All ER 210.

102 *Ibid*, p 216.

103 [1940] 2 All ER 306.

104 [1944] 2 All ER 474.

But there was evidence, open to criticism though it was, that there was in the circumstances a serious risk of a happening such as did occur in the present case, and that the defendant as an experienced breeder should have anticipated and foreseen it.

Edmund-Davies LJ preferred to rest his judgment on the ground that it was foreseeable that a pack of dogs would overrun a child and cause physical harm. The defendant could not escape liability by reason of the fact that the damage had been caused by bites. I find this approach attractive.

Roskill LJ stated:<sup>[105]</sup>

If the present claim were to succeed, it was in my view essential for the plaintiff to show, since he could not prove *scienter*, that the propensity of a pack of Jack Russell terriers allowed to wander was such that the appellant knew or ought to have known and thus ought to have foreseen that there was a real risk of attack on a small child whom the pack might encounter in its unchallenged wanderings.

In this case, there is no evidence that the defendant was a breeder of dogs to whom might be imputed any special knowledge of their propensities. Potcakes are perhaps the most common class of dogs in the island of New Providence and it cannot be said that there is any special risk of attack from potcakes when wandering in pairs or larger numbers.

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105 [1972] 2 All ER 210, p 229.

# CHAPTER 10

## DEFAMATION

### INTRODUCTION

The tort of defamation, which protects a person's interest in his reputation, occupies a prominent place in Caribbean jurisdictions, as it does in most developing countries in which the common law applies. The pre- and post-independence periods in Commonwealth Caribbean countries have been characterised by vigorous political activity supported by an articulate and free press. As Summerfield CJ has pointed out, journalists play their part 'in the rough and tumble of politics in this part of the world', and they 'add spice to the interplay of politics'.<sup>1</sup> Many newspapers have featured as defendants in defamation actions, and most of the leading cases in defamation in the region have a political background.

### LIBEL AND SLANDER

A defamatory statement may be either (a) libel; or (b) slander.<sup>2</sup> The historical origins of libel and slander are different, slander being derived from the common law action on the case and libel from the criminal proceedings in the Star Chamber. The main difference between the effects of slander and libel is that, whereas libel is always actionable *per se*, slander is not actionable *per se*, except in certain defined instances.

Libel is a defamatory statement in a *permanent* form, most usually consisting of written words in a newspaper, book, pamphlet, printed notice or letter. It also includes defamatory paintings, cartoons, photographs, effigies, films and computer-derived exposure, such as e-mail messages, bulletin boards, newsgroups and the world wide web. Also, by s 3 of the Defamation Act, Cap 6:03 (Guyana) and s 3 of the Defamation Act (Jamaica), defamatory words in radio and television broadcasts are to be treated as being in permanent form, that is, as libel.

Slander is a defamatory statement in a *transient* form, principally by means of spoken words or gestures.

It is sometimes said that libel is addressed to the eye, whilst slander is addressed to the ear. It is doubtful whether defamatory statements contained in audio discs, cassettes or tape recordings are libel or slander, for they are in permanent form and yet are addressed to the ear. Most commentators consider such statements to be libel, but there appears to be no firm judicial authority on the point.

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1 *Bodden v Bush* [1986]CILR 100 (Grand Court, Cayman Islands), p 118.

2 Defamation Act 1996 (Barbados), s 3(1) abolishes the distinction between libel and slander. Under the Act, actions lie only for 'defamation'.

## PROOF OF DAMAGE

Since libel is actionable *per se*, the law presumes that damage has been caused to the plaintiff's reputation and he will be awarded general damages by way of compensation in any event.<sup>3</sup> If he does prove that he has suffered actual loss, he will be awarded a further sum as special damages.

In slander, on the other hand, the plaintiff has no cause of action unless he can show he has suffered actual loss, meaning *temporal* or *material* loss, for example, that as a consequence of the defamatory statement he has been dismissed from his employment, or that he has been refused credit by a bank. The mere loss of the consortium of friends or associates is insufficient. This principle is illustrated by the Trinidadian case of *Sunanansingh v Ramkerising*<sup>4</sup> where, at an East Indian meeting called a 'Panchayite', the defendant had made certain imputations to the effect that the plaintiff had cohabited with his sister-in-law and that she had become pregnant by him. The plaintiff alleged that, in consequence of these imputations, he had been banished from the society of members of his caste. He sued the defendant for slander. It was held that the plaintiff's claim disclosed no cause of action. In an action for slander, it must be proved that the plaintiff has suffered special damage as a consequence of the words uttered, and such damage must be the loss of some temporal benefit. Mere loss of the consortium of friends or associates was not sufficient. Goldney CJ said:

In law, words spoken are different from words written, and special damage is necessary to support an action for slander, not imputing crime, misconduct in a profession or trade, or some kinds of disease: *Chamberlain v Boyd*,<sup>[5]</sup> *per* Bowen LJ.

The same principle of law is laid down by Channel B in *Foulger v Newcomb*:<sup>[6]</sup>

Where words are spoken which are of a defamatory nature, yet such that the law will not imply [as in this case] damage from them, still they are actionable if they are shown actually to cause (as their legal and natural consequence) damage of a character which the law will recognise.

Practically all that was attempted to be proved was a loss of 'consortium'. Such a loss is not sufficient; the loss must be temporal in its nature; there must be a loss of some temporal benefit: *Roberts v Roberts*,<sup>[7]</sup> *Chamberlain v Boyd*.<sup>[8]</sup> I think the plaintiff has failed to show the loss of any temporal benefit, or that such inconvenience as he has suffered is the natural consequence of the words spoken by the defendant.

## SLANDER ACTIONABLE PER SE

In the following cases, slander is actionable without proof of damage, in the same way as libel.

3 *British Guiana Rice Marketing Board v Peter Taylor and Co Ltd* (1967) 11 WIR 208, p 219 (below, pp 267–69).

4 (1897) 1 Trin LR 54.

5 (1883) 11 QBD 407, p 415.

6 (1867) LR 2 Ex 327, p 330.

7 (1864) 33 LJ QB 249.

8 (1883) 11 QBD 407, p 416.

## Imputation of crime

Where the defendant alleges that the plaintiff has committed a crime punishable by imprisonment or corporal punishment, such as theft, drug offences,<sup>9</sup> blackmail<sup>10</sup> or corruption in public office,<sup>11</sup> such slander is actionable *per se*. The offence imputed must be punishable by imprisonment in the first instance. An imputation of a crime punishable by fine only is not within the exception, notwithstanding that failure to pay the fine may be punishable by imprisonment, or that the offence is one for which the offender may be arrested summarily.<sup>12</sup>

In *Cupid v Gould*,<sup>13</sup> the offence imputed ('making use of threatening language') was punishable by a penalty of \$24 or by imprisonment for one month. The trial magistrate interpreted this to mean that the offence was punishable by a \$24 fine and by one month's imprisonment only in default of payment of the fine; he thus held that the slander was not actionable *per se*. However, on appeal, Lewis CJ held the magistrate's interpretation to be incorrect; in Lewis CJ's view, the fine and imprisonment were alternative punishments, either of which might be imposed in the first instance. The offence imputed had, therefore, to be taken to have been punishable by imprisonment in the first instance, and the slander was thus actionable *per se*.

To be actionable *per se*, there must be a direct assertion of guilt. A mere allegation of suspicion is not sufficient.<sup>14</sup> Thus, to say that the plaintiff 'is a thief' would be actionable *per se*, but to say that he 'is suspected of having stolen' would not.

The words used by the defendant must be looked at in the context in which they were spoken, in order to determine what was actually imputed. Thus, words which, taken by themselves, would be defamatory, might not be so when taken together with other words spoken by the defendant, or when considered in the light of the circumstances in which they were uttered. Thus, for example, the words 'P is a thief would not be actionable *per se* if followed by, 'the cloth he has sold me is not worth half of what he charged me for it', since, taken together, the words do not impute any criminal offence, but only that P has not given value for money. Nor will spoken words be actionable at all if they constitute mere vulgar abuse. Words will amount to vulgar abuse and not slander if:

- (a) they were words of heat and anger; and
- (b) they were so understood by persons who were present when they were uttered.

Thus, disparaging or insulting words spoken at the height of a violent quarrel may be vulgar abuse and not actionable,<sup>15</sup> but the same words spoken 'in cold blood' may amount to slander.<sup>16</sup>

9 *Craig v Miller* (1987) High Court, Barbados, No 317 of 1986 (unreported).

10 *Ibid.*

11 *Smith v Adams* (1982) Court of Appeal, Barbados, Civ App No 6 of 1982 (unreported).

12 *Nauth v Alexander* [1960] LRBG 313.

13 (1971) 2 OECSLR 162.

14 *Wight v Bollers* [1936] LRBG 330, p 332.

15 *Ie*, in Jamaican parlance, a 'contest of verbal stones': *Blake v Spence* (1992) 29 JLR 376.

16 In *Lament v Emmanuel* (1966) Court of Appeal, Trinidad and Tobago, No 1 of 1965 (unreported), Wooding CJ held that where specific defamatory charges are made (eg, that a married woman has committed adultery), the defence of vulgar abuse is not available.

The Jamaican case of *Griffiths v Dawson*<sup>17</sup> illustrates the requirement that the words complained of must be considered in the context in which they were spoken. Here, the defendant/respondent, in the presence of witnesses, spoke to the plaintiff/appellant, an estate overseer, in the following words: 'You, Griffiths, are a... criminal; you are sabotaging my life, stop me from getting work and blackball me all around; you are a...criminal.' Luckhoo JA held that no reasonable person, hearing the words uttered in the particular circumstances, could come to the conclusion that the defendant was accusing the plaintiff of having committed a criminal offence for which the plaintiff might be liable to imprisonment. The words amounted only to vulgar abuse and were not actionable. He explained:

In the present case, it is necessary to remember that one must have regard to the context in which the words were used by the defendant and to the circumstances under which they were used. There was no doubt in this case, upon the evidence given by the plaintiff and by his witnesses, that the defendant was, before he uttered these words, abusing some other person or persons in the crowd, and that upon remonstrance by the plaintiff he made use of the words about which complaint has been made. It is also necessary to observe that the word 'criminal' was not used in isolation. The context in which the word 'criminal' was used makes it clear, in my view, that the defendant was using that word in relation to what he believed had been the act of the plaintiff in preventing him getting work at the estate for which the plaintiff was overseer; that his complaint by the use of the words was really that the plaintiff was against him by reason of the fact that he had prevented him from getting work; that because of that he considered the plaintiff to be a criminal.

I do not think that a reasonable person hearing the words uttered in the particular circumstances could come to the conclusion that the defendant was accusing the plaintiff of having committed a criminal offence or criminal offences for which the plaintiff might be rendered liable to imprisonment. I agree with the conclusion reached by the learned magistrate that the words complained of, looked at in the context in which they were used and the circumstances of the case, amounted only to vulgar abuse. The learned magistrate was right in dismissing the action and giving judgment for the defendant with costs.

### Imputation of certain diseases

It is actionable *per se* to allege that the plaintiff is infected with certain contagious or repulsive diseases, since this would tend to cause other persons to shun or avoid him. There is uncertainty, however, as to what diseases are included within this exception. It is established that contagious venereal diseases (including AIDS)<sup>18</sup> are included, and leprosy, plague or any contagious skin disease caused by personal uncleanness may be within the exception.<sup>19</sup> But it has been held in at least two

17 [1968] Gleaner LR 17 (Court of Appeal, Jamaica). On the other hand, in *Tulloch v Shepherd* [1968] Gleaner LR 5, where the defendant said to the plaintiff in the presence of witnesses, 'You will soon go back to prison because you have been there already. I can prove that while you were abroad you went to prison', it was held by a majority of the Jamaican Court of Appeal that the words, in their natural and ordinary meaning, did convey the imputation of a crime punishable by imprisonment and were actionable *per se*. See also *Gray v Jones* [1939] 1 All ER 798.

18 *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported) (below, pp 272, 273).

19 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 395.

Jamaican cases that an imputation of tuberculosis is not included.<sup>20</sup> In *Murray v Williams*<sup>21</sup> the defendant spoke the following words concerning the plaintiff, a shopkeeper: 'The damn long neck consumption coolie man Murray think it is him alone can get truck to trust, but him can't help it. Him catch the consumption from his wife. Every pickney him have catch it. A it dey kill them out.' It was held that the slander was not actionable *per se*. Brown JA said:

There are three questions which fall for decision:

- (1) Are the words defamatory?
- (2) Are they actionable without proof of special damage?
- (3) If they are not actionable without proof of special damage, has special damage been proved?

These questions are settled by legal decisions and the textbooks.

(1) In our opinion, the words are capable of being defamatory as used in the circumstances of this case. It is defamatory to impute insanity in certain cases or to attribute to the plaintiff certain contagious and infectious diseases of a loathsome nature, and it has been pointed out that no substantial distinction can be drawn between an imputation of mental disease and one of bodily disease (*Clerk and Lindsell on Torts*, 8th edn, p 502).

As to (2), if the matter were one of principle, small pox, scarlet fever, measles and similar contagious diseases would be within the rule; but small pox is not and it is improbable that the list will be extended. For practical purposes, the rule may be taken to be limited to statements attributing venereal disease (*Clerk and Lindsell on Torts*, 8th edn, p 506). In *Jones v Jones*,<sup>[22]</sup> affirmed in the House of Lords, the case is thus stated by Swinfen Eady LJ:

If the court were at liberty to deal with this case (an action for imputing immoral conduct to a teacher) upon principle, there would be much to be said in favour of this view; but the law of slander is an artificial law, resting on very artificial distinctions and refinements, and all the court can do is to apply the law to those cases in which heretofore it has been held applicable. It is not like a law founded on settled principles, where the court applies established principles to new cases, as they arise, which fall within them.

In *Alexander v Jenkins*,<sup>[23]</sup> Lord Herschell said: 'I feel very strongly in this case what was said by Pollock CB in delivering the judgment of the court in the case of *Gallwey v Marshall*,<sup>[24]</sup> that we ought not to extend the limits of actions of this nature beyond those laid down by our predecessors. When you are dealing with some legal decisions which all rest on a certain principle, you may extend the area of those decisions to meet cases which fall within the same principle; but where we are dealing with such an artificial law as the law of slander, which rests on the most artificial distinctions, all you can do is, I think, to say that if the action is to be extended to a class of case in which it has not hitherto been held to lie, it is the legislature that must make the extension and not the court.'

Thus, the Slander of Women Act 1891 in England made the imputation of unchastity or adultery to a woman or girl actionable without proof of special damage, but it was not until 1905 that this was done in Jamaica [see now s 18 of the Libel and Slander Act].

20 *Murray v Williams* (1936) 6 JLR 180 (Court of Appeal, Jamaica); *Hinds v Lee* (1952) 6 JLR 176.

21 *Ibid.*

22 [1916] 1 KB 351, p 358.

23 [1892] 1 QB 797, p 801.

24 (1853) 156 ER 126.

In our opinion, we cannot go beyond the cases, and we agree with the passage already referred to from *Clerk and Lindsell on Torts*, that, 'for practical purposes the rule may be taken to be limited to statements attributing venereal disease' and apparently also leprosy.

Nor do we consider that the words used can be said to have been spoken of the plaintiff in reference to his occupation as a shopkeeper.

As to (3), [special damage was not proved].

On the other hand, in *Allen v Miller*<sup>25</sup> the defendant/respondent uttered words of a disgusting nature which the plaintiff/appellant alleged to mean that the plaintiff was suffering from a venereal disease. The resident magistrate had held that the words were defamatory of the plaintiff, but he was not satisfied that they conveyed the imputation that the plaintiff was suffering from a venereal disease so as to make the words actionable *per se*. The Jamaican Court of Appeal took the view that the words carried the imputation alleged by the plaintiff. Duffus P said:

I am sorry that I am unable to support the judgment of the learned resident magistrate for Westmoreland. There can be no doubt that he went into the matter very thoroughly and very carefully. Unfortunately, he erred in applying as a test the test of the purist in the use of the English language. Perhaps on an interpretation in the classroom of the words used by the defendant it could be said that there was no imputation that the plaintiff was suffering from venereal disease. Similarly, on the very literal, very technical interpretation of the word 'sick' which was used by the plaintiff's witness in describing what she thought was meant by the words used by the defendant, it could be said that this too did not embrace venereal disease; but the test to be applied is not the test of the purist of English or the test of the school teacher in a girls' school; the test to be applied is, what would a reasonable man in the canepieces of Westmoreland have understood by the use of these words; and in the language of the workers of the canefields, beyond a shadow of a doubt, these words, even without the innuendo, would have borne but one meaning, and that is that this unfortunate plaintiff was suffering from venereal disease. It seems to me that it is that test which should have been applied by the learned resident magistrate; the test which the persons hearing the words in the particular circumstances and particular area would have understood them to mean.

There can be no doubt that the defendant succeeded in packing the maximum of offensiveness into the few horrible obscene words used in this slander, which, as my learned brother indicated, even we of the Bench will not repeat.

### Imputation of unchastity or adultery

By s 1 of the Slander of Women Act 1891 (UK), an imputation of unchastity<sup>26</sup> or adultery concerning any woman or girl is actionable *per se*. Section 6 of the Libel and Defamation Act, Ch 11:16 (Trinidad and Tobago), s 6 of the Defamation Act, Cap 6:03 (Guyana) and s 18 of the Libel and Slander Act (Jamaica) contain similar provisions.<sup>27</sup>

It was held by Savary J in the Guyanese case of *Wight v Bollers*<sup>28</sup> that, in order to be actionable *per se*, the words must amount to a definite imputation that the

25 [1967] Gleaner LR 176 (Court of Appeal, Jamaica).

26 'Unchastity' includes lesbianism: *Kerr v Kennedy* [1942] 1 KB 409.

27 See also, eg, Grenada, Cap 171, s 6; Dominica, Cap 7:04, s 10; BVI, Cap 42, s 10; St Kitts/Nevis, Cap 44, s 10; Belize, Cap 131, s 6; Antigua, Cap 248, s 10; St Vincent, Cap 89, s 14.

28 [1936] LRBG 330.

plaintiff is guilty of adultery or unchastity, and words which do no more than raise a doubt about the plaintiff's chastity are not within the statutes. Thus, where the defendant said to the plaintiff's husband, 'You may not be Oscar's father', which suggested that the plaintiff had had an adulterous union from which the child, Oscar, had been born, the words were held merely to have raised a doubt about the plaintiff's chastity and were not actionable *per se*.

In the Trinidadian case of *Ramkhelawan v Motilal*,<sup>29</sup> the defendant called the plaintiff, a respectable married woman, a 'nasty whore and a prostitute' in the presence of witnesses, and accused her of having brought men to her house. Rees J held that the words amounted to slander actionable *per se* within s 6 of the Libel and Defamation Ordinance, Ch 4, No 10 (see now s 6 of the Libel and Defamation Act, Ch 11:16). The defence of 'vulgar abuse' failed. He said:

To call a married woman a nasty whore and a prostitute, and at the same time and place to specify a date on which she had men in her house, are words which clearly impute adultery to the plaintiff and, as such, must fall into one of those categories of slander wherein an action will lie without specifying damage. I refer to s 6 of the Libel and Defamation Ordinance, Ch 4, No 10, which provides as follows:

Words spoken and published which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable.

As I see it, it is only necessary for the plaintiff to prove that the defendant used and published to others the defamatory words contained in her pleadings, and that is enough to constitute an actionable wrong.

The defendant, however, contends that the words used were merely words of vulgar abuse. The burden is therefore on him to prove that which he asserts. If he is successful in proving that the words used were mere vulgar abuse, for which no action lies, then he must succeed. *Gatley on Libel and Slander*, 5th edn, para 205, p 126, contains an accurate and clear commentary on the burden of proof in cases where the words complained of are defamatory and publication is satisfactorily proved; the writer says:

The onus lies on the defendant to prove from the context in which the words were used, or from the manner of their publication (for example, in slander, the tone in which the words were pronounced) or other facts known to those to whom the words were published, that the words would not be understood by reasonable men to convey the imputation suggested by the mere consideration of the words themselves, for example, that they were understood merely as a joke, or (in an action for slander) as vulgar abuse, or as in no sense defamatory of the plaintiff. The defendant will not discharge this burden merely by proving that he did not intend his words to convey the meaning suggested by the words themselves. He must satisfy the jury that reasonable persons who read or heard them would not understand them in that meaning.

On an examination of the evidence of the defendant and his witnesses in the instant case, I do not think that the burden which lay on the defendant has been discharged, in that he has not proved to my satisfaction that this was mere vulgar abuse. I will not dispute that the words used were vulgar, abusive or obscene, but I do not think that

29 (1967) 19 Trin LR (Pt II) 117. Other successful actions for slander of women in the Caribbean include *Bennett v Skyers* [1965] Gleaner LR 180 (Court of Appeal, Jamaica); *Blake v Spence* (1992) 29 JLR 376 (Court of Appeal, Jamaica); *Lamont v Emmanuel* (1966) Court of Appeal, Trinidad and Tobago, No 1 of 1965 (unreported); *Persaud v Gajraj* (1978) High Court, Guyana, No 1221 of 1976 (unreported); *Persaud v Kunar* (1978) High Court, Guyana, No 435 of 1975 (unreported).

the law is that a man may with impunity use words to a married woman which are inherently offensive, false and calculated to expose her to hatred, contempt and ridicule and then be permitted to shelter under the umbrella of vulgar abuse. To succeed in such a defence he must go further and prove to the court's satisfaction that the words were spoken in the heat of altercation, but even that alone is not sufficient. He must go yet further and show that the words were not intended to convey the defamatory meaning which they have ordinarily; and finally, that the words were not understood by his audience, who are presumed to be reasonable persons, to convey a defamatory meaning. In this case I think that no reasonable and intelligent bystander would have understood the words used to convey a meaning other than what is the ordinary and natural meaning of the words 'whore and prostitute', particularly as the defendant actually gave a specific date when the plaintiff was having, by inference, an immoral association with other men in her house. In fact, the evidence disclosed that the men referred to were none other than her brothers. Enough has been said to indicate that, in my opinion, the defence of mere vulgar abuse must fail, and there will be judgment for the plaintiff. On the question of damages, in addition to the other considerations to which I shall hereafter refer, I must bear in mind the observations of the Chief Justice in the local case of *Lamont v Emmanuel*,<sup>[30]</sup> where he had this to say:

The second point taken was that this was mere vulgar abuse. The sooner that people understand that they cannot licentious use bad language to women, and particularly to married women, the better for all concerned. It is an unfortunate fact—and this is, I suppose, what counsel was referring to when he suggested that we should approach the matter differently from the way they do in England or that we should regard the language in some different sense—that some men are so utterly lacking in respect for women that they allow themselves tremendous licence. But no such yardstick will be accepted by this court. This court will demand for the women of this country respect from their menfolk, or from menfolk generally, to no less extent than is accorded to women in any country.

I think that the slander in the present case is a particularly mischievous and odious one, because not only were the words spoken in the presence of several people, but in the presence of her husband and her husband's employees.

### Imputation affecting professional or business reputation

Examples of such statements are: that a doctor is incompetent;<sup>31</sup> that a banker is fraudulent; that an engineer has no technique; that a lawyer knows no law; and that a trader is insolvent.

At common law, the scope of this exception is considerably restricted by the rule that slander is not actionable *per se* under this head unless it amounts to a disparagement *in the way of the plaintiff's* profession or business. This means that the words must have been 'spoken of a person following a calling, and spoken of him in that calling, which impute to him unfitness for or misconduct in that calling'.<sup>32</sup>

30 (1966) Court of Appeal, Trinidad and Tobago, No 1 of 1965 (unreported), *per* Wooding CJ.

31 In *Ying v Richards* (1972) Court of Appeal, Jamaica, Civ App No 80 of 1971 (unreported), R said to L: 'You should not have gone to that gangster doctor. He is no good and no one recognises him.' These words were held to be slander actionable *per se*. See also *Haynes v Johnson* (1978) 31 WIR 95 (High Court, Barbados), where an allegation at a political meeting that the plaintiff, a physician as well as a prominent politician, was in the habit of overcharging and extorting money from his patients and of neglecting them, was a slander actionable *per se*.

32 *Jones v Jones* [1916] 2 AC 481, p 500, *per* Lord Sumner.

The severity of this rule is illustrated by *Jones v Jones*,<sup>33</sup> where it was held not actionable *per se* to say that a schoolmaster had committed adultery with a married woman employed at the school as a cleaner, because although the statement imputed moral misconduct to the plaintiff and would certainly be injurious to him in his profession, it did not allege misconduct in *the course of his duties as a schoolmaster*.

In the recent Trinidadian case of *Gordon v Panday*,<sup>34</sup> the plaintiff was the proprietor of the *Trinidad Guardian* newspaper and the defendant was Prime Minister. During a public speech, the latter had referred to the plaintiff as a 'pseudo-racist'. One of the issues in the case was whether this defamatory imputation disparaged the plaintiff in his profession or calling. Jamadar J had no doubt that the statement did disparage the plaintiff in his calling in the media business, as the defendant had implied that the plaintiff had used, or misused, racism in order to maintain a monopolistic advantage over his competitors in the business.

Section 2 of the Defamation Act 1952 (UK), s 4 of the Defamation Act, Cap 6:03 (Guyana) and s 4 of the Defamation Act (Jamaica) have altered the position in those jurisdictions by providing that:

In an action for slander in respect of words calculated to disparage the plaintiff in any office, profession, calling, trade or business held or carried on by him at the time of publication, it shall not be necessary to allege or prove special damage, whether or not the words are spoken of the plaintiff in the way of his office, profession, calling, trade or business.

The effect of the statutes is that any words spoken of the plaintiff which are reasonably likely to injure him in his office, profession, etc, will be actionable *per se* even though not spoken 'in the way of his office, profession etc.'<sup>35</sup> Thus, cases such as *Jones v Jones* would be decided differently under the statutes.

## REMOTENESS OF DAMAGE IN LIBEL AND SLANDER

In accordance with general tort principles, the damage complained of as a result of a defamatory statement must not be too remote. The plaintiff may recover compensation only for those consequences of the defendant's defamatory statement which were foreseeable. It was held in one case<sup>36</sup> that, if A slanders B, so that B is wrongfully dismissed (that is, in breach of contract) from his employment by C, A is not liable to compensate B for the dismissal since, being wrongful, it is too remote a consequence of the slander. But this is no longer regarded as good law. The modern view is that A will be liable if B's dismissal was the natural and probable result of the slander, whether B's dismissal by C was wrongful or not.<sup>37</sup>

Again, if A slanders B to C, and C repeats the slander to D, who then dismisses B, A is not liable for B's dismissal since the damage is too remote. But A will be liable if:

33 *Ibid.*

34 (2000) High Court, Trinidad and Tobago, No CV 1443 of 1997 (unreported).

35 In *Chanderpaul v Raffudeen* (1977) High Court, Guyana, No 2376 of 1975 (unreported), it was held that an imputation that the plaintiff had fathered the child of a married female neighbour was not likely to injure him in his business as a sanding contractor.

36 *Vicars v Wilcox* (1806) 103 ER 244.

37 *Op cit*, Winfield and Jolowicz, fn 19, pp 393, 394.

- (a) he authorised the repetition; or
- (b) C had a legal or moral duty to repeat it; or
- (c) A should have foreseen that his slander would be repeated by C.

These rules of remoteness apply equally to cases of libel.<sup>38</sup>

### WHAT IS DEFAMATORY?

A defamatory statement is one which tends:

- (a) to lower a person in the estimation of right-thinking members of society generally;<sup>39</sup> or
- (b) to expose a person to hatred, contempt or ridicule; or
- (c) to cause other persons to shun or avoid him; or
- (d) to discredit a person in his trade, profession or calling; or
- (e) to damage a person's financial credit.<sup>40</sup>

A statement which tends to lower a person's reputation not in the minds of right-thinking members of society generally, but only in the minds of a particular section of the community, such as the members of a private club, is not defamatory. In *Byrne v Dean*,<sup>41</sup> the plaintiff and defendant were both members of a golf club. The plaintiff alleged that the defendant had defamed him by putting up a notice in the club to the effect that the plaintiff had made a report to the police about certain illegal gaming machines kept in the club premises. It was held that the defendant's statement could not be defamatory since, although the other members of the club might think less well of the plaintiff for 'sneaking' to the police as the notice alleged, right-thinking members of the general public would approve rather than disapprove of a person who reported a criminal offence to the police.

In assessing the standard of the average right-thinking member of the public, the court will:

...rule out on the one hand persons who are so lax or so cynical that they would think none the worse of a man whatever was imputed to him, and on the other hand those who are so censorious as to regard even trivial accusations (if they were true) as lowering another's reputation, or who are so hasty as to infer the worst meaning from any ambiguous statement... The ordinary citizen... is neither unusually suspicious nor unusually naive, and he does not always interpret the meaning of words as would a lawyer, for he is not inhibited by a knowledge of the rules of construction.<sup>42</sup>

38 See below, p 252.

39 *Sim v Stretch* [1936] 2 All ER 1237, p 1240, per Lord Atkin.

40 See, generally, Gately, *Gately on Libel and Slander*, 9th edn, 1998, London: Sweet & Maxwell, Chapter 2.

41 [1937] 2 All ER 204.

42 *Op cit*, Winfield and Jolowicz, fn 19, p 398; *Lewis v Daily Telegraph Ltd* [1964] AC 234, p 258, per Lord Reid.

It must also be borne in mind that what may be defamatory in one society will not necessarily be so in another, and that, as time passes and social attitudes change, words may cease to be or become defamatory, as the case may be.<sup>43</sup> The former point is illustrated by the case of *Rogers v News Company Ltd*,<sup>44</sup> where Cenac J, in the High Court of St Vincent and The Grenadines, held that to refer to the plaintiff, who was a Superintendent of Police, in a newspaper report as 'Bat' Rogers was defamatory, since, in Vincentian society, to call a person 'bat' imputed 'ignorance, stupidity and eccentricity'.

## PRESUMPTION OF FALSITY

In a defamation action, a defamatory statement is presumed to be *untrue*; but if the defendant can prove that his statement was true of the plaintiff, he will have a complete defence, for the plaintiff is not entitled to protect a reputation he does not really possess. This is the defence of justification (see below, pp 255–57).

## EXAMPLES OF DEFAMATORY STATEMENTS

- A statement that a businessman was involved in the cocaine trade.<sup>45</sup>
- A statement that a corporation's cheques had 'bounced'.<sup>46</sup>
- A statement that the plaintiff had 'stolen money'.<sup>47</sup>
- A statement that a married woman was a 'prostitute'.<sup>48</sup>
- A statement that the plaintiff had associated with a person infected with the AIDS virus.<sup>49</sup>
- A statement that a university lecturer had committed plagiarism.<sup>50</sup>
- A statement that a university lecturer had been dismissed for failure to publish.<sup>51</sup>
- A statement that a lawyer was dishonest, incompetent and discourteous.<sup>52</sup>
- A statement that a newspaper proprietor was a 'pseudo-racist'.<sup>53</sup>

43 *Op cit*, Gatley, fn 38, para 47. See also below, pp 240–42.

44 (1995) High Court, St Vincent and The Grenadines, No 221 of 1993 (unreported).

45 *Spice Island Printers Ltd v Bierzynski* (1994) Court of Appeal, Eastern Caribbean States, Civ App No 5 of 1992 (unreported). See also *Scantlebury v The Advocate Co Ltd* (1997) High Court, Barbados, No 2017 of 1993 (unreported).

46 *British Guiana Rice Marketing Board v Peter Taylor and Co Ltd* (1967) 11 WIR 208 (below, pp 267–69).

47 *Briggs v Mapp* (1967) Court of Appeal, West Indies Associated States, Civ App No 2 of 1964 (unreported) (below, pp 285–86).

48 *Ramkhelawan v Motilal* (1967) 19 Trin LR (Pt II) 117 (above, pp 233–34).

49 *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported) (below, pp 272–73); *Polidore v Crusader Caribbean Publishing Co Ltd* (2000) High Court, St Lucia, No 380 of 1990 (unreported).

50 *Gafar v Francis* (1980) Supreme Court, Jamaica, No G 028 of 1979 (unreported); on appeal (1986) Court of Appeal, Jamaica, Civ App No 45 of 1980 (unreported).

51 *Sham v The Jamaica Observer Ltd* (1999) Supreme Court, Jamaica, No S 292 of 1995 (unreported).

52 *Emanuel v Lawrence* (1999) High Court, Dominica, No 448 of 1995 (unreported).

53 *Gordon v Panday* (2000) High Court, Trinidad and Tobago, No CV 1443 of 1997 (unreported).

In order to succeed in a defamation action, the plaintiff must establish:

- (a) that the words were defamatory;
- (b) that they referred to him; and
- (c) that they were published to at least one person other than the plaintiff himself.

### Words must be defamatory

This question must be approached in two stages. In a trial with judge and jury, the judge's function is to decide whether the words are capable of being defamatory. If he answers this question in the affirmative, it is then for the jury to decide whether they are defamatory in the circumstances of the particular case. Where trial is by judge alone—as is almost invariably the case in Commonwealth Caribbean jurisdictions—the judge must perform both functions.<sup>54</sup>

As Bollers J explained in *Ramsahoye v Peter Taylor and Co Ltd*:<sup>55</sup>

In this Colony, where there is no jury, I can do no better than repeat the *dictum* of Camacho CJ in *Woolford v Bishop*,<sup>[56]</sup> where he stated in his judgment:

On this aspect of the case, the single duty which devolves on this court in its dual role is to determine whether the words are capable of a defamatory meaning and, given such capability, whether the words are in fact libellous of the plaintiff. If the court decides the first question in favour of the plaintiff, the court must then determine whether an ordinary, intelligent and unbiased person reading the words would understand them as terms of disparagement, and an allegation of dishonest and dishonourable conduct. The court will not be astute to find subtle interpretations for plain words of obvious and invidious import.

Where the words are clearly defamatory on their face, a finding that they are capable of being defamatory will almost inevitably lead to the conclusion that they are defamatory in the circumstances. But where the words are reasonably capable of either a defamatory or a non-defamatory meaning, the court must decide what the ordinary reader or listener of average intelligence would understand by the words.

Further, as has been pointed out by Byron JA in the Eastern Caribbean Court of Appeal in *Carasco v Cenac*,<sup>57</sup> it is irrelevant that the defendant did not intend the words he used to be understood in a defamatory sense. The intention of the defendant may be material to the assessment of damages, but it is immaterial in determining whether the words were defamatory or not.

In *Gordon v Chokolingo*,<sup>58</sup> Lord Ackner, delivering the judgment of the Privy Council, said:

In *Lewis v Daily Telegraph Ltd*,<sup>[59]</sup> [Lord Reid made] the following important statement:

There is no doubt that in actions for libel the question is what the words would convey to the ordinary man: it is not one of construction in the legal sense. The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction.

54 *Smith v Adams* (1982) Court of Appeal, Barbados, Civ App No 6 of 1982 (unreported).

55 [1964] LRBG 329, p 331.

56 [1940] LRBG 93, p 95.

57 (1995) Court of Appeal, OECS, Civ App No 6 of 1994 (unreported).

58 (1988) PC App No 19 of 1986, on appeal from the Court of Appeal of Trinidad and Tobago.

59 [1964] AC 234, p 258.

Moreover, in the subsequent case of *Morgan v Odhams Press Ltd*,<sup>60</sup> Lord Reid said:

If we are to follow *Lewis*' case and take the ordinary man as our guide, then we must accept a certain amount of loose thinking. The ordinary reader does not formulate reasons in his own mind; he gets a general impression and one can expect him to look again before coming to a conclusion and acting on it. But formulated reasons are very often an afterthought.

The publishers of newspapers must know the habits of mind of their readers and I see no injustice in holding them liable if readers, behaving as they normally do, honestly reach conclusions which they might be expected to reach.

In the same case, Lord Pearson said:<sup>61</sup>

... I do not think the reasonable man—who can also be described as an ordinary sensible man—should be envisaged as reading this article carefully. Regard should be had to the character of the article; it is vague, sensational and allusive; it is evidently designed for entertainment rather than instruction or accurate information. The ordinary, sensible man, if he read the article at all, would be likely to skim through it casually and not to give it concentrated attention or a second reading. It is no part of his work to read this article, nor does he have to base any practical decision on what he reads there. The relevant impression is that which would be conveyed to an ordinary sensible man...reading the article casually and not expecting a high degree of accuracy.

This test was applied in *Maxwell v Forde and St John*.<sup>62</sup> Here, the appellants published an article in their newspaper in which they referred to a 'colossal act of treason against the people of Barbados' on the part of the respondents, who were practising barristers and candidates in a forthcoming general election. The article criticised the respondents for representing the United Society for the Propagation of the Gospel (USPG) in an action against the Attorney General, the main issue in which was whether the USPG were the absolute owners of Codrington College or whether they were trustees under the will of Sir Christopher Codrington.

The article alleged that, if the USPG had succeeded in their claim that they were the absolute owners of the property, 'the people of Barbados would have lost Codrington College', as the purpose of the USPG was to sell the property to an hotel development group. The article also referred to the 'fat cats' who would have been created by the sale, and concluded that it 'takes a great deal of [the respondents] to present themselves as candidates for election as the people's representatives in any constituency in Barbados'. The trial judge found that the article contained five distinct and separate libels against the respondents: (a) an imputation of the crime of treason, punishable by death; (b) an imputation of unpatriotic behaviour; (c) an imputation that the respondents took part in the case for the purpose of obtaining improper financial gain; (d) an imputation of professional impropriety; and (e) an imputation that the respondents were unfit to be members of the General Assembly.

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60 [1971] 1 WLR 1239, p 1245.

61 *Ibid*, p 1269.

62 (1974) 22 WIR 12 (Court of Appeal, Barbados). See also *Lawrence v Lightburn* (1981) 31 WIR 107 (Court of Appeal, Belize).

Douglas CJ held that the interpretation placed by the trial judge on the words 'colossal act of treason against the people of Barbados', as amounting to an accusation of the crime of treason punishable by death, was unduly strained and unrealistic, having regard to the context of the article, but the other four imputations were clearly libellous and the appellants were liable in defamation.

On the other hand, the Guyanese case of *Bacchus v Bacchus*<sup>63</sup> shows that the court should take into account the prevailing public attitudes in the particular jurisdiction. In this case, the plaintiff and defendant were employees of the Demerara Company and resided as neighbours on the company's estate, sharing an electricity meter. The defendant made a complaint to N, the company's personnel manager, who was in charge of the estate, that since the plaintiff had taken up residence, the electricity charges (which were paid by the company) had risen sharply, and he attributed this to the plaintiff's habit of keeping her lights on even after daybreak. N wrote to the plaintiff, advising her that lights should be turned off after 5.30 am and that, in future, there would be surcharges for high electricity bills. The plaintiff became enraged at this letter, and verbally abused N, the defendant and others at the estate office. The defendant then made a written report to N, stating, *inter alia*: 'One can only draw the conclusion that [the plaintiff's] behaviour seems to suggest a perverted personality development from sub-cultural socialisation.' The plaintiff brought an action for libel in respect of these words.

It was held that, in the light of the Guyanese ideal of an egalitarian society, these words were not capable of a defamatory meaning. Massiah J said:

It is my view that the words complained of are incapable of a defamatory meaning and do not bear the meaning ascribed to them by the plaintiff [that is, that she is not a fit and proper person to associate with normal Guyanese citizens]. The test to be applied here is the classic one of whether the words complained of would tend to lower the plaintiff in the estimation of right-thinking members of society generally or would cause her to be shunned and avoided.

The defendant himself did not appear to understand the meaning of what he wrote and may have used those words to add what he may have thought was intellectual spice to his report. He said that he borrowed his words from a sociologist.

But his reasons for using the words are immaterial in determining his liability, for, as Lord Russell said in *Cassidy v Daily Mirror Newspapers Ltd*:<sup>64</sup>

Liability for libel does not depend on the intention of the defamer, but on the fact of defamation.

In determining whether or not the words are defamatory, one must endeavour to find out whether or not the ordinary, reasonable Guyanese citizen would have so considered them. Would the words, one has to ask oneself, tend to lower the plaintiff in that citizen's estimation or cause him to shun or avoid her? For it is what the average, ordinary, intelligent citizen of Guyana thinks about the matter that is important, not how it is viewed by a Guyana scholar or a professor at the University of Guyana, or by a censorious person, or, on the other hand, by the cynic who would treat with a sneer and with contempt the worst that may be said of him or anyone else, but would go no further.

The exact words complained of, as I said earlier, are:

63 [1973] LRG 115 (High Court, Guyana).

64 [1929] 2 KB 331, p 354.

One can only draw the conclusion that her behaviour seems to suggest a perverted personality development from sub-cultural socialisation.

‘Culture’ has been defined as ‘the distinctive way of life of a group of people; their complete design for living’—Clyde Kluckhohn’s *The Study of Culture*, p 86.

A sub-culture is a culture that is different and distinguishable from the normal or dominant culture that prevails in a society. So Leonard Broom and Philip Selznick in their work, *Sociology* (3rd edn) write as follows, at p 60:

Sub-cultures are distinguishable from one another and from the dominant culture forms by such manifest characteristics as language, clothing, gesture and etiquette.

Sub-cultures may be ethnic, regional, occupational and the like. The Puerto Ricans in the United States of America have their own sub-cultural patterns, and there are those who would consider that many Guyanese who live in humble circumstances have a sub-culture of their own.

In the work just quoted, the authors write as follows (p 93) about ‘socialisation’:

The process of building group values into the individual is called socialisation. From the point of view of society, socialisation is the way culture is transmitted and the individual is fitted into an organised way of life... From the point of view of the individual, socialisation is the fulfilment of his potentialities for personal growth and development. Socialisation humanises the biological organism and transforms it into a self having a sense of identity, capable of disciplining and ordering behaviour, and endowed with ideals, values and ambitions.

Socialisation regulates behaviour, but it is also the indispensable condition for individuality and self-awareness.

And later, at p 96:

Socialisation inevitably produces a degree of conformity. People brought up under similar circumstances tend to resemble each other in habits, values and personality.

The words complained of seem to mean to me, therefore, that the plaintiff’s personality is not properly developed because she was brought up in a stratum of society with cultural values and standards below the normal, and that it was these sub-cultural values that now determine the pattern of her behaviour.

What he meant in effect was that the plaintiff behaved the way she did because she was not brought up in what he would have considered to be the right social circles. He seemed to think that she did not possess the refined manners and breeding of those whom he must have thought were her social betters.

In my view, to determine whether or not the reasonable man in Guyana would today look down upon such a person or tend to shun or avoid him, one would have to consider the social changes that have taken place in this country over the last decade.

The law is a living thing and must be interpreted and applied in the context of contemporary life and prevailing ideas. Words that were defamatory 10 years ago might not be so considered today. In England, during the Caroline age, it was actionable to call a person a Papist; it is certainly not so today. The proper test, to my mind, therefore, is what would the average Guyanese citizen think today about this matter, not how he would have viewed it 10 or 15 years ago. One has to bear in mind that, with the attainment of political independence and the birth of our nation, new social ideas have been conceived and social changes brought about.

In this age of the small man and the Guyanese ideal of an egalitarian society to which all appear committed, there has arisen at all levels a commendable awareness of the plight and social condition of the person who used to be called ‘the common man’, and there is a corresponding diminution of the tendency to disparage him because he was considered to have been spawned in a milieu once described as ‘lower class’. A resident of Albouystown or Tiger Bay does not at the present time bear the social

stigma which previously derived from the very fact of living in those areas, because today a new and different view is taken of social inequalities.

It is against this background and in the light of this mood of social change and the present stirring of what the sociologists call one's 'social conscience' that this matter must be seen and determined, and I am therefore of the view that the words complained of, if believed, would not tend to lower the plaintiff in the estimation of right-thinking members of our society or cause them to shun or avoid her, though, perhaps, a snob might wish to do so.

It must not be understood that I feel that the average Guyanese is indifferent to misbehaviour in our society and that we are approaching a state of decadence. There can be no doubt that the average citizen would frown on misbehaviour and indecency no matter what the cause may be, and would no doubt shun a person who so misconducts himself. And there can be no doubt that the plaintiff misbehaved herself at the estate office on 27 April 1971.

But what the plaintiff complains about is the explanation for her misconduct which the defendant suggested, and that is what, in my view, the average citizen would not view unfavourably. In other words, what the average Guyanese would find objectionable is a person's misbehaviour, not the cause of it, at least not if the cause is the social conditions under which the defaulter had the misfortune to have been raised.

### *Innuendo*

Where words are not clearly defamatory on their face, the plaintiff may allege an *innuendo*. Innuendoes are of two types: (a) true (or legal) innuendo; and (b) false (or popular) innuendo. In a *true innuendo*, the words are innocent on their face but the plaintiff alleges that they are defamatory *because of some special facts or circumstances not set out in the words themselves but known to the persons to whom the words were published*; for example, a statement that 'P is a good trader' is innocent on its face, but may be defamatory if published to persons who know that P is a priest who is prohibited by his calling from engaging in business; or a statement that 'P is a frequent visitor at No 10 Sesame Street' is perfectly innocent on its face, but it may be defamatory if it is published to persons who know the special fact that No 10 Sesame Street is a brothel, for then the statement would carry the innuendo that P associated with prostitutes.

In *Cassidy v Daily Mirror Newspapers Ltd*,<sup>65</sup> a newspaper published a photograph of Mr C and Miss X with the caption 'Mr C and Miss X, whose engagement has been announced'. These words were completely innocent on their face but were held to be defamatory of Mrs C, since persons who knew that she had been living with Mr C might believe that she was not Mr C's wife and had been immorally cohabiting with him.

A *false innuendo*, on the other hand, is merely a defamatory inference that reasonable persons might draw from the words themselves. Thus, in a false innuendo the words are taken to be defamatory on their face, and, unlike in the true innuendo, there are no special facts or circumstances known to persons to whom the words are published; for example, where a bank wrongfully returns a cheque to the payee, stamped 'return to drawer' or 'R/D', such a statement is defamatory because it carries the inference or innuendo that the drawer is, at best, a bad financial risk or, at worst, dishonest.

65 [1929] 2 KB 331.

The distinction between true and false innuendo was explained by Bollers J in *Ramsahoye v Peter Taylor and Co Ltd*:<sup>66</sup>

A true innuendo depends for its existence upon extrinsic circumstances or facts, and only becomes necessary when the words, in their natural and ordinary meaning, are meaningless or innocent and become defamatory only by reason of the special or extrinsic circumstances which give rise to a separate cause of action. A false or popular innuendo is merely the ordinary and natural meaning which arises from the words themselves which the plaintiff attributes to them.

A 'false', or 'popular', innuendo was alleged in *Bonaby v Nassau Guardian*.

**Bonaby v Nassau Guardian (1985) Supreme Court, The Bahamas,  
No 730 of 1984 (unreported)**

An article was published in the defendant newspaper, purporting to be an account of the evidence given by one NB, an attorney at law, before a Commission of Enquiry into Drug Trafficking then sitting in Nassau. Part of the account read:

He denied that he had made payments to officials in relation to a case known before the Commission as the 'Green Cay matter'. He specifically denied that he paid out monies to the magistrate, Mrs Sylvia Bonaby...

The plaintiff, Mrs Bonaby, was at the date of the publication a stipendiary and circuit magistrate sitting in Nassau, but she did not hold that position at the date of the 'Green Cay matter' and so could not have heard that case. The plaintiff alleged the innuendo that she was liable to take a bribe and was dishonest.

*Held*, it was impossible to read into a positive denial that a bribe had been paid to an individual an inference that such individual was nonetheless a person likely to receive a bribe. Witnesses who testified that they thought less well of the plaintiff on having read the article should be categorised as 'unduly suspicious', and not as reasonable men 'thinking loosely but still being reasonable'. Georges JA said:

I was satisfied that the innuendoes pleaded in the statement of claim were not 'true' or 'legal' innuendoes. They were statements of the implications which could be drawn from the published words.

Paragraph 5(i), which states that there was an implication that the plaintiff was 'involved in the Green Cay matter', and para 5(iii), stating that she was the magistrate before whom that matter was heard, appear to me to be obvious inferences which can be drawn from the words published...

None of them show that the words have a meaning other than that which can be deduced, however remotely, from a painstaking and meticulous analysis of the words themselves. In *Lewis v Daily Telegraph Ltd*,<sup>67</sup> Lord Devlin gave an example of an extrinsic fact:

Thus, to say of a man that he was seen to enter a named house would contain a derogatory implication for anyone who knew that that house was a brothel, but not for anyone who did not.

If a libel was of that nature, it would be necessary to plead as extrinsic facts that the named house was a brothel, and to name the persons who knew that it was a brothel—unless of course the fact was notorious because the occupiers had recently

66 [1964] LRBG 329, p 332.

67 [1964] AC 234, p 279.

been convicted of operating it as a brothel, and the fact of the conviction had been widely publicised in the very paper publishing the libel. In such a case the names of the people who knew would not necessarily have to be pleaded.

Because of the view which I took, I overruled Mr Butler's objection, holding in effect that the plaintiff had pleaded only 'popular' and not 'legal' or 'true' innuendo. I also noted that if attempts were made to lead evidence which would in effect be evidence of 'extrinsic facts', objection could be taken then and a ruling sought.

It seemed proper to hold, however, that the general context in which the alleged libellous words had been published was relevant in determining the 'insinuations and innuendoes' which could be 'reasonably read into them by ordinary men', to use the language of Lord Devlin. Accordingly, I allowed evidence to establish that a Commission of Inquiry had been appointed by the Governor General to investigate the use of The Bahamas as a transshipment area for the conveyance of drugs into the continental US. I also allowed evidence tending to show that there had been allegations of misconduct against lawyers in private practice and in the civil service. I am satisfied, and so find, that there was at the time in the thought processes of the average reasonable person in The Bahamas, a sense of heightened suspicion in relation to public officials and lawyers, including both those in private practice and those who were employed in the civil service...

In *Lewis v Daily Telegraph Ltd*,<sup>68</sup> the allegation complained of was that the plaintiff's affairs were being investigated by the fraud squad. Lord Reid, in considering the meaning which could be put on these words by the ordinary man, stated:<sup>69</sup>

In this case it is, I think, sufficient to put the test this way. Ordinary men and women have different temperaments and outlooks. Some are unusually suspicious and some are unusually naive. One must try to envisage people between these two extremes and see what is the most damaging meaning they would put on the words in question. So let us suppose a number of ordinary people are discussing one of these paragraphs which they had read in the newspaper. No doubt one of them might say—'Oh, if the fraud squad are after these people you can take it they are guilty'. But I would expect the others to turn on him, if he did say that, with such remarks as—'Be fair. This is not a police state. No doubt their affairs are in a mess or the police would not be interested. But that could be because Lewis or the cashier has been very stupid or careless. We really must not jump to conclusions. The police are fair and know their job, and we shall know soon enough if there is anything in it. Wait till we see if they charge him. I wouldn't trust him until this is cleared up, but it is another thing to condemn him unheard.'

What the ordinary man, not avid for scandal, would read into the words complained of must be a matter of impression. I can only say that I do not think he would infer guilt of fraud merely because an inquiry is on foot.

In this case, as I have indicated, I am prepared to accept that the ordinary man, avid for scandal, is likely to be less balanced and reasonable than the persons reported in Lord Reid's dialogue. Nonetheless, it seems to me impossible to read into a positive denial that a bribe had been paid, an inference that the individual who is reported as not having received a bribe is nonetheless a person likely to receive a bribe. This type of inference is possible only on the basis that mere mention of one's name in evidence before the Commission of Inquiry carried a taint. Such mention may have been

68 *Ibid.*

69 *Ibid.*, pp 259, 260. See also *Mapp v Newsgroup Newspapers Ltd* [1998] 2 WLR 260, pp 267, 268, per Hirst LJ.

unpleasant and undesirable; it cannot of itself carry a taint. Mrs Bonaby was in no way accused of having received a bribe. It is evident from the context that it had been reported by witnesses that the witness, Mr Bowe, had said that he needed money for bribing magistrates. Mr Bowe was denying that he ever said that, and that he ever paid bribes. It must be assumed that whatever the atmosphere, readers of the newspaper retained some capacity for discrimination in reading what was reported.

Witnesses did testify that they thought less of Mrs Bonaby on having read the article. The reasons for this show that they fall into the group of the unusually suspicious. They are not reasons which would come from reasonable men thinking loosely but still being reasonable—more so as they all knew the plaintiff as an upright person...

I can appreciate the plaintiff's anger and hurt at having, to use police officer Seymour's phrase, 'made the Commission of Inquiry' when she was not in any way involved. It was an unfortunate error and might not have resulted in a suit had it been more sympathetically handled.

Though the report was false, I find that the words used were not in their ordinary meaning, taking the context and the atmosphere of the period into account, libellous of the plaintiff.

### Reference to the plaintiff

The second requirement for a successful action in defamation is that the defamatory words must be shown to have referred to the plaintiff. In most cases the plaintiff will be mentioned by name, but this is not a necessary requirement. It is sufficient for liability if he is mentioned by, for example, his initials or his nickname, or if he is depicted in a cartoon, photograph or verbal description, or if he is identified by his office or post. It may also be sufficient if a particular group of which he is a member is mentioned. In all cases, the test is whether a reasonable person might understand the defamatory statement as referring to the plaintiff. In *AG v Milne*,<sup>70</sup> for instance, it was held that there was sufficient reference to the plaintiff where a radio broadcaster referred to 'one irresponsible businessman...who...pledges half a million dollars on placards, posters and other subversive material'. And in *Gairy v Bullen (No 1)*,<sup>71</sup> a newspaper article which alleged sexual impropriety towards young girls seeking employment was held to contain sufficient reference to the plaintiff, the Prime Minister of Grenada, although it did not mention him by name, because 'a substantial number of ordinary sensible persons who knew the plaintiff, because 'a substantial number of ordinary sensible persons who knew the plaintiff, reading the article, would believe that it referred to him'.<sup>72</sup>

In a more recent case, *Jordan v The Advocate Co Ltd*,<sup>73</sup> the defendant newspaper published an article under the heading 'Little Help for Junior Doctors', in which it

70 (1973) 2 OECSLR 115 (Court of Appeal, Eastern Caribbean States). See also *Polidore v Crusader Caribbean Publishing Co Ltd* (2000) High Court, St Lucia, No 380 of 1990 (unreported).

71 (1972) 2 OECSLR 93 (High Court, Grenada).

72 In *Luther v The Argosy Co Ltd* [1940] LRBG 88 (Supreme Court, British Guiana), it was held that where a defamatory article is published in a newspaper, it is sufficient for liability if a substantial number of persons reading the article would believe that it refers to the plaintiff. It was not necessary, nor possible, to show that all readers would believe that it referred to him. It is also established that it is not necessary for the readers to have believed the defamatory imputation to be true of the plaintiff: *Morgan v Odhams Press Ltd* [1971] 1 WLR 1239, p 1246, per Lord Reid. See, generally, Goodhart, AL (1971) 87 LQR 451.

73 (1998) High Court, Barbados, No 727 of 1996 (unreported).

was alleged that junior doctors at the Queen Elizabeth Hospital in Barbados were often forced to make decisions regarding the treatment of patients without the benefit of consultation with senior medical practitioners. The latter were accused of spending more time playing golf than attending to their duties at the hospital. The plaintiff, a senior consultant physician and prominent amateur golfer, brought an action for libel against the newspaper, claiming that, although the writer of the article purported to criticise senior practitioners as a group, and the plaintiff's name was not mentioned, reasonable readers would understand the article to refer to him.

Payne J, in the Barbados High Court, considered that the question was 'whether reasonable readers generally or reasonable readers with the knowledge of certain special facts proved would understand the article to refer to the plaintiff'. He went on to hold that, in the circumstances, reasonable readers generally would not understand the article to refer to the plaintiff, as distinct from the group of which he was a member, but that persons knowing the special facts, namely, that there was only one other consultant at the hospital who played golf, and that this consultant was in the Department of Radiology and would not, therefore, be involved in the medical care of patients, would reasonably understand the article to refer to the plaintiff. The learned judge continued:

The writer of the article gave evidence that it was a general article about the care of patients at the Queen Elizabeth Hospital, and referred to no one. It should be said that it does not matter whether reference to the plaintiff was intended, or whether the defendant knew or could have known the special facts which caused the readers with special knowledge to link the article with the plaintiff. I also find that the words were defamatory of the plaintiff, by conveying that, by absenteeism in breach of his duties, he is not always available for consultation by junior doctors when required, and that he does not give sufficient supervision to junior staff in the care of patients.

### *Class or group defamation*

Where a disparaging statement is made of a whole class or group of persons (for example, 'all lawyers are thieves'), no individual member of the class can sue, unless:

- (a) the class is so small or so ascertainable that what is said about the class is necessarily said of each member of it; or
- (b) the individual member can show that he was particularly pointed out.<sup>74</sup>

In *Bodden v Bush*,<sup>75</sup> a defamatory article in a newspaper which referred to 'the elected government in the Cayman Islands' as, *inter alia*, 'dictators and communists', was held to refer to each and every member of the Executive Council, which consisted of four persons. Summerfield CJ<sup>76</sup> emphasised that 'the elected government' was 'so small a class in these Islands, and so easily ascertainable as a class, that what is said of the class is necessarily said of each member of that class'.

The question of class or group defamation also arose in *Ramsahoye v Peter Taylor and Co Ltd*, in which the relevant principles were discussed.

<sup>74</sup> *Knuppfer v London Express Newspaper Ltd* [1944] AC 116.

<sup>75</sup> [1986] CILR 100 (Grand Court, Cayman Islands).

<sup>76</sup> *Ibid*, p 106.

**Ramsahoye v Peter Taylor and Co Ltd [1964] LRBG 329,  
Supreme Court, British Guiana**

An article was published in the defendants' newspaper which reported that the Minister of Education had criticised the practice of teachers accepting fees for after-school tuition, and that the Minister had said that teaching is a profession and teachers should not act unprofessionally. The writer of the article took exception to this criticism and retorted that 'there are one or two members of the Government who are professionals, and they are certainly not averse to doing one or two things that are unprofessional and totally dishonest. [They have] no regard for the law of the country or for the Constitution'. The plaintiff, who was a barrister, Attorney General and a member of the Council of Ministers, sought to recover damages for libel, contending that the defamatory article referred to him.

*Held*, though the defamatory words reflected on a class of persons, they would lead reasonable people who knew the plaintiff to believe that the article referred to him. Bollers J said:

In the particular circumstances of the present case, I have no difficulty in answering the question whether there is evidence upon which the words can be regarded as referring to the plaintiff, in the affirmative. The publication speaks of one or two members of the Government and must be taken to mean the members of the Cabinet of the Government, or, as is described in the British Guiana Constitution, at Art 28(1), the Council of Ministers. Counsel for the defendants has tried in vain to impress me with the argument that members of the Government, within the context of the publication, must be taken to mean members of the whole machinery of Government. That submission I cannot accept, for, as already pointed out with reference to the dictionary definition of 'Government', in England members of the Government would be taken to mean members of the Cabinet or the Ministry, that is to say, the body of persons charged with the duty of governing or controlling the affairs of state. In British Guiana, the ordinary intelligent reader would interpret the words 'members of the Government' as being members of the Council of Ministers. He would not for one moment consider a backbencher or floor member as being a member of the Government. In point of fact, such a member of the legislature is described in the office records of the Legislative Assembly as being a member of the governing party. He would not consider a member of the civil service who, as an officer of the Government, is technically a member of the section of the administration which is the executive arm of the Government, as a member of the Government...

I arrive at the conclusion at this stage, therefore, that the publication is in fact defamatory of a very small group of persons who are, of course, the members of the Government who are professional men.

It is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff'. No writing is considered to be a libel unless it reflects on and casts an imputation on some particular person. In this case it has been strongly urged by counsel for the defendant company that, even if the words are capable of a defamatory meaning, they are incapable of referring to the plaintiff and do not in fact refer to the plaintiff.

It is well settled that, where the defamatory words reflect on a body or class of persons generally, such as lawyers, clergymen or politicians, no particular member of the body or class can maintain an action; for, to give the classic example as uttered by Willes J in *Eastwood v Holmes*,<sup>1771</sup> 'if a man wrote that all lawyers were thieves, no

particular lawyer could sue him unless there were something to point to the particular individual'. In *O'Brien v Eason*,<sup>[78]</sup> it was held that, where comments of an alleged defamatory character were made upon an association called the Ancient Order of Hibernians, an individual member of the Order who was not named or in any way referred to could not maintain an action for libel. In *Browne v Thomson and Co*,<sup>[79]</sup> however, where a newspaper article stated that in Queenstown instructions were issued 'by the Roman Catholic religious authorities that all Protestant shop assistants were to be discharged', and where seven pursuers averred that they were the sole persons who exercised religious authority in name and on behalf of the Roman Catholic Church in Queenstown, it was held that they were entitled to sue for libel as being individually defamed. Lord President Dunedin in this case said, at p 363:

I think it is quite evident that if a certain set of people are accused of having done something, and if such accusation is libellous, it is possible for the individuals in that set of people to show that they have been damnified, and it is right that they should have an opportunity of recovering damages as individuals.

In the earlier celebrated case of *Le Fanu v Malcolmson*,<sup>[80]</sup> Lord Campbell in giving judgment stated:

Where a class is described, it may very well be that the slander refers to a particular individual. That is a matter of which evidence is to be laid before the jury, and the jurors are to determine whether, when a class is referred to, the individual who complains that the slander is applied to him is, in point of fact, justified in making such complaint. That is clearly a reasonable principle, because whether a man is called by one name or by another, or whether he is described by a pretended description of a class to which he is known to belong, if those who look on know well who is aimed at, the very same injury is inflicted; the very same thing is in fact done as would be done if his name and Christian name were ten times repeated.

Finally, in the case of *Knuppfer v London Express Newspaper Ltd*,<sup>[81]</sup> the law on the subject was crystallised by the House of Lords, and it was laid down that when defamatory words are written or spoken of a class of persons, it is not open to a member of that class to say that the words were spoken of him unless there was something to show that words about the class referred to him as an individual. Two questions must be determined: the first one is of law, and is whether the words are capable of referring to the plaintiff; the second is one of fact, and is whether reasonable people who knew the plaintiff think the words refer to him. Above all, the primary rule in all cases of defamation must be observed, and that is, the plaintiff must show that the words complained of were published of himself. If the words are not so published, the plaintiff is not defamed and cannot have any right to ask that the defendants should be held responsible to him in respect to them.

As to the statement that there are one or two members of the Government who are professionals, the ordinary reasonable reader of average intelligence in this Colony would of necessity think only of those members who are members of a learned profession. It is the evidence supplied by the plaintiff's witnesses to which I am not bound but which I accept as being true, that the word 'profession' and the words 'professional men' are in this Colony never used in the widest sense to include any calling or occupation, but is generally confined to meaning members of the learned professions of medicine and law. That is to say, the words 'professional men' are usually given to and understood as meaning doctors and lawyers. Dentists, too, are included in the nomenclature or category of doctors of medicine.

78 (1913) 47 Ir LT 266.

79 [1912] SC 359.

80 (1848) 1 HLC 637.

81 [1944] AC 116.

The witnesses for the plaintiff, a barrister-at-law and an officer of the Government Information Service, have stated boldly that when they read the publication their minds went at once to the three members of the Council of Ministers who they understood to be members of the learned professions, that is to say, the plaintiff, who was a barrister-at-law and Attorney General of the Colony, the Premier, the Honourable Dr CB Jagan, who is a dentist, and the Honourable BS Rai, who is a barrister-at-law and who, at the time, was Minister of Home Affairs. I have no reason to doubt this evidence and, although I must reiterate that I am not bound by this evidence, I must answer the second question of fact in the affirmative by stating that the article would in fact lead reasonable people who knew the plaintiff to the conclusion that the article did refer to him.

### *Unintentional defamation*

At common law, it is no defence to an action for libel or slander that the defendant did not intend to defame the plaintiff.<sup>82</sup> The intentions of the defendant may be relevant to the assessment of damages,<sup>83</sup> but they are irrelevant to the question of liability. Defamation may be unintentional either with regard to reference to the plaintiff, or with regard to knowledge of facts which make a statement, which is innocent on its face, defamatory of the plaintiff (the legal innuendo).<sup>84</sup> Unintentional defamation with regard to reference to the plaintiff is illustrated by two cases: *Hulton v Jones* and *Newstead v London Express Newspaper Ltd*.

In *Hulton v Jones*,<sup>85</sup> the defendants published a fictional story in their newspaper concerning the adulterous exploits of one 'Artemus Jones'. A real person named Artemus Jones, who was a barrister, sued the defendants for libel, and his action succeeded, despite the fact that the use of his name was quite accidental. In *Newstead v London Express Newspaper Ltd*,<sup>86</sup> the defendants published an accurate and correct report about the trial for bigamy of one Harold Newstead of Camberwell. Unknown to the defendants, there was another Harold Newstead, also of Camberwell, who produced witnesses who swore that they believed that the report referred to him. The plaintiff's action for libel succeeded, though the court awarded only nominal damages.

Unintentional defamation with regard to knowledge of facts which make a seemingly innocent statement defamatory of the plaintiff is illustrated by *Cassidy v Daily Mirror Newspapers Ltd*.<sup>87</sup> There, the defendants published in their newspaper a photograph of one Corrigan in the company of Miss X with the caption, 'Mr Corrigan the racehorse owner and Miss [X] whose engagement has been announced.' Mrs Corrigan brought an action for libel, pleading the innuendo that readers of the newspaper who knew her would think that she was not the lawful wife of Corrigan and that she had been living with him in immoral cohabitation. Her action succeeded.

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82 *Op cit*, Gatley, fn 40, para 3.12.

83 See below, p 292.

84 See above, p 242.

85 [1909] 2 KB 444.

86 [1940] 1 KB 377.

87 [1929] 2 KB 331.

The ‘terror to authorship’<sup>88</sup> highlighted by *Hulton v Jones* and the manifest absurdity of cases such as *Newstead* and *Cassidy* prompted the legislature in England to introduce a new statutory defence in cases of unintentional defamation. This defence, contained in s 4 of the Defamation Act 1952, was later introduced into Jamaica by s 6 of the Defamation Act and into Guyana by s 12 of the Defamation Act, Cap 6:03.<sup>89</sup> The sections<sup>90</sup> provide that, where words are published innocently, as defined by the statutes, a defendant may escape liability for damages if he is willing to publish a reasonable correction and apology, called an ‘offer of amends’. Words are published ‘innocently’ within the statutory definition if either:

- (a) the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him,<sup>91</sup> or
- (b) the words were not defamatory on the face of them and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that person,<sup>92</sup>

and, in either case, the publisher exercised all reasonable care in relation to the publication.

An offer of amends under the statutes is an offer:

- (a) in any case to publish a suitable correction and apology; and
- (b) where copies of the defamatory material have been distributed by or with the knowledge of the defendant, to take reasonable steps to notify persons to whom copies have been distributed that the words are alleged to be defamatory of the plaintiff.

If the offer of amends is accepted by the party aggrieved and is duly performed, no proceedings for libel or slander may be taken or continued by that party against the party making the offer in respect of the publication in question.

If the offer of amends is not accepted by the party aggrieved, then it is a defence in any proceedings by him for libel or slander to prove:

- (a) that the words were published innocently in relation to the plaintiff;
- (b) that the offer was made as soon as practicable after the defendant received notice that they were or might be defamatory of the plaintiff; and
- (c) if the publication was of words of which the defendant was not the author, that the words were written by the author without malice.

88 *Knuppfer v London Express Newspaper Ltd* [1943] KB 80, p 89.

89 See also Libel and Slander Act (Jamaica), s 3; Libel and Defamation Act, Ch 11:16 (Trinidad and Tobago), s 5; Libel and Defamation Act, Cap 131 (Belize), s 4, which provide a defence for newspapers and periodicals in respect of libels published without malice and gross negligence. Similar provisions are in force in Dominica, Cap 7:04, s 3; BVI, Cap 42, s 3; Antigua, Cap 248, s 3; St Kitts/Nevis, Cap 44, s 3; St Vincent, Cap 89, s 15.

90 The Defamation Act 1996 (Barbados) contains similar provisions in s 16.

91 This sub-section is intended to cover cases of unintentional reference to the plaintiff (as in *Hulton v Jones* [1909] 2 KB 444 and *Newstead v London Express Newspaper Ltd* [1940] 1 KB 377).

92 This sub-section is intended to cover cases of unintentional defamation with regard to knowledge of facts which make an apparently innocent statement defamatory (as in *Cassidy v Daily Mirror Newspapers Ltd* [1929] 2 KB 331).

## Words must be published

The plaintiff must prove that the words of which he complains were ‘published’, that is, communicated by the defendant to at least one person other than the plaintiff himself.<sup>93</sup> The reason why publication to the plaintiff alone is not actionable is that the tort of defamation protects a person from injury to his reputation among other people, and not from injury to his feelings about himself.<sup>94</sup>

Every repetition of a defamatory statement is a fresh publication and creates a fresh cause of action.<sup>95</sup> Thus, for example, in a libel contained in a newspaper, the following will be *prima facie* liable: the writer of the article, the editor, the publisher, the printer, and even a newsagent and street vendor. Nor is it a defence that, in publishing a defamatory statement, the defendant was merely repeating what someone else told him.<sup>96</sup> Thus, a newspaper cannot escape liability for libel by prefixing a defamatory report with words such as ‘It was learnt that...’ or ‘It is rumoured that...’. For the purposes of the law of libel, a hearsay statement has the same effect as a direct statement.

There is no publication if the defamatory words cannot be understood by the person to whom they are addressed, for example, where the latter is too blind to read or is illiterate, or is too deaf to hear, or where he does not understand the language in which words are written or spoken.<sup>97</sup> Nor is the defendant responsible for publication to a person to whom he did not intend to publish and to whom he could not reasonably have foreseen the words would be published, for example, where a third party unexpectedly overhears his words, where a father wrongfully opens a letter addressed to his son, or where a servant opens a letter addressed to his master (even if the letter is unsealed).<sup>98</sup> On the other hand, a correspondent should expect that, if he sends a defamatory letter to a businessman at his place of business, the latter’s clerk or secretary might, in the ordinary course of business, open it and read it (unless marked ‘Private’, ‘Personal’ or ‘Confidential’), and the correspondent will be liable for the publication. If the defamatory words are written on a postcard or contained in a telegram, there is a rebuttable presumption that they are published to post office officials and to telegraph operators respectively.<sup>99</sup> And it was held, somewhat surprisingly, in *Theaker v Richardson*<sup>100</sup> that it is to be expected that a husband might open an unstamped brown envelope lying on the doormat of the matrimonial home and looking like a circular, even though it is sealed and addressed to his wife.

Communication of defamatory matter by a husband to his wife and vice versa is not ‘publication’, since husband and wife are treated as one person. But the communication by a third party to one spouse of matter defamatory of the other

93 *Lamont v Emmanuel* (1966) Court of Appeal, Trinidad and Tobago, No 1 of 1965 (unreported), *per* Wooding CJ.

94 *Op cit*, Gattley, fn 40, para 222.

95 *Truth (NZ) Ltd v Holloway* [1960] 1 WLR 997.

96 *Lewis v Daily Telegraph Ltd* [1964] AC 234, p 260; *Myers v Gooding* (1989) High Court, Trinidad and Tobago, No 5825 of 1986 (unreported); *Scantlebury v The Advocate Co Ltd* (1997) High Court, Barbados, No 2017 of 1993 (unreported).

97 *Op cit*, Winfield and Jolowicz, fn 19, p 412; *Gransauil v De Gransauil* [1922] Trin LR 176, High Court, Trinidad and Tobago.

98 *Huth v Huth* [1915] 3 KB 32.

99 See, generally, *op cit*, Winfield and Jolowicz, fn 19, pp 411, 412.

100 [1962] 1 WLR 151.

spouse,<sup>101</sup> or the communication to a third party by one spouse of matter defamatory of the other, is publication.

### *Repetition*

A difficult question is the extent to which the original publisher of a defamatory statement may be liable for subsequent repetitions of the statement. The basic rule is that the original publisher is not liable for damage ensuing from any republication of his statement where the republication is the voluntary act of a third party over whom he has no control, but he will be liable:

- (a) if he authorised or intended the republication (for example, where he spoke at a press conference<sup>102</sup> or made the statement to a newspaper reporter, intending that his words should be published in the newspaper),<sup>103</sup> or
- (b) where there was an obligation on the other person to repeat the words<sup>104</sup> (for example, a defamatory statement made to a junior official who had a duty to repeat it to his superiors); or
- (c) where the repetition was, in the circumstances, the natural consequence of the publication by the original publisher; in other words, where republication was reasonably foreseeable.<sup>105</sup>

The question of the liability of the original publisher may arise where a newspaper publishes a report of a speech made by the defendant in circumstances where the defendant knew that reporters would be present. Such was the situation in the recent Trinidadian case of *Gordon v Panday*,<sup>106</sup> where the defendant, the Prime Minister of Trinidad and Tobago, made a speech on the occasion of the Indian Arrival Day Celebrations, in which he referred to the plaintiff as a 'pseudo-racist'. Jamadar J held that it was clear, in the circumstances, that the defendant 'both impliedly authorised and intended that his slander of the plaintiff would be published throughout the length and breadth of Trinidad and Tobago and abroad', and he was therefore liable for the republication of his statement in the newspapers and on television. Jamadar J explained:

On the facts before me, the Prime Minister's address was delivered with the aid of a prepared text or notes. His office gave notice of it to TTT and authorized full coverage of it (without any restrictions). Further, in his defence, the Prime Minister purported to raise the defence of a reply to an attack, that attack being the plaintiff's criticism of the Green Paper on Media Reform in his speech of the 7th May, 1997. In these circumstances, it is more than likely that the Prime Minister intended that his 'reply to the plaintiff's attack' would receive the same or similar coverage that 'the plaintiff's attack' had generated. Moreover, it is clear that the TTT cameras had followed the Prime Minister around, so he must have known of their presence, and of the TTT microphone taped onto the podium before him. Further, this was the inaugural celebration of Indian Arrival Day and the Prime Minister was delivering the feature

101 See *Watt v Longsdon* [1930] 1 KB 130 (below, p 277).

102 *Sims v Wran* [1984] 1 NSWLR 317.

103 *Duncan and Neill on Defamation*, 2nd edn, 1983, London: Butterworths, para 8.15.

104 *Ibid.*

105 *Ibid.*; *Speight v Gosnay* (1891) 60 LJ QB 231.

106 (2000) High Court, Trinidad and Tobago, No CV 1443 of 1997 (unreported). For another recent example, see *McManus v Beckham* [2002] 1 WLR 2982 (CA).

address. It would have been unprecedented in a society such as Trinidad and Tobago for such an event and address not to be covered by all media houses, if not directly, then by the sharing of information (as the plaintiff testified was the practice). In my opinion, the Prime Minister's submitted intention to put his defence to the plaintiff's alleged attack before the people of Trinidad and Tobago is consistent with the inference that the Prime Minister was speaking for publication and that he had authorized what he said to be published in the newspapers and on television.

In this context, against the background of the Green Paper controversy ignited by the plaintiff a few weeks earlier and still burning throughout the country, the Prime Minister must have known that to identify and single out the plaintiff and to defame him in the way he did, would receive the most widespread and extensive coverage, not only in Trinidad and Tobago but throughout the Caribbean...which is exactly what happened. To adapt the words of Lief J in *Stopforth v Goyer*,<sup>107</sup> when a Prime Minister makes a direct charge of racism against a prominent named individual in a public address at which the media are present, he impliedly if not expressly authorizes republication of his communication and is thus responsible for any libel.

### *Innocent dissemination*

The law takes a more lenient attitude towards those who are not the authors, printers or first or main publishers of a libel but who take only a subordinate part in its dissemination, such as booksellers who sell books containing libellous material, libraries or museums which exhibit libellous books, or newsvendors who sell libellous newspapers.<sup>108</sup> Such disseminators have a defence to an action for libel if they can show:

- (a) that, at the time that they disseminated the newspaper or book, they did not know that it contained libellous matter; and
- (b) that it was not due to any negligence in conducting their business that they did not discover the libel.<sup>109</sup>

It is a question of fact in each case as to whether the defendant was negligent or not, the onus being on the defendant to establish his lack of knowledge of the libel and the absence of carelessness on his part.<sup>110</sup>

### *Liability of internet service providers*

An issue which has come to the fore in recent years concerns the extent to which internet service providers (ISPs), who typically allow subscribers access to mailing lists, newsgroups, chatrooms, web home pages and email facilities, can be held responsible for the republishing or repetition of defamatory material created by a subscriber. It will often be futile for a person who has been defamed on the internet to contemplate legal proceedings against the original defamer, who may be anonymous, untraceable, located in a foreign jurisdiction which does not recognise common law libel principles, or without resources. On the other hand, the ISP is

107 (1978) 87 DLR (3d) 373, p 385.

108 Defamation Act 1996 (Barbados), s 20 extends the defence of innocent dissemination to the printer of defamatory matter.

109 *Vizetelly v Mudie's Select Library Ltd* [1900] 2 QB 170.

110 *Ibid.*

likely to have a registered place of business and to have sufficiently 'deep pockets' to satisfy any judgment given against it. Thus, ISPs, as 'gatekeepers to the internet', may justifiably fear being submerged by a flood of libel litigation, unless they can rely on a defence, such as that of innocent dissemination.

Clearly, unlike in the case of a newspaper or magazine, it would be completely impracticable for ISP officials to inspect all material transmitted on the internet by the ISP for potentially defamatory statements; and whereas software filtering technologies can assist in blocking access to criminal content, such as child pornography, they would be incapable of identifying merely libellous material. Such case law as there is on this topic stresses the factor of control. In the US case of *Cubby v CompuServe*,<sup>111</sup> the defendant ISP was held not liable for defamatory information posted on the internet by a third party, since the defendant had no opportunity to review the material prior to publication. The court took the view that the defendant's position was akin to that of a newsstand, bookstore or public library, and it would be unduly restrictive of the free flow of electronic information to impose a higher standard on an ISP.

On the other hand, in another US case, *Stratton Oakmont Inc v Prodigy Services*,<sup>112</sup> the defendant ISP was held liable for defamatory comments posted to a local discussion forum which it hosted, on the ground that the defendant had explicitly marketed itself as 'a family-oriented computer network' which controlled and edited messages posted on its bulletin boards to prevent the publication of inappropriate messages. The court in this case took the view that the defendant was not a mere distributor but rather a publisher of the libels, and was more akin to conventional hard-copy publishers, or TV or radio broadcasters who have control over what they publish and a corresponding duty to check for defamatory material.

The consequence of the reasoning in the *CompuServe* and *Prodigy* decisions is that an ISP which takes a *laissez-faire* approach and refrains from exercising control and monitoring the content of messages posted on the internet will escape liability for defamation, while an ISP which conscientiously exercises such control will be penalised in damages. Such a result seems perverse, and hardly likely to improve the legal environment in which the internet operates.

In the UK, an attempt has been made in the Defamation Act 1996 to protect ISPs by providing, in s 1(3)(e), that an 'operator or provider of access to a communications system by means of which the statement is transmitted, or made available, by a person over whom he has no effective control', is not to be considered the publisher of a defamatory statement; and provided he shows that he took reasonable care over the publication and did not know, and had no reason to believe, that he had caused publication of a defamatory statement, he will have a defence to liability.<sup>113</sup> Section 15(5)(e) of the Defamation Act 1996 (Barbados) contains a similar, but not identically worded, provision to the effect that 'the operator of a communication system by means of which a defamatory statement is transmitted, or made available, by a person for whose acts the operator is not responsible' is not to be regarded as primarily responsible for the publication of a

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111 766 F Supp 135 (SD NY 1991).

112 1995 NT Misc, 23 Media L Rep 1794.

113 See *Godfrey v Demon Internet* [1999] 4 All ER 343.

defamatory statement. Moreover, the Barbados Act differs from the UK Act in that it puts the onus of proof on the *plaintiff* to show that the defendant knew or had reason to believe that the statement was defamatory, and on the defendant to show that he had reasonable grounds for believing the statement could be justified or otherwise excused.

## DEFENCES

In addition to the defences of unintentional defamation and innocent dissemination already considered, there are four major defences which can be relied upon in actions for defamation: justification; fair comment; absolute privilege; and qualified privilege. Each of these must now be considered in turn.

### Justification (truth)<sup>114</sup>

It is a complete defence to an action for libel or slander that the words complained of were true in substance. Where a defamatory statement is uttered, the plaintiff does not have to prove that it is false, for the law presumes this in his favour;<sup>115</sup> but if the defendant can prove its truth, he will defeat the plaintiff's claim.

Thus, for example, if D states that P is 'a lunatic', D will not be liable in defamation if he can prove that P was confined in a psychiatric hospital, for P cannot recover damages for injury to a character he is in fact not entitled to bear.

The defendant should not plead justification unless he has good reason to believe it will succeed, for failure to establish the defence will usually inflate any damages awarded against him, the court treating it as an aggravation of the original injury.<sup>116</sup> The mere fact that the defendant has placed a plea of justification on the record is a matter which may be taken into consideration in assessing damages, even though the defendant withdraws the plea at the trial, or abandons it and relies on an alternative plea of privilege.<sup>117</sup>

It is sufficient if the defendant proves his statement to be true in substance. If it is inaccurate only in minor details which do not add to the 'sting' of the charge, the defence will still succeed. Thus, for example, where the defendants published a notice that the plaintiff had been sentenced to a fine of £1 with three weeks' imprisonment in default of payment because he had travelled on a train without the appropriate ticket, it was held that the defence of justification could succeed on proof that the plaintiff had been so convicted and fined £1 with two weeks' imprisonment in default.<sup>118</sup> On the other hand, it was emphasised by Hewlett J in the BVI High Court in *Halliday v Baronville*,<sup>119</sup> citing a passage from *Halsbury's Laws*, that where the defendant imputes the commission by the plaintiff of a criminal offence, his plea of justification will not succeed unless he can prove the commission

114 Defamation Act 1996 (Barbados), s 7 provides that, after the commencement of the Act, the defence is to 'be known as the defence of truth'.

115 *Op cit*, Winfield and Jolowicz, fn 19, p 416.

116 *Small v The Gleaner Co Ltd* (1979) Supreme Court, Jamaica, No CL S-188 of 1976 (unreported).

117 *Smart v Trinidad Mirror Newspaper Ltd* (1968) High Court, Trinidad and Tobago, No 875 of 1965 (unreported).

118 *Alexander v North Eastern Rly Co* (1865) 122 ER 1221. See also *Edwards v Bell* (1824) 130 ER 162.

119 (1977) 2 OECSLR 138.

of the offence as strictly as if the plaintiff were being prosecuted for the offence. This is contrary to the more conventional view that where a libel imputes the commission of a criminal offence, the defendant needs only to establish the commission of the offence charged on a balance of probabilities.

At common law, every material charge must be justified. Thus, if the defendant makes four distinct defamatory allegations against the plaintiff and succeeds in proving the truth of only three of them, the defence will fail altogether.<sup>120</sup> But this rule has been modified by s 7 of the Defamation Act (Jamaica),<sup>121</sup> s 7 of the Defamation Act, Cap 6:03 (Guyana) and s 12 of the Libel and Slander Act, Cap 171 (Grenada), which are modelled on s 5 of the Defamation Act 1952 (UK). These sections provide that:

In an action for libel or slander in respect of words containing two or more distinct charges against the plaintiff, a defence of justification shall not fail by reason only that the truth of every charge is not proved if the words not proved to be true do not materially injure the plaintiff's reputation having regard to the truth of the remaining charges.

Thus, if, for example, the defendant alleges: (a) that the plaintiff stole certain property; and (b) that he received other property, knowing it to have been stolen, the defendant may succeed in a plea of justification if he can prove that the first allegation is true,<sup>122</sup> even though he cannot prove the truth of the second, since the second charge does not materially injure the plaintiff's reputation in view of the truth of the first.

Where the defendant repeats a defamatory statement originally made by someone else, he must prove that the statement was true, not merely that it was made,<sup>123</sup> and 'if you repeat a rumour, you cannot say it is true by proving that the rumour in fact existed; you have to prove that the subject matter of the rumour is true'.<sup>124</sup> Thus, for example, if the defendant says to Z, 'X tells me that Y has stolen his (X's) bicycle', he will have a defence to an action by Y only if he can prove that Y did steal the bicycle; it is not sufficient for him to prove simply that X made the accusation against Y. Similarly, if the defendant states that there is a suspicion that the plaintiff has murdered X, he must prove that the plaintiff did murder X, not merely that X was suspected of it.

This principle has been applied where a newspaper has reported defamatory allegations contained in pleadings in pending litigation. Where a newspaper reports that, for example, a writ has been issued against X for negligence, or that an indictment has been laid against Y for forgery, the newspaper may rely on justification since such a statement 'may be capable of conveying no more than the fact that the relevant proceedings have in fact been launched',<sup>125</sup> and there is

120 Though these circumstances would be relevant in assessing damages: Brazier, M, *Street on Torts*, 9th edn, 1993, London: Butterworths, p 443.

121 The defence failed in *Bonnick v Morris* (1998) Supreme Court, Jamaica, No B 142 of 1992 (unreported).

122 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247; *Blackman v The Nation Publishing Co Ltd* (1997) High Court, Barbados, No 474 of 1990 (unreported), per Payne J.

123 *Hornal v Neuberger Products Ltd* [1957] 1 QB 247, p 258; *Emanuel v Lawrence* (1999) High Court, Dominica, No 448 of 1995 (unreported); *Brewster v Trinidad Publishing Co Ltd* (1999) High Court, Trinidad and Tobago, No 1222 of 1999 (unreported).

124 *Cookson v Harewood* [1932] 2 KB 478, p 485, per Greer LJ.

125 *Stern v Piper* [1996] 3 All ER 385, p 394, per Hirst LJ.

no element of ‘hearsay’ in such a report. However, it seems that a newspaper would not be entitled to the defence if it reported the specific allegations contained in a statement of claim or other pleading, as this would involve ‘hearsay’ and amount to a repetition of a defamatory allegation;<sup>126</sup> in order to rely on the defence, the newspaper would have to prove the truth of the allegations. Moreover, it has been established that the defence of qualified privilege protects only reports of proceedings taking place in open court and not pleadings, affidavits and other documents served before the matter comes on for trial.<sup>127</sup>

In the Trinidadian case of *Brewster v Trinidad Publishing Co Ltd*,<sup>128</sup> a newspaper article reported that a bank clerk (Z) had sued a nursing home and one of its doctors (the plaintiff) for medical negligence, and it repeated the particulars of negligence contained in Z’s statement of claim. These particulars alleged, *inter alia*, that Z had received ‘inexpert, unskillful and unprofessional’ treatment from the plaintiff. Mendonca J held that the newspaper could not rely on qualified privilege or justification. He said:

The articles referred not only to the writ but also to allegations made in the statement of claim filed in the action by Miss [Z]. Privilege, however, only protects reports of proceedings taking place in open court... [and, with respect to the defence of justification] it would... be totally unsatisfactory if a publication of a defamatory statement said to be made by someone or appearing in a document on an occasion which is not privileged can be justified simply by pleading and proving that the statements were in fact made by someone or that they in fact appear in the document... The articles are sought to be justified not only on the basis that a writ was issued against the plaintiff but also on the basis of a statement of claim having been filed in the action in which are contained the allegations and statements published in the articles.

### Fair comment

It is a defence to an action for libel or slander that the statement complained of was fair comment on a matter of public interest.<sup>129</sup> It is important to preserve the fundamental right to freedom of expression, and the defence is available to all who comment ‘fairly’ (within the legal definition) on all matters which may be said to be the legitimate concern of the public. Although the defence is particularly useful to publishers of newspapers, it is not the exclusive preserve of the press.<sup>130</sup>

#### *Requirements for the defence*

### The matter commented on must be one of public interest

Such matters include, *inter alia*:

- the affairs of government, both national and local;<sup>131</sup>

<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> (1999) High Court, Trinidad and Tobago, No 1222 of 1999 (unreported).

<sup>129</sup> Defamation Act 1996 (Barbados), s 8 renames the defence ‘comment’.

<sup>130</sup> *Singh v The Evening Post* (1976) High Court, Guyana, No 2754 of 1973 (unreported), *per* Bollers CJ.

<sup>131</sup> *Op cit*, Gatley, fn 40, paras 12.30, 12.31; *Osadebay v Solomon* (1983) Supreme Court, The Bahamas, No 803 of 1979 (unreported); *Barrow v Caribbean Publishing Co Ltd* (1971) 17 WIR 182 (High Court, Barbados) (below, pp 265–67).

- the administration of justice;<sup>132</sup>
- the management and affairs of public institutions, such as hospitals, prisons, schools and universities;<sup>133</sup>
- the public conduct of those who hold or seek public office or positions of public trust;<sup>134</sup>
- church matters;<sup>135</sup>
- the conduct of private businesses which affect the community at large;<sup>136</sup>
- published books and other literary matter, and public theatrical, artistic or musical performances;<sup>137</sup>
- anything which may fairly be said to invite comment or challenge public attention.<sup>138</sup>

### **The statement must be a comment or opinion and not an assertion of fact**

It is essential to the defence of fair comment that the defamatory matter must appear on its face to be a comment or opinion and not a statement of fact.<sup>139</sup> If it is the latter, then the defence will not be available and the defendant will have to rely on justification.

### **The comment must be based upon true facts**

A comment or opinion is not protected if it is based upon untruths, for 'you cannot invent untrue facts about a man and then comment on them'.<sup>140</sup>

### **The comment must be 'honestly' made**

'Honest' here means 'genuinely held'. Provided that the defendant expresses his genuine opinion on the subject matter, he will have a defence, notwithstanding that his opinion may have been biased, prejudiced, exaggerated or irrational. But the defendant is not entitled to cast defamatory aspersions on the personal character

132 *Op cit*, Gatley, fn 40, para 12.34; *Singh v The Evening Post* (1976) High Court, Guyana, No 2754 of 1973 (unreported).

133 *Op cit*, Gatley, fn 40, para 12.32; *Soltysik v Julien* (1955) 19 Trin LR (Pt III) 623 (West Indian Court of Appeal) (below, pp 269–71).

134 *Op cit*, Gatley, fn 40, para 12.29.

135 *Op cit*, Gatley, fn 40, para 12.33.

136 *Op cit*, Gatley, fn 40, para 12.32; *British Guiana Rice Marketing Board v Peter Taylor and Co Ltd* (1967) 11 WIR 208 (below, pp 267–69).

137 *Op cit*, Gatley, fn 40, para 12.35; *Clapham v Daily Chronicle*, Supreme Court, British Guiana (below, pp 259–63); *Bourne v The Advocate Co Ltd* (1994) High Court, Barbados, No 715 of 1991 (unreported).

138 *Op cit*, Gatley, fn 40, para 12.41.

139 See *British Guiana Rice Marketing Board v Peter Taylor and Co Ltd* (1967) 11 WIR 208 (below, pp 267–69); *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported) (below, pp 272, 273).

140 *Op cit*, Winfield and Jolowicz, fn 19, p 424; *Soltysik v Julien* (1955) 19 Trin LR (Pt III) 623 (below, pp 269–71); *Singh v The Evening Post* (19/6) High Court, Guyana, No 2754 of 1973 (unreported).

of the plaintiff, or to ascribe to him base, dishonest or corrupt motives.<sup>141</sup> If he does so, he steps outside the boundaries of the defence.<sup>142</sup>

### The comment must not be actuated by malice

The word 'malice' is used here in the sense of 'a corrupt or wrong motive, or making use of the occasion for some indirect purpose'. The plaintiff has the onus of proving malice on the defendant's part.

Fair comment is very frequently pleaded in the courts in the Commonwealth Caribbean, but rarely succeeds. One case in which the defence was successfully relied on is *Clapham v Daily Chronicle*, in which the proper approach to pleading the defence was discussed.

#### **Clapham v Daily Chronicle [1944] LRBG 71, Supreme Court, British Guiana**

The plaintiff (a composer, performer and teacher of music) took part in a public performance at a theatre, in which he played a number of solo piano pieces by well known composers. The defendant newspaper published a review of the recital, written by one of its reporters, in the following terms:

#### **LONDON PIANIST DISAPPOINTS CANJE AUDIENCE**

I saw people sulk; I heard others speak in disappointing terms. Some even complained to me after Ruthland Clapham's piano recital at the Canje last Saturday night. 'It is an insult to our intelligence', one minister told me. It did not take a musical genius to detect the mistakes made during Beethoven's Minuet and Rachmaninoff's Prelude in C sharp minor. Among some of this town's leading musicians who attended and showed visible signs of disappointment were Mrs Ruby McGregor, the Rev NS Shellock, Mr Sammy Nicholas and Mrs Kunkle.

The plaintiff brought an action against the defendant newspaper and its reporter for libel. The defendants pleaded fair comment.

*Held*, the words used were defamatory of the plaintiff, but the defence of fair comment succeeded. Verity CJ said:

The words which refer to the disappointment of the audience, if they stood alone, I might be prepared to hold are incapable of bearing and do not in fact bear a defamatory meaning, for mere disappointment may result from many causes entirely independent of the skill or competence of the performer. When, however, the writer proceeds to publish the statement, 'It was an insult to our intelligence', even though this comment is not his own, and that 'it did not take a musical genius to detect the mistakes the performer made', then indeed I am unable to hold otherwise than that the words are not only capable of bearing a defamatory meaning but are in fact defamatory of the plaintiff in the way of his profession as a musical performer.

It remains to be seen whether the plea [that 'in so far as the words consist of allegations of fact they are true in substance and in fact; and in so far as they consist of expressions

141 Defamation Act 1996 (Barbados), s 8(3) provides that the defence shall no longer be affected by the fact that base or sordid motives have been attributed to the plaintiff.

142 *Barrow v Caribbean Publishing Co Ltd* (1971) 17 WIR 182 (below, pp 265–67).

of opinion they are fair comments made in good faith and without malice upon the said facts which are matters of public interest'] is open to the defendants, and if so, whether it has been established by the evidence.

In the first place, it may be convenient to recall that the plea in this case is no more than a plea that the publication complained of fairly and honestly comments on a matter of public interest. It is true that the form of the plea is that which has been called 'the rolled-up plea', but this was described by Lord Finlay in *Sutherland v Stopes*<sup>[143]</sup> as a 'misnomer based on a misconception of the nature of the plea'. His Lordship added that this plea 'has been sometimes treated as containing two separate defences rolled into one [that is, fair comment and justification] but it in fact raises only one defence, that being the defence of fair comment on matters of public interest'. The averment that the facts were truly stated 'is merely to lay the necessary basis for the defence on the ground of fair comment'.

It may be well also to clear the ground of another misconception: that it is requisite for the defendants to distinguish plainly either in the publication itself or in their pleadings what are the facts stated and what are the comments. Support for this view is sought in the statement to be found in *Gatley on Libel and Slander*, 2nd edn, p 378, where the learned author states: '...a critic should never mix up his comments with the facts on which they were based.' That this statement is rather by way of counsel than the setting out of a legal requirement may be seen by reference to the words of the learned author of *Odgers on Libel and Slander*, 6th edn, p 575, where, in regard to this particular plea, he says, 'It was only intended to be used where allegations of fact were sometimes inextricably mixed up with comment in the libel, and where the comments were based upon the facts stated in the libel'. Indeed, it is clear from the judgments of the Court of Appeal in *Aga Khan v Times Publishing Co Ltd*<sup>[144]</sup> that it is not incumbent upon the defendant either by the form of his publication or by the nature of his pleadings to pick out which part consists of statements of fact and which matters of opinion. 'For', said Bankes LJ, 'the category to which the several statements belong is a question for the jury'. It is necessary, however, in order that this plea should succeed, that the defendants should establish that the facts stated, wherever they are to be found, are true, and that the matters of opinion, wherever expressed, are fair and honest comment on those facts.

With these principles in mind, I would proceed to the consideration of the present case. It is true that facts and opinions are by no means tabulated or otherwise clearly distinguished by the writer of the article. As was pointed out in the case last referred to by me, even had he attempted to do this he might have been wrong in his classification. Nevertheless, I experience little difficulty in distinguishing those parts of the account which appear to me to be statements of fact and those which appear to be in the nature of comment thereon. It is tolerably clear, I think, that, when the writer states that the plaintiff made mistakes in the playing of certain pieces of music and when he states that certain members of the audience, including some of the town's leading musicians, displayed disappointment either by voice or demeanour, he is stating facts. When, on the other hand, he concludes that the plaintiff disappointed the audience as a whole or that the performance was an insult to the intelligence of the audience, or that the mistakes could be detected even by one who was not a musical genius, then he is expressing an opinion by way of comment on those facts. He must, therefore, establish that the facts are truly reported, for only truth can be

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143 [1925] AC 47, p 62.

144 [1924] 1 KB 675.

the basis of fair comment, and he must further establish that the opinions he expressed in regard to the facts are fair and honest comment.

The defendants are not to seek advantage by the application of too literal an interpretation. Such a construction is to be placed upon them as would appear open to a reasonable man, and the effect as well as the meaning of the precise words used must bear the same test. Thus, they cannot escape responsibility for the statement, 'It is an insult to our intelligence' as a comment upon the proceedings by proof that, as a matter of fact, it is true that one minister said so. By its publication, without disclaimer, the writer had adopted the comment as his own and would be so understood. On the other hand, if they succeed in establishing the substantial truth of a statement of fact, then they are not to be penalised because it may not have been precisely established in detail. Thus, if, in fact, 'some sulked and some complained', the substance of the statement is proved, even though the writer has not given evidence that he himself saw them sulk or that they complained to him, as for the sake of artistry he alleged in his report.

The first issue of fact is whether or not the plaintiff made mistakes in the playing of certain pieces of music. He most emphatically denies this and gives reasons for his denial: that the first named piece is simple and one which he has played many times; and that, in the second piece, that part in which it is suggested that he made mistakes is of such a nature that the player, if playing from memory, would completely break down if he made a mistake. It appears from all the evidence that the two pieces are very well known and that they especially attracted the notice of those who gave evidence for the defendants because they were so familiar to them. All save two of these witnesses aver that the plaintiff made mistakes in playing these two pieces. Of the exceptions, one would not say that he could detect mistakes but, having heard the second piece played by its composer, he did not find that the plaintiff's performance appealed to him, and indeed, considered it to be an insult to his intelligence. The other expresses himself as greatly disappointed; his disappointment passing from disgust to amusement.

Two of the witnesses might no doubt be described, with due allowance for the language of journalism, as amongst the town's leading musicians, one an enthusiastic amateur and the other an apparently successful professional teacher of music. Both of these witnesses were able to state unhesitatingly that the plaintiff made mistakes in playing these two pieces and to indicate certain precise particulars in which he misplayed them.

It has been submitted that the defendants cannot avail themselves of this testimony, in that the writer of the article cannot rely on facts which were not within his knowledge at the time he wrote the article, but I think that the proper view is that he is quite at liberty to adduce other evidence to confirm his own observations and so establish the truth of his statement. Here, the writer professes himself to have observed mistakes. If this be true, he may not then have been in a position through lack of musical training to identify their precise nature nor in a position now to recall them in detail. He is at liberty, however, to substantiate his own observations by the evidence of those better qualified than himself in this regard, who were also present and themselves not only heard but identified the errors. I have no doubt whatever from the way the defendants' witnesses gave their evidence that they are honest witnesses and that, so far as Mr Lindley and Mrs McGregor are concerned, they are adequately qualified to judge of the occurrence of the mistakes to which they referred.

Taking all the evidence into consideration, I can reach no other conclusion but that the plaintiff, as a fact, on that occasion, did make mistakes in the playing of these two

pieces of music and that these mistakes were observed by members of the audience who were not trained musicians. The defendants have therefore established the substantial truth of the first statement of fact contained in the article.

I am also satisfied on the evidence as a whole that certain members of the audience showed such visible signs of disappointment as those indicated by the writer of the article. It would indeed be strange if those whose feelings of disappointment amounted to disgust showed no such signs, and if, as witnesses aver, a measure of the applause was derisive; this in itself would be an expression of, at least, lack of appreciation on the part of others besides those who actually gave evidence as to their emotions. The defendants have therefore established the truth of the second statement of fact contained in the article. The question then arises whether the opinions expressed in the report are to be considered fair and honest comment on these facts so stated.

In the first place, the report comments that the plaintiff disappointed the audience. Is this a fair comment upon the facts? Including the writer, who was himself a member of the audience, several witnesses have stated their disappointment and there is no doubt that members of the audience displayed this in a manner apparent to the observer. In the absence of any evidence which would go to show that these persons constituted but a small proportion of the audience or that a large proportion of the audience dissented from this view, I do not think it an unfair comment that the audience was disappointed. If, as the plaintiff and his witness Miss De Rushe aver, the audience as a whole were so pleased that their applause might truthfully be described as 'thunderous' or their reactions 'sensational', then indeed the comment based upon the statement that a limited number only were disappointed could hardly be called fair and would not be honest. There is, however, no support for these statements. Out of the whole of the audience, but one person is called as a witness who is able to express appreciation, and that person is a brother-in-law of one of the performers. In these circumstances, I cannot say that the comment is unfair.

In regard to the statement that the mistakes made were such that they could be detected by a person who was not a musical genius, this would appear to be a fair comment in the circumstances, for, while there may be but little merit in the use of the phrase 'musical genius' in this connection, it is apparent that the mistakes were observable by others besides those who have some musical training.

The weightiest part of the comment is to be found in the opinion expressed that the performance was an insult to the intelligence of the audience, and it remains to be seen whether or not this falls within the limits of fair comment. Exaggeration, even gross exaggeration, in the expression of one's views does not necessarily destroy the protection afforded those who are at liberty to criticise the public acts of another, although this may be so where comment 'passes out of the domain of criticism itself, to use the words of Collins MR in *McQuire v Western Morning News*.<sup>[145]</sup> Can it be said that the phrase now under consideration does this, or that the whole article does so? It is true that to describe the plaintiff's performance as an 'insult to the intelligence' of the audience is to use strong and perhaps exaggerated language, but on the facts as truly stated in the article can it be said to go beyond the limits of honest comment? There can be but little doubt that one who may truly be described as a 'London pianist' and is to be credited, therefore, with skill perhaps above the average, shows little respect for the musical appreciation of a country or provincial audience if he plays well known pieces of music in such a manner that mistakes are obvious to comparatively untrained listeners. Comment expressed in such terms would, I think, be well within the limits of fair comment, and I am further of the opinion that a mere exaggeration of such a comment—and that is all the defendants have published—would not go beyond them.

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Taking the article complained of either piece by piece or as a whole, I find that the plea of fair comment has been established and there is nothing in the evidence to lead me to the conclusion that the defendants or any of them were actuated by malice or any indirect or improper motive.

There is no doubt—indeed, it was not contested—that the matter is one of public interest, and with that finding the defendants’ plea is completely established and the plaintiff fails in his claim.

I should wish to add that, while the report truly states certain facts, fairly if strongly comments thereon, and is therefore not actionable, it does not perhaps do complete justice to the performance it purports to describe nor to the ability of the plaintiff to which his past record and the testimony of more than one witness pay tribute. Had the writer been more charitably disposed, or had he sought to produce a more well balanced criticism of the concert as a whole, he might well have given praise where praise was due as generously as he lavished adverse comment. I am yet to learn, however, that a newspaper report is actionable because it does not preserve due balance in its terms or that a person who sets out to criticise adversely the public acts of another is to be liable in damages if he does not at the same time catalogue that other’s virtues or good deeds.

Those who seek the opinion of the public in the course of their profession and in the service of their own interests expose themselves to public criticism, and if they fail to serve that end, must not complain. The plaintiff sought by the favourable publicity he hoped to obtain from this concert to enhance his musical reputation and increase the number of his pupils. In so doing, he exposed himself to the risk of adverse criticism and it was that which he secured. If, as may possibly be deduced from the evidence, he took less care in his performance in this country theatre than he would have done in London, he has only himself to blame. The views of the audience and the criticism of the newspaper reflect rather upon the skill displayed by him on this particular occasion than upon what may well be his more usual high standard of musical ability. If the general public appear to have given greater weight to an isolated failure than to a reputation earned by previous success, this may be an example of that caprice which the famous and the notorious alike learn to expect. They should perhaps learn also to meet with equanimity both praise and blame. It is those who have not yet learned this lesson who tend to aggravate their loss by seeking the further publicity of a libel action which cannot succeed, unless the criticism of their acts goes beyond the generous limits allowed to those who would exercise their freedom of expression.

### *Political comment*

The right of the press to comment on the political affairs of the day is a fundamental right in a democratic society, and ‘fair comment’ may be an appropriate defence in a libel action brought by a politician who complains of a defamatory article contained in a newspaper. In *Osadebay v Solomon*,<sup>146</sup> Da Costa CJ pointed out that this is an important area of the law, because:

...we are here concerned with the exercise of one of the fundamental freedoms—freedom of expression—which is now enshrined in Art 23 of the Constitution of the Commonwealth of The Bahamas. It embraces the right to discuss and criticise the utterances and conduct of men in public life. But, as the definition in Art 23 shows, freedom of expression, like other fundamental freedoms, is not an unfettered right and must be exercised according to law. As Diplock J said in his summing-up to a jury in *Silkin v Beaverbrook Newspapers Ltd*:<sup>147</sup>

146 (1983) Supreme Court, The Bahamas, No 803 of 1979 (unreported).

147 [1958] 2 All ER 516, p 517.

Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual...whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public, which means you and me, and the newspaper editor and the man who, but for the present bus strike, would be on the Clapham omnibus, to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

It is important to be aware that the principle of freedom of speech does not confer a licence to make unfounded attacks upon the integrity and moral character of individuals, whether political personalities or not. In *Craig v Miller*,<sup>148</sup> a particularly slanderous attack on a government minister was made by a speaker at a public meeting in the course of an electioneering campaign in Barbados. Williams CJ stated:

It is said that the plaintiff was a public figure and that men and women in public life must expect criticism which in their case is apt to have less impact than criticism of others. It is also said that the statements were uttered at a political meeting which was part of the political campaign and held three months before the general election. In such circumstances there is a charged atmosphere and things are said which would not be said in normal times.

There are imputations of criminal activity, and I know of no law which places public figures in a worse position than other members of the public for protecting their reputations against charges of serious breaches of the criminal law, nor do I know of any provision which abrogates the rule of law during the conduct of political campaigns.

In *France v Simmonds*,<sup>149</sup> the defendant was the editor of a newspaper supportive of the opposition party, in which appeared an article boldly captioned, 'Simmonds you better talk fast. Where's the one and a half million gone?'. The article alleged that the plaintiff, the Prime Minister of St Kitts and Nevis, had 'given away' to a party activist a ferry boat purchased on behalf of the Government, which was described as 'a rip-off business'. The Court of Appeal of the OECS, upholding the decision of the trial judge, held the article to be clearly defamatory of the plaintiff and unprotected by the defence of fair comment. Robotham CJ said:

In fulfilling this role in opposition, which role may be achieved not only by the making of political speeches, but by reporting to the media, robust and intemperate language in dealing with their political adversaries may be used. However, there are limitations. An editor or writer has only the general right which belongs to the public to comment upon public matters... It often proves a difficult and hazardous task to draw the line, but if the language, robust though it may be, goes beyond the limits of fair criticism, the law of defamation takes over. It becomes even more difficult to justify if it descends into personalities, and the use of derogatory terms or expressions.

The defence of fair comment also failed in the earlier case of *Barrow v Caribbean Publishing Co Ltd*. With respect, this latter decision seems questionable, in that the comments complained of would appear to have been more in the nature of robust political argument at a time of heightened political consciousness, rather than

148 (1987) High Court, Barbados, No 317 of 1986 (unreported).

149 (1986) Court of Appeal, Eastern Caribbean States, Civ App No 2 of 1985 (unreported).

personal invective directed at the Prime Minister as an individual. The case perhaps shows how fine the dividing line between comment and invective may be in the minds of some judges.

**Barrow v Caribbean Publishing Co Ltd (1971) 17 WIR 182,  
High Court, Barbados**

The defendant's newspaper contained an article entitled 'The White Lie', which was a commentary upon a government White Paper on *The Federal Negotiations, 1962–65, and Constitutional Proposals for Barbados*. The article was highly critical of the approach of the Barbados Government and, in particular, of the Prime Minister, Errol Barrow, towards the negotiations. The Prime Minister brought an action, complaining that the article was defamatory of him, in that it asserted that he was not entitled to any reputation for honesty and integrity. The defendant pleaded fair comment on a matter of public interest.

*Held*, by using the words 'truth and honesty are irrelevant considerations, if considerations at all' in relation to the plaintiff, the writer had stepped outside the bounds of fair comment, as these words constituted an attack on the personal character of the plaintiff. Douglas CJ said:

Matters of far reaching importance are raised in these proceedings in which the plaintiff seeks damages for alleged defamation occasioned by the publication on 15 August 1965, of an article entitled 'The White Lie', appearing in the *Barbados Sunday News*. The first defendants are the publishers and the second defendant the editor of the said newspaper...

On the face of it, the article complained of is a critique of the White Paper and an expression of opinion on what it contains. There can be no doubt that the White Paper, dealing as it does with constitutional proposals for Barbados, is a matter of public interest.

The only issues are whether the article was actuated by malice and whether it constitutes fair comment in the sense of being honest comment on a matter of public interest.

On the first question, there is no evidence of personal animosity or aversion between the writer of the article, Mr Nigel Barrow, and the plaintiff, or between the second defendant and the plaintiff. In that state of the evidence, counsel asks the court to infer malice from the language of the article itself. From the evidence, it is clear that there was at the time great political ferment about the constitutional future of the Island. Public meetings were being held and an atmosphere of controversy and acrimony prevailed. The plaintiff himself rejected federation as a solution and characterised the contrivance of federal constitutions as 'an inevitable act of final absolution performed by departing British officialdom' (see para 77 of the White Paper), and in his evidence speaks of people who 'would have opposed independence even if they had been slaves' and of 'a contrived issue by a bunch of criminals who were going on the platform of the under 40s'. Throughout the documentary and oral evidence, the plaintiff uses robust and sometimes intemperate language in dealing with his political adversaries; it is not surprising that journalists, in commenting on the political scene in mid-1965, should make use of equally robust and forceful language. The onus of proving malice is on the plaintiff and I cannot say on the material before me that he has discharged that burden because, although the language of the article is harsh and biting, it is the language of political controversy as such controversy was conducted in the context of events which took place in Barbados in 1965.

On the second question, the principles underlying the law of fair comment were laid down as long ago as 1863 by Cockburn CJ in *Campbell v Spottiswoode*<sup>[150]</sup>

I think the fair position in which the law may be settled is this; that where the public conduct of a public man is open to animadversion and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct so that a jury shall say that the criticism was not only honest, but also well founded, an action is not maintained.

These principles have been restated in many cases, and well expressed by Diplock J in *Silkin v Beaverbrook Newspapers Ltd.*<sup>[151]</sup>

Freedom of speech, like the other fundamental freedoms, is freedom under the law, and over the years the law has maintained a balance between, on the one hand, the right of the individual...whether he is in public life or not, to his unsullied reputation if he deserves it, and on the other hand, but equally important, the right of the public...to express their views honestly and fearlessly on matters of public interest, even though that involves strong criticism of the conduct of public people.

In the *Silkin* case, the allegation was that the words published by the defendants' newspaper were defamatory, and that they meant that the plaintiff was an insincere and hypocritical person who was prepared to sacrifice his principles for selfish reasons of personal profit, and that he was unfit to participate in the debate in the House of Lords. The jury was directed that any person is entitled to say, by way of comment on a matter of public interest, what he honestly thinks, however exaggerated, obstinate or prejudiced that may be, and that such comment is fair and sustainable as a defence to a libel action, unless it is so strong that no fair minded person could have made it honestly. As Cockburn CJ observed in *Wason v Walter*:<sup>[152]</sup>

...though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties.

In *Slim v Daily Telegraph Ltd.*<sup>[153]</sup> Lord Denning MR observed that the comments complained of were capable of different interpretations: one person might read into them imputations of dishonesty, insincerity and hypocrisy; while another person might take them to mean inconsistency and want of candour. He pointed out that the cardinal test is the honesty of the writer, or, as Lord Porter put it in *Turner v Metro-Goldwyn-Mayer Pictures Ltd.*<sup>[154]</sup>

...the question is not whether the comment is justified in the eyes of judge or jury, but whether it is the honest expression of the commentator's real view and not merely abuse or invective under the guise of criticism.

My own view is that there is a clear distinction between criticism of a document and an attack on the personal character of its author. I suppose it can be argued that it is impossible to criticise a book without at the same time appearing to criticise the author. To say that a document is badly written or illogical is to suggest that the author is unskilful or lacking in judgment. But that does not amount to an attack on his personal character of the quality of which the decided cases speak. To constitute such an attack, the writer must go beyond fair comment and make imputations against the author as a person as distinct from his character as an author.

150 (1863) 122 ER 288, p 291.

151 [1958] 2 All ER 516, p 517.

152 [1861-73] All ER Rep 105, p 113.

153 [1968] 1 All ER 497.

154 [1950] 1 All ER 449, p 461.

The onus of showing that the article is a fair comment on the White Paper, in the sense of expressing views honestly held for which there is some foundation, rests on the defence. In deciding whether this onus has been discharged, weight must be given to the fact that the article dealt with a matter of the greatest public importance; that it was the duty of the press to submit the White Paper proposals to the most careful scrutiny; and that there were certain inaccurate and misleading statements in a document which is part of the recorded history of this country.

Learned counsel for the plaintiff submits that the whole object of the article was that it should be used as a veil for personal reference to the plaintiff and as a cloak for abuse. In putting forward his case on this basis, he has set out a large number of complaints in regard to specific portions of the article which he claims to be defamatory. To the extent that he complains about so many portions of the article which are obviously proper comment on a matter of public interest—for example, he complains about the statement, ‘paras 111–13 are too obviously untrue, \$500,000 will become \$5,000,000. Ask Trinidad or Jamaica...’—then these facets of his case are misconceived. On the whole, in my view, the article is severe but honestly held comment on a public document. It is only in the words complained of in sub-para (ix) of para 6 of the statement of claim, namely, Truth and honesty are irrelevant considerations, if considerations at all’, that the writer has gone too far and crossed the line between fair comment and personal invective. These words are a serious imputation against the author of the White Paper, taxing him in effect with cynical irresponsibility and conduct reprehensible in a man of his position. Up to that point, the writer was criticising the contents of the White Paper, but he allowed himself to be carried away into attacking the personal character of the author.

In *London Artists Ltd v Littler*,<sup>[155]</sup> the defendant published a letter suggesting that the plaintiffs had taken part in what appeared to be a plot to force the end of the run of a successful play. It was held in the Court of Appeal that, although the comment was on a matter of public interest, the defendant having alleged a plot which he failed to substantiate, the defence of fair comment failed. In the event, the plaintiffs were held to be entitled to the modest sums awarded them by way of damages.

In the circumstances of the instant case, the plaintiff is entitled, in my judgment, to damages against the defendants jointly and severally which I fix at the sum of \$2,400.

### *Statements of fact not protected*

In Commonwealth Caribbean cases (exemplified by *British Guiana Rice Marketing Board v Peter Taylor and Co Ltd*), the defence of fair comment most often fails because what the defendant alleges to be comment is, in reality, a series of statements of fact. Such statements of fact are unprotected by the defence of fair comment. The only defence available to a defendant in such a case would be justification, in which he is required to prove the truth of the statements (see above, pp 255–57).

#### **British Guiana Rice Marketing Board v Peter Taylor and Co Ltd (1967) 11 WIR 208, High Court, Guyana**

Two farmers, H and K, told the defendants, the publishers of *The Evening Post* newspaper, that they could not get payment for rice which they had sold to the plaintiff corporation (the RMB). They showed two cheques drawn by the RMB, both of which had been referred by the RMB’s bankers, marked ‘present later’ and

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155 [1969] 2 All ER 193.

'refer to drawer'. Other farmers had also reported to the defendants that they had not been able to obtain payment from the RMB for rice sold, and they expressed a wish that their grievances should be made public by being reported in the press. The defendants attempted to obtain the comments of the General Manager of the RMB to verify the farmers' story, but he declined to comment. Later, the defendants' reporter, who had been detailed to investigate the farmers' complaints, wrote an article in the newspaper in the following terms:

### **RMB CHEQUES BOUNCE**

#### **Farmers plan mass protest tomorrow**

The local banks have served notice on the BG Rice Marketing Board that they can no longer cash its cheques until its financial position improves, the *Evening Post* was told this morning.

As a result, many cheques from the Board have bounced, and farmers who have travelled many miles to the city have had to return home empty handed.

The reason given for the banks' refusal, the *Evening Post* understands, is that 'RMB deposits with the bank are virtually exhausted'.

While it was not stated when the banks began refusing the cheques, it is known that a large number of cheques issued to farmers by the Board in payment for their rice have been rejected by the banks over the past week.

### **PROTEST**

And this morning, some disappointed farmers went to the Board to protest against what they called 'an unsatisfactory state of affairs'.

They blamed the management of the Board 'for creating this uncertain position' and demanded that immediate steps be taken to remedy the situation.

Some of the farmers complain that they have been told for several weeks now that the cheques are being processed and that they would receive their money soon.

But, as nothing is being done, the farmers feel that they are being pushed around and claim that other farmers have actually been told that the Board has no money and that they will have to wait for their payment when the situation improves.

### **OVERDRAFT**

This is not the first occasion on which the banks have had to refuse cashing cheques from the Board. Eight months ago, it is understood, similar action had to be taken.

The current overdraft at the banks is said to be in the vicinity of \$6 million.

Mr Jack Ali, General Manager of the Board, this morning refused to discuss the matter when he was asked about it by an *Evening Post* reporter.

Meanwhile, a delegation of farmers from all the rice producing areas in the country is to protest at the Board about the continued failure to collect money.

Bollers CJ held that:

- (a) a corporation can maintain an action for a libel reflecting on the management of its trade or business and injuriously affecting the corporation as distinct from the individuals composing it;<sup>156</sup>

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156 Following *South Hetton Coal Co v North Eastern News Association Ltd* [1891–94] All ER Rep 548, p 552, per Lopes LJ. See also *Trinidad and Tobago National Petroleum Co v Trinidad Express Newspapers Ltd* (2002) High Court, Trinidad and Tobago, No S-862 of 1999 (unreported).

- (b) it is defamatory to state that a cheque has been dishonoured, for such an allegation implies insolvency, dishonesty or bad faith in the drawer of the cheque; and
- (c) the defence of fair comment could not succeed in this case because the entire article complained of consisted of a series of statements of fact and not comment.

*Comment must be based on true facts*

Defamatory comment will not be protected unless it is based on facts proved to be true. In *Osadebay v Solomon*,<sup>157</sup> Da Costa CJ explained the position:

The comment must be an expression of an opinion and not an assertion of fact, and the critic should always be at pains to keep his facts and his comments upon them severable from one another. For if it is not reasonably clear that the matter purported to be fair comment is such, he cannot plead fair comment as a defence. The facts themselves must be truly stated, as Fletcher Moulton LJ observed in *Hunt v Star Newspaper Co Ltd*:<sup>[158]</sup>

In the next place, in order to give room for the plea of fair comment, the facts must be truly stated. If the facts upon which the comment purports to be made do not exist, the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J to the jury in *Joynt v Cycle Trade Publishing Co*,<sup>[159]</sup> which has been frequently approved of by the courts. Finally, comment must not convey imputations of an evil sort except so far as the facts truly stated warrant the imputation.

It is not, however, necessary that all the facts upon which comment is based should themselves be stated in the alleged libel. To paraphrase what Lord Porter said in *Kemsley v Foot*:<sup>160</sup> the question is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action, and whether the facts or subject matter on which comment is made are indicated with sufficient clarity to justify comment being made. The substratum of facts or subject matter may be indicated impliedly in the circumstances of the publication.

An example of failure of the defence, on the ground that the comment was not based on true facts, is *Soltysik v Julien*.

**Soltysik v Julien (1955) 19 Trin LR (Pt III) 623, West Indian Court of Appeal**

The appellant was the Surgeon Specialist at the Colony Hospital, under contract with the Government of Grenada. He performed an appendicitis operation on WJ, the son of the respondent. On WJ's discharge from the hospital, the appellant handed him a bill for consultation. The bill was not paid. Some nine months later, the appellant saw WJ in the street and reminded him that he owed the appellant a consultation fee, which WJ denied. The appellant then said, 'I see you did not want to pay, but next time you will see you will have to pay'. On being told of this incident, the respondent, who was at that time a member of the Legislative Council,

157 (1983) Supreme Court, The Bahamas, No 803 of 1979 (unreported), cited with approval by Summerfield CJ in *Bodden v Bush* [1986] CILR 100, p 110.

158 [1908–10] All ER Rep 513, p 517.

159 [1904] 2 KB 292, p 294.

160 [1952] 1 All ER 501, p 506.

wrote a letter to the appellant, copied to the Administrator and to the Governor, in the following terms:

Dear Sir,

You are claiming that my son Wilfred Julien owes you \$30 for 'consultation fee' when in fact you never had a consultation prior to his operation for appendicitis.

This afternoon you met him and asked for your money and in the presence of a witness you literally threatened him by using these words: 'You don't intend to pay me but next time you will see.' Now, doctor, those words used by a surgeon to a supposed debtor can be interpreted to mean two things to a jury but, to me, that threat can mean one thing only.

I am responsible for the non-payment of that bogus consultation fee, and I tell you this so that if you have the pleasure of knifing me at any time, you may by way of revenge allow your knife to slip because I am not afraid to die. But let me warn you that I would not stand by and let you or any other man threaten my son for a debt which was not incurred.

Many Grenadians have borne with a heavy heart your demands for the now famous 'consultation fee' because they are afraid that 'next time they would see'.

I am demanding from you an explanation of that threat to my son because, now you have started the ball rolling, the time for the showdown has arrived. A copy of this letter has been forwarded to the Administrator and one to the Governor. I expect to have your explanation by noon on Wednesday 4th instant.

Yours sincerely,

WE Julien

*Held*, the letter was clearly defamatory of the appellant. The defence of fair comment failed, since the facts upon which the comments were based—namely, that many Grenadians had paid consultation fees to the appellant because of fear that non-payment might result in the appellant allowing his 'knife to slip' should further surgical treatment become necessary—were not proved to be true. The mere fact that the respondent honestly believed the charges to be true was in itself no defence. Perez, Collymore and Jackson CJJ stated:

It is clear law that, for a comment to be fair, the following conditions must be satisfied:

- (a) it must be based on facts truly stated;
- (b) it must not contain imputations of corrupt or dishonourable motives on the person whose conduct or work is criticised, save in so far as such imputations are warranted by the facts;
- (c) it must be the honest expression of the writer's real opinion.

A writer may not suggest or invent facts or adopt as true the untrue statements of fact made by others and then comment upon them on the assumption that they are true. If the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail. 'If the defendant makes a misstatement of any of the facts upon which he comments, he at once negatives the possibility of his comment being fair.'<sup>[161]</sup> 'In a case where the facts are fully set out in the alleged libel, each fact must be justified and if the defendant fails to justify one, even if it be comparatively unimportant, he fails in his defence [*per* Lord Porter in *Kemsley v Foot*]'<sup>[162]</sup> Further, fair comment is not absolute but relative; criticism must not be used as a cloak for

161 *Digby v Financial News Ltd* [1907] 1 KB 502, p 508, *per* Collins MR.

162 [1952] 1 All ER 501, p 506.

mere invective nor for personal imputations not arising out of the subject matter and not based on fact.

Where the public conduct of a public man is open to animadversion, and the writer who is commenting upon it makes imputations on his motives which arise fairly and legitimately out of his conduct, so that a jury shall say that the criticism was not only honest but also well founded, an action is not maintainable. But it is not because a public writer fancies that the conduct of a public man is open to the suspicion of dishonesty that he is therefore justified in assailing his character as dishonest.<sup>1163</sup>

The respondent further contended that, as a member of the Legislative Council, it was his duty to bring to the notice of the proper authorities the conduct of the appellant in relation to the so called consultation fees. It is significant that in the letter he states that ‘many Grenadians have borne with a heavy heart your demands for the now famous “consultation fee” because they are afraid that “next time they would see”’. While it may be true that there is some evidence that certain people questioned the consultation fees charged by the appellant, there is no evidence of payment by anyone because of fear that non-payment may result in the appellant allowing ‘his knife to slip’ should further surgical treatment of those persons become necessary. Furthermore, an examination of the evidence of the respondent shows that he failed completely to support that allegation; albeit no justification in respect thereof was pleaded.

The mere fact that the respondent honestly believed the charges to be true is in itself no defence. The learned trial judge...evidently thought that whatever views a commentator may express, short of mere abuse or invective, they cannot constitute a libel so long as they are the commentator’s honest views; on this he is seriously in error and his view is in conflict with authority, for the views must not only be honest but also be well founded.

If the contents of the letter had been properly confined to the question whether the appellant was or was not entitled to charge consultation fees, there could be no complaint and we have no doubt that the respondent honestly believed that such consultation fee was not payable. But the contents go much further and impute that the appellant, when operating on people who had questioned his fee, ‘may allow his knife to slip’—a graver accusation against a surgeon would be difficult to conceive. Counsel urged that implicit in the words alleged to have been used by the appellant to Wilfred Julien was a threat that, should Wilfred Julien return to hospital for surgical treatment, the appellant would do him ‘harm as a surgeon in that capacity’. Assuming that the words used were as deposed to by Wilfred Julien, we are convinced that they are not in the nature of a threat to do violence as interpreted by the respondent.

The onus lay on the respondent to prove not only that the subject matter was one of public interest, but also that the words of the letter were a fair comment on it. The judge, as has already been indicated, found that it was a matter of public interest and that the qualified privilege was destroyed. The letter here contained statements of fact and the onus was on the respondent to prove that the statements of fact were true, or that there had been no misstatement of facts in the statement of the materials upon which the comment was based, and that the comment based on such facts was warranted in the sense that a fair minded man might *bona fide* hold the opinion expressed upon them. It is only when the above onus has been discharged that the burden to prove that the words exceed the limits of fair comment shifts to the appellant.

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163 *Campbell v Spottiswoode* (1863) 122 ER 288, p 291, *per* Cockburn CJ.

The respondent failed to prove that all the statements of fact contained in the letter are true, and we are of opinion that the language used is so extreme that no fair-minded man could in the circumstances honestly have used it. We find the letter defamatory of the appellant and the defences set up fail.

### *Sensational newspaper reports*

It is a fact of modern life in the Caribbean, as elsewhere, that newspapers thrive on sensationalism. The reading public has an insatiable appetite for gossip, scandal and sensation, especially where it concerns well known personalities in politics and showbusiness. The greatest risk of such journalism is, of course, that of the libel action, in which an award of massive damages against a newspaper can spell financial disaster for its proprietors. Notwithstanding this obvious danger, newspaper editors appear to be willing to run the gauntlet of the libel laws in the quest for improved circulation.

Such was the background to *Forde v Shah and T & T Newspaper Publishing Group Ltd*,<sup>164</sup> where an article on the front page of *The Mirror* newspaper read:

#### **TOP NAR MAN IN AIDS SCARE**

A senior member of the NAR Government is reportedly trembling in his boots following recent reports reaching Trinidad indicating that top local songbird, Charmaine Forde [the plaintiff] has died.

The former Gonzales girl was romantically linked for some time with showbiz impresario Anvil Savary, who perished earlier this year in New York from AIDS.

*Mirror* was the first to announce last year that Savary was dying from AIDS, but he claimed it was untrue.

When we spoke about his involvement with Miss Forde, she angrily declared that she didn't have the disease and announced that she was so incensed by those reports that she would never return home.

Earlier this week, *Mirror* received several reports that Miss Forde had died in Jamaica three weeks ago, and her body shipped home under an assumed name.

Since then, the NAR Cabinet man has been trembling in his boots. Informed sources told *Mirror* that the politician carried on a steamy relationship with the songbird after she broke off with Savary. Their love nest was a posh home in Valsayn which the NAR man 'borrowed' from an associate.

Hamel-Smith J held that:

- (a) the article was defamatory of the plaintiff, since ordinary persons would draw the inference that she had indulged in several affairs with a number of men; and, further, an imputation that the plaintiff had become infected with the AIDS virus would cause ordinary persons to shun or avoid her; and
- (b) the defence of fair comment was not available to the defendants, since: (i) the words complained of were not comment but a series of statements of fact; and (ii) the statements of fact were untrue, in that the plaintiff had not died but was alive and well; nor was it proved that AS had died; nor was there proof of any intimate relationship between the plaintiff and AS.

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<sup>164</sup> (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported).

Hamel-Smith J explained:

The plea of fair comment has been relied on in this case. The facts upon which the comment was based were pleaded by way of particulars and the onus was on the defendant to prove those facts. *Gatley on Libel and Slander*, 8th edn, para 692, explains that the facts must be in existence at the time of publication, thus disqualifying the defendant from relying on events which may occur after the date of the comment, save, possibly, to draw inferences to support the facts. The difference in the pleas of justification and fair comment is that in the former the facts and the imputations must be true, while in the latter, although the facts must be established as true, the imputations need not. It is those imputations (based on established facts) which must be honest expressions of the writer's real opinion.

*Gatley*, at para 692, states that to succeed in a defence of fair comment the defendant must show that the words are comment, and not a statement of fact. He must also show that there is a basis of fact for the comment, contained or referred to in the matter complained of. At para 710, the author states that, 'in order that the comment may be fair, the defendant must state the facts on which he is commenting. Often, these facts will be set out in the publication, but this is by no means necessary'. If, however, the facts upon which the comment purports to be made do not exist, the defence of fair comment must fail and comment based on matters of opinion only, which may or may not be true, equally affords no defence. The question, therefore, in all cases is whether there is a sufficient substratum of fact stated or indicated in the words which are the subject matter of the action...or is there subject matter indicated with sufficient clarity to justify comment being made?...

Fact No 1, that Savary was a show business impresario seems to have been established...

[Facts Nos 2 and 3 were not applicable.]

Fact No 4, the death of Savary from AIDS, has not been established.

Fact No 5, that the plaintiff and Savary were publicly romantically linked has not, in my view, been established.

Fact No 6, the alleged death and shipping home under an assumed name, could not be proved, for the simple reason that the plaintiff was still alive. In any event, the defendants could not rely on a plea that 'reports had been received' to justify the fact pleaded. That was simply rumour. They had to prove the facts contained in the alleged report and they were unable to do so. In *Gatley*, para 715, the law is clearly set out: a writer may not suggest or invent facts, or adopt as true the untrue statements of fact made by others, and then comment on them on the assumption that they are true

...

Finally, I have searched the article in an effort to determine what is the comment made on the alleged facts. There appears to be none. The entire article seems to be one of alleged fact and it is difficult to discern anything which resembles comment at all.

## Absolute privilege

Absolute privilege is a complete defence to an action for libel or slander, however false or defamatory the statement may be and however maliciously it may have been made. It arises in those circumstances, such as proceedings in the legislature or in a court of law, where public policy demands that persons should be able to speak or write with absolute freedom, without fear of liability for defamation.

Absolute privilege covers the following statements.

*Statements made in the course of and with reference to judicial proceedings by any judge, jurymen, advocate, party or witness*

The privilege is given a wide interpretation so that, for example, anything which a witness says in the witness box with reference to the subject matter of the proceedings will be protected, even though the statement may not be strictly relevant in law. It has been suggested, however, that if a man, when in the witness box, was to take advantage of his position to utter something having no reference whatever to the proceedings in hand in order to assail the character of another, he would not be protected.<sup>165</sup>

Absolute privilege extends not only to proceedings in the regular courts, such as a Court of Appeal, High Court or magistrates' court, but also to other tribunals recognised by law,<sup>166</sup> such as courts martial and disciplinary committees of professional bodies.

In *Bodden v Brandon*,<sup>167</sup> the defendant was appearing in the Grand Court, Cayman Islands, as counsel for the accused in a trial for the attempted murder of one Mostyn Bodden. The plaintiff, a married woman living with her husband, was called to serve as a juror, whereupon the defendant challenged her. After the plaintiff had sat down, the defendant turned towards her and said in a clearly audible voice, 'Yes, I challenged you because you are one of Mostyn's girlfriends'. The Court of Appeal of Jamaica, on appeal from the Grand Court, held that the words were slanderous, but on grounds of public policy they were absolutely privileged. In answer to the plaintiff's argument that the offending words were not addressed to the court, were irrelevant and were not made in good faith for the advancement of the defendant's client, Duffus P said:<sup>168</sup>

No cases have been cited to us in which a similar or parallel situation has arisen. After a great deal of anxious consideration, I have arrived at the conclusion that this is not a case in which any limit or boundary can be set between the liberty of counsel and licentiousness. The liberty of counsel is wide and it is not deniable that it should not be restricted in any but the clearest of cases.

Lewis JA held<sup>169</sup> that it was 'not necessary that the words should be addressed to the court'. It was 'sufficient that they were made by the defendant when speaking as an advocate and with reference to the case then being heard in court'.

*Statements made in proceedings of the legislature*

Statements made in the course of proceedings by members of a parliament, including Senate or House of Representatives, are absolutely privileged. This is properly regarded as a matter of immunity from legal action, rather than as a defence.<sup>170</sup> The privilege covers statements made in debate or in committee and includes statements made by witnesses called to give evidence before a committee.<sup>171</sup>

165 *Seaman v Netherclift* (1876) 2 CPD 53, pp 56, 57, per Cockburn CJ.

166 *O'Connor v Waldron* [1935] AC 76, p 81.

167 [1965] Gleaner LR 199.

168 *ibid*, p 207

169 *Ibid*, p 208.

170 Carter-Ruck, *Libel and Slander*, 4th edn, 1991, London: Butterworths, p 109.

171 *Coffin v Donnelly* (1881) 44 LT 141.

*Communications made by one officer of state to another in the course of his official duty*

The leading case is *Chatterton v Secretary of State for India*,<sup>172</sup> where it was held that a letter from the UK Secretary of State for India to his Parliamentary Under-Secretary, which provided material for the answer to a question raised in Parliament, was absolutely privileged. The privilege certainly includes communications between high ranking officers of state such as Ministers,<sup>173</sup> or Ambassadors and High Commissioners,<sup>174</sup> but it is not clear how far down the hierarchy of civil servants it extends. As far as the armed forces are concerned, it was held in *Dawkins v Lord Paulet*<sup>175</sup> that a defamatory report on a lieutenant colonel made by his commanding officer was absolutely privileged, but this view has been challenged.<sup>176</sup> Probably the better view is that communications between civil servants of below ministerial rank are only qualifiedly and not absolutely privileged,<sup>177</sup> and the same should apply to all communications between army officers. Surprisingly, however, in *Halliday v Baronville*,<sup>178</sup> Hewlett J, in the High Court of the BVI, held that a report by a woman police constable to the Deputy Chief of Police to the effect that the plaintiff, a sergeant, had indecently assaulted her, was absolutely privileged, as it fell within the general compass of official communications.

*Reports of judicial proceedings*

By s 15 of the Libel and Slander Act (Jamaica):<sup>179</sup>

A fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged, provided that nothing in this section shall authorise the publication of blasphemous or indecent matter.

This section was modelled on s 3 of the Law of Libel Amendment Act 1888 (UK), which, after a long period of uncertainty, was held in 1964 to create absolute privilege.<sup>180</sup> The statutory privilege is additional to the qualified privilege that fair and accurate reports of judicial proceedings enjoy at common law.<sup>181</sup> Section 11 of the Defamation Act (Jamaica)<sup>182</sup> extends the statutory privilege to radio and television broadcasts.

172 [1895] 2 QB 189.

173 *Szalatnay-Stacho v Fink* [1946] 1 All ER 303.

174 *Isaacs v Cook* [1925] 2 KB 391.

175 (1869) LR 5 QB 94, *per* Mellor and Lush JJ.

176 *Ibid*, *per* Cockburn CJ.

177 *Op cit*, Brazier, fn 120, p 447.

178 (1977) 2 OECSLR 138.

179 See also Defamation Act, Cap 6:03 (Guyana), s 13; Libel and Defamation Act, Ch 11:16 (Trinidad and Tobago), s 13; Defamation Act 1996 (Barbados), s 9(1). The defence was upheld by Moosai J in the Trinidadian case of *Alleyne-Forte v Trinidad Express Newspapers Ltd* (1999) High Court, Trinidad and Tobago, No S 1012 of 1989 (unreported).

180 *McCarey v Associated Newspapers Ltd* (No 1) [1964] 2 All ER 335.

181 See below, p 281.

182 See also Defamation Act, Cap 6:03 (Guyana), s 18.

## Qualified privilege

Both absolute and qualified privilege exist for the same fundamental purpose: to give protection to persons who make defamatory statements in circumstances where 'the common convenience and welfare of society'<sup>183</sup> demand such protection; but whereas absolute privilege is limited to a few well defined occasions, qualified privilege applies to a much wider variety of situations in which it is in the public interest that persons should be able to state what they honestly believe to be true without fear of legal liability.

The main difference between the two defences is that a plea of qualified privilege will be defeated if the plaintiff proves that the defendant, in publishing the words complained of, was actuated by express malice, whereas in absolute privilege the malice of the defendant is irrelevant.

### *Occasions of qualified privilege*

#### **Statements made in the performance of a legal, moral or social duty**

Here, the defendant must show both that he was under a legal, moral or social duty to communicate the defamatory matter to a third party, and that the third party had a corresponding interest in receiving it.<sup>184</sup> A common instance of such an occasion is where a former employer of the plaintiff gives a damaging reference as to the plaintiff's character to a prospective employer.

Another common example of qualified privilege is where D makes a report to the police, accusing P of having committed a crime.<sup>185</sup> *A fortiori*, statements made by a police officer in the course of his enquiries into a suspected crime are privileged. In *Stewart v Green*,<sup>186</sup> for example, the defendant was a detective constable investigating a report of arson. In the course of questioning the plaintiff at a dance hall where there were other persons present, the defendant said: 'I put it to you, is you burn down the house. Is it you burn down the house?' The Jamaican Court of Appeal held that these words were qualifiedly privileged and, in the absence of malice, the defendant was not liable in defamation. Waddington JA emphasised that different considerations apply where a police officer makes a defamatory accusation in the presence of witnesses from those which apply where one private person accuses another in public, the implication being that the police officer's privilege is wider in such circumstances.<sup>187</sup>

Whether a legal, moral or social duty to communicate the defamatory matter exists in the particular case is a question of law, to be decided by the judge. If it is a legal duty which is relied upon (for example, the duty of a citizen to report the commission of a crime to the police), the judge's task will normally be straightforward; but where the defendant pleads a moral or social duty, it is more

183 *Toogood v Spyring* (1834) 149 ER 1044, per Parke B.

184 *Watt v Longsdon* [1930] 1 KB 130; *Hoyte v Liberator Press Ltd* (1973) High Court, Guyana, No 269 of 1972 (unreported) (below, pp 286, 287).

185 *Yaseen v Persaud* (1977) Court of Appeal, Guyana, Civ App No 20 of 1975 (unreported); *Suckoo v Mitchell* (1978) Court of Appeal, Jamaica, Civ App No 32 of 1978 (unreported)

186 (1967) 10 JLR 220.

187 *Ibid*, p 221.

difficult.<sup>188</sup> In deciding whether such a moral or social duty exists he must ask himself the question: 'would the great mass of right minded men in the position of the defendant have considered it their duty, under the circumstances, to make the communication?'<sup>189</sup> It is an objective and not a subjective test which is applied. Thus, if the judge decides that a reasonable, right minded person would not have recognised a duty to communicate the defamatory matter, it will be no defence for the defendant to plead that he believed honestly and in good faith that there was such a duty.

Whether a moral or social duty existed to communicate a defamatory statement may be particularly difficult to determine in family or domestic situations. It has been held that a father or near relative may warn young man as to the character of an associate,<sup>190</sup> and that a near relative or intimate friend of a woman may warn her about the character of the man whom she proposes to marry,<sup>191</sup> but it has been said that, 'as a general rule, it is not desirable for anyone, even a mother-in-law, to interfere in the affairs of man and wife'.<sup>192</sup> In the leading case of *Watt v Longsdon*,<sup>193</sup> was held that a report by the defendant, a company director, to the chairman of the company concerning the alleged immoral conduct of an employee was privileged, but that, in the circumstances, the defendant had no duty to communicate this information to the employee's wife, so that he was liable for the latter publication.

In *Mirchandani v Barbados Rediffusion Service Ltd*,<sup>194</sup> the question arose as to whether defamatory words contained in three calypsos broadcast over the radio during the Crop-Over festival in Barbados were protected by qualified privilege. The calypsos alleged that the plaintiffs had processed diseased chickens and offered them for sale to the public. It was held, on a preliminary point of pleading, that the calypsos were not privileged because the defendant had no legal, moral or social duty to communicate the defamatory words to the general public.

Williams CJ put the question thus:

Did the defendant, then, have a social or moral duty to communicate the words of the calypsos to the general public? Is it in the interests of the public that calypsos should be broadcast over the radio during Crop-Over, or at any other time, regardless of their word content? To what extent is any public advantage outweighed by the injustice which men and women in the public eye, and possible others, may suffer by having defamatory statements about them constantly repeated over the radio?

Calypso is unquestionably an established Caribbean musical art form and over the years calypsos have been written and sung about matters of current and topical interest. None of this can be denied, and it does not seem to me that an expert on calypso from Trinidad and Tobago can take the matter any further. Everything pleaded in the defence about the calypso can be accepted without challenge.

In my view, no privilege attached to the publication of the calypsos, and the defence of qualified privilege must fail and is struck out. If any special protection is to be

188 See *Augustus v Nicholas* (1994) High court, Dominica, No 262 of 1991 (unreported), per Adams J.

189 *Stuart v Bell* [1891] 2 QB 341, p 350, per Lindley LJ.

190 *Moffat v Coates* (1906) 44 Sc LR 20.

191 *Adams v Coleridge* (1884) 1 TLR 84.

192 *Watt v Longsdon* [1930] 1 KB 130, p 150, per Scrutton LJ.

193 *Ibid.*

194 (1992) 42 WIR 38.

given in respect of the publication of calypsos, it should be done by statute as part of a comprehensive review of the law and after due and appropriate consultation and balancing of the different interests.

Very similar allegations concerning the same plaintiffs were in issue before the Barbados Court of Appeal in *McDonald Farms Ltd v The Advocate Co Ltd*,<sup>195</sup> where a newspaper published a report alerting the public to certain allegations concerning food contamination at the plaintiffs' chicken farm, which, the report stated, were under investigation by the public health authorities. In an action for libel brought against it, the newspaper pleaded qualified privilege. The trial judge rejected the defence and the Court of Appeal upheld that decision. Williams CJ explained the court's approach to the issue:<sup>196</sup>

There is no doubt that the general law of qualified privilege is available to newspapers; see Stephenson LJ in *Blackshaw v Lord*.<sup>197</sup> The law was summarised by Cantley J in *London Artists Ltd v Littler*<sup>198</sup> after he had extracted passages from a number of earlier cases. The judge said:<sup>199</sup>

The cases to which I have referred show a uniformity of approach. In my view, the privilege for publication in the press of general public interest is confined to cases where the defendant has a legal, social or moral duty to communicate it to the general public, or does so in reasonable self defence to a public charge, or in the special circumstances exemplified in *Adam v Ward*.<sup>200</sup>

A duty will thus arise where it is in the interests of the public that the publication should be made, and will not arise simply because the information appears to be of legitimate public interest.

Cartwright J spoke to like effect in delivering the judgment of the Supreme Court of Canada in *Banks v Globe and Mail Ltd*.<sup>201</sup>

The decision of the trial judge in the case at bar quoted above appears to involve the proposition of law, which in my opinion is untenable, that given proof of the existence of the subject matter of wide public interest throughout Canada without proof of any other special circumstances, any newspaper in Canada (and *semble*, therefore, any individual) which sees fit to publish to the public at large statements of fact relevant to that subject matter, is to be held to be doing so on an occasion of qualified privilege...

There can be no dispute that the health of the Barbadian public and possible food contamination are matters of great public interest and concern; so that the public would have had an interest in being informed about the conditions and practices at the first plaintiff's chicken farm. But, as had been indicated earlier (*per* Stephenson LJ in *Blackshaw v Lord*):

...public interest and public benefit are...not enough without more. There must be a duty to publish to the public at large and an interest in the public at large to receive the publication, and a section of the public is not enough...

Public health and possible food contamination being of vital concern to the Barbadian public, the question is whether Mr Trotman's report to *The Advocate* about the

195 (1996) 52 WIR 64.

196 *Ibid*, pp 68–72.

197 [1983] 2 All ER 311, p 326.

198 [1968] 1 All ER 1075.

199 *Ibid*, p 1085.

200 [1917] AC 309.

201 [1961] SCR 474, p 484.

conditions and practices at the first plaintiff's chicken farm gave rise to a duty on the newspaper to inform the public.

The facts are clear. *The Advocate*, on Mr Trotman's instigation, visited the farm on Saturday 25 February 1989 and received a report from Mr Trotman. Six days later, on 3 March, the newspaper passed on information to the public in a report that stated that public health officials were investigating the report and had temporarily halted operations at the plant. It did not identify the plaintiffs nor the farm as the first plaintiff's. A week later, the newspaper returned to Mr Trotman's report, stating that there were allegations and denials, identifying the farm as the plaintiff's and giving a comprehensive report of what Mr Trotman had told it on 25 February.

Since *The Advocate* knew that Mr Trotman had also made a report to the public health officials and that those officials were investigating the report (this was disclosed in the 3 March article), it would seem that the law as stated by Stephenson LJ in *Blackshaw v Lord* applies: that, where damaging charges are made and are still under investigation, there can be no duty to report them to the public.<sup>[202]</sup>

The further question remains: were there special circumstances that warranted the publication of Mr Trotman's allegations against the plaintiffs, even though they were being investigated? Was the publication, in Parke B's words in *Toogood v Spyring*,<sup>[203]</sup> 'fairly warranted by any reasonable occasion or exigency', or, in the words of Stephenson LJ in *Blackshaw v Lord*, an extreme case:

... where the urgency of communicating a warning is so great or the source of the information so reliable, that publication of a suspicion or speculation is justified?

The report was made to *The Advocate* on 25 February. An edited version appeared in the newspaper six days later, which alerted the public to the danger and stated that the complaint was being investigated by public health officials. It did not identify the farm or the plaintiffs.

A week later, the newspaper returned to the story and identified the farm and the plaintiffs. It was not disclosed whether the health officials had concluded their investigations or made a report, or whether any attempt had been made to find out. It disclosed that there were allegations and denials, presumably meaning that Mr Trotman was alleging the existence of unhealthy practices and conditions and that the plaintiffs were denying that they existed. It also stated that the matter was being generally discussed and debated in public.

In the circumstances, it cannot in my opinion be said that the *Weekend Investigator's* story on 10 March was published in fulfilment of any duty to the public. The plaintiffs' being identified in a publication made almost two weeks after *The Advocate* received the report, and one week after its previous report to the public had alerted the public and disclosed that investigations were being carried out, the article cannot be said to be for alerting the public as a matter of urgency such as to warrant the publication of suspicion or speculation. Mr Trotman's dissatisfaction with the conduct of the public health officials might have been a ground for reporting them to a higher authority, or even for criticism of them in the newspaper, but it could not reasonably be regarded as any justification for releasing to the public the names of those against whom all the allegations in the report were being made.

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202 See also *Blackman v The Nation Publishing Co Ltd* (1997) High Court, Barbados, No 474 of 1990 (unreported); *Bonnick v Morris* (1998) Supreme Court, Jamaica, No B 142 of 1992 (unreported); *Nicholas v Augustus* (1996) Court of Appeal, OECS, Civ App No 3 of 1994 (unreported).

203 (1834) 149 ER 1044.

### Statements made to the proper authorities in order to obtain redress for public or private grievances

A private grievance in this context means a grievance suffered by the defendant as an individual and not by the public as a whole; whilst a public grievance is one which affects the general public and which any member of the public, whether he is personally affected or not, has an interest in bringing to the attention of the proper authorities.

As Gatley explains:<sup>204</sup>

Where a man believes that he has suffered a grievance at the hands of another, he is entitled to bring his grievance to the notice of the person or body whose power or duty it is to grant redress or to punish or reprimand the offender, or merely to enquire into the subject matter of the complaint, and any statement made is privileged, if made in good faith and not for the purpose of slandering the plaintiff.

An example of a communication protected under this head would be a letter from a member of the public to the Minister of Health complaining of malpractice in a hospital, or to the Education Authority alleging immoral conduct on the part of a school principal.

### Statements made in self-defence

A defamatory statement made in order to protect the defendant from an attack upon his reputation or property by the plaintiff is qualifiedly privileged. This is illustrated by *Osborn v Boulter*.<sup>205</sup> In that case, a publican had complained to the brewery, which supplied him with beer for sale to his customers, that the beer was of poor quality. The brewery replied that they had heard rumours to the effect that the poor quality of the beer was due to its being watered down by the publican, and they published this statement to a third party. It was held that this statement was qualifiedly privileged, since it was made in defence of the defendant's own property and reputation.

In defending himself, however, the defendant is not entitled to make unnecessary imputations on the private life of his attacker which are wholly unconnected with the attack and irrelevant to his vindication. 'The privilege extends only so far as to enable him to repel the charges brought against him, and not to bring fresh accusations against his adversary.'<sup>206</sup>

### Statements made between parties having a common interest

A statement made by A to B which is defamatory of C will be protected by qualified privilege if A and B had a common interest in the subject matter of the communication. The privilege may arise in a wide variety of cases. The common interest may be pecuniary, for example, where an insurance company writes to a policyholder warning him against dealing with a former agent of the company,<sup>207</sup> or professional, for example, where an auctioneer writes to other auctioneers in the district, informing

<sup>204</sup> *Op cit*, Gatley, fn 40, para 572.

<sup>205</sup> [1930] 2 KB 226. See *Adam v Ward* [1917] AC 309.

<sup>206</sup> *Dwyer v Esmonde* (1878) 2 Ir LR 243, p 254, per May CJ.

<sup>207</sup> *Nevill v Fine Art and General Insurance Co Ltd* [1897] AC 68.

them that a person has purchased goods at an auction and received them without paying.<sup>208</sup> Also protected under this head would be an advertisement by D Co in a newspaper to the effect that P is no longer employed by D Co, nor has authority to transact any business on behalf of D Co, and that all persons dealing with P do so at their own risk. In such a case, the company and members of the public are taken to have a common interest in the information given.

**Where a newspaper or radio or television company makes a fair and accurate report of proceedings in the legislature or in a court of law<sup>209</sup>**

The report must be 'fair and accurate'.<sup>210</sup> If, for example, the report alleges that certain statements were made that were not in fact made, the defence is not available.<sup>211</sup>

**Where a newspaper's statement is privileged under statutory provisions**

Various classes of statement published in a newspaper or in a radio broadcast are statutorily privileged, as listed in ss 13–18 of the Defamation Act (Guyana) and in the Schedule to the Defamation Act (Jamaica).

**Defamatory statements and political discussion in the media**

An important question which has recently been discussed in the highest courts in England,<sup>212</sup> Australia<sup>213</sup> and New Zealand,<sup>214</sup> and which has also been in issue in Grenada<sup>215</sup> and Jamaica,<sup>216</sup> is the extent to which citizens and the media are free to criticise politicians or other public figures without the fear of liability for libel if they get the facts wrong or cannot prove them to be true.<sup>217</sup> In this area, it is important for the courts to strike a balance between freedom of expression, on the one hand, and protection of public reputation on the other. The traditional common law principle is that an untrue and defamatory statement cannot properly be made to the world at large merely because it concerns a matter of public interest. Thus, in the defence of fair comment, as we have seen,<sup>218</sup> the defendant must prove the factual basis of the comment to be true; while in qualified privilege, although the defendant is not required to prove the truth of the defamatory statement, he is required, as we have seen,<sup>219</sup> to show that the publication was in fulfillment of a duty to inform the public. Thus, there is traditionally no privilege in favour of widespread political dialogue which engenders untrue statements, even though honestly made.

208 *Boston v Bagshaw* [1966] 1 WLR 1126.

209 It was held by Deane J in *Gransauil v De Gransauil* [1922] Trin LR 176 that the privilege does not extend to publication of a statement of claim which is filed in the Registry.

210 *The Gleaner Co Ltd v Wright* (1979) Court of Appeal, Jamaica, Civ App No 29 of 1975 (unreported).

211 See, eg, *Husbands v The Advocate Co Ltd* (1968) 12 WIR 454 (High Court, Barbados), where the defence under the Libel and Defamatory Words Act 1906, s 14 was under consideration.

212 *Reynolds v Times Newspapers Ltd* [1998] 3 WLR 862 (CA); [1999] 3 WLR 1010 (HL).

213 *Lange v Australian Broadcasting Corp* (1997) 189 CLR 520.

214 *Lange v Atkinson* [1998] 3 NZLR 424.

215 *Mitchell v Charles* (2002) High Court, Grenada, No 704 of 1998 (unreported).

216 *Bonnick v Morris* (2002) Privy Council Appeal No 30 of 2001 (unreported).

217 See, generally, Trindade, FA (2000) 16 LQR 185; Williams, K (2000) 63 MLR 748.

218 See above, pp 269–73.

219 See above, pp 277–79.

More recently, however, the High Court of Australia in *Lange v Australian Broadcasting Corp*,<sup>220</sup> the Court of Appeal of New Zealand in *Lange v Atkinson*,<sup>221</sup> and the Court of Appeal of England and Wales in *Reynolds v Times Newspapers Ltd*,<sup>222</sup> approved a new occasion of qualified privilege for communication in the course of political discussion, so that the discussion of political issues in a newspaper or on television or radio broadcasts would be protected by the new arm of qualified privilege even though it might contain defamatory and untrue statements, provided there was no evidence of malice. However, the three courts have expressed differing views as to the requirements for the defence. The High Court of Australia has held that the publisher must satisfy the court that its conduct in publishing the defamatory statement was 'reasonable', which would ordinarily require the defendant to show (i) that it took proper steps to verify any allegation; (ii) that it gave an opportunity to the plaintiff to respond to those allegations; and (iii) that those responsible for the allegations honestly believed them to be true. The New Zealand Court of Appeal, on the other hand, refused to incorporate the requirement of reasonableness on the part of the publisher, but preferred to give a sweeping 'generic' protection for statements published in the course of political discussion in the media.<sup>223</sup> Finally, the English Court of Appeal, in *Reynolds v Times Newspapers Ltd*,<sup>224</sup> held that allegations concerning how politicians and others discharge their public functions could attract qualified privilege where there was a duty to publish to the public and a corresponding interest in receiving it, but the court added a further requirement (which has become known as the 'circumstantial test') that the defendant must show that the 'nature, status and source of the material, and the circumstances of the publication' are such that it should 'in the public interest be protected, in the absence of proof of express malice'.<sup>225</sup> In the *Reynolds* case, in which defamatory allegations had been made against the Irish Prime Minister, the Court of Appeal held that the defendant could not rely on the defence since, *inter alia*, it had used an unreliable source of information, and had failed to give the plaintiff an opportunity to put his side of the story.

On appeal, the House of Lords in *Reynolds*<sup>226</sup> held that there was no automatic and separate privilege for political speech; nor was there a separate 'circumstantial test' in addition to the traditional requirement of reciprocal duty and interest; but widespread publication might be privileged in the public interest, depending on the nature of the material and all of the circumstances in which it was published. In short, the House of Lords denied that there was any blanket or 'generic' protection by way of qualified privilege for misstatements of fact in the course of disseminating 'political information', that is, 'information, opinions and arguments concerning government and political matters that affect the people of the United Kingdom'.<sup>227</sup> According to Lord Nicholls, in the absence of any additional safeguard for reputation,

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220 (1997) 189 CLR 520.

221 [1998] 3 NZLR 424.

222 [1998] 3 All ER 961 (CA).

223 [1998] 3 NZLR 424.

224 [1998] 3 All ER 961 (CA).

225 *Ibid*, p 995, *per* Lord Bingham CJ.

226 [1999] 4 All ER 609 (HL).

227 *Ibid*, p 630, *per* Lord Steyn.

acceptance of the blanket defence would mean that a newspaper which was anxious to be the first with a 'scoop' would 'be free to publish seriously defamatory misstatements of fact based on the slenderest of materials',<sup>228</sup> and it would be unsound in principle to distinguish political discussion from discussion of other matters of serious public concern. Lord Nicholls further suggested<sup>229</sup> a non-exhaustive list of matters which a court ought to take into account when deciding whether a defamatory statement, which misstates facts, was published in the public interest and on an occasion of qualified privilege. These matters included the nature of the information and the extent to which the subject matter was a matter of public concern; the seriousness of the allegation (because the more serious the charge, the more the public is misinformed and the plaintiff harmed, if the allegation is untrue); the source of the information; the steps taken to verify the information and the status of the informant; the urgency of the matter, because news is a 'perishable commodity'; whether comment was sought from the plaintiff; whether the article contained the gist of the plaintiff's side of the story; and the overall tone of the article.

More recently still, the English Court of Appeal in *Loutchansky v Times Newspapers Ltd (No 2)*<sup>230</sup> has emphasised that, in the light of *Reynolds*, when a court is deciding whether there had been a duty to publish defamatory words to the general public, the standard to be applied was that of 'responsible journalism'. The standard of responsible journalism should not be set too low, as that would encourage newspapers to publish untruths, which was not only against the interests of defamed persons but also contrary to the interests of the media themselves, in that the public would eventually cease to believe much of what they read in the newspapers. On the other hand, the standard should not be set too high, as this would deter newspapers from discharging their proper function of keeping the public informed.

The reasoning of the House of Lords in *Reynolds* has since been applied in the Grenadian case of *Mitchell v Charles*,<sup>231</sup> which concerned a defamatory statement made by a caller during a live radio talk show hosted by the Grenadian Broadcasting Network (GBN). The statement contained an allegation that the plaintiffs, who were members of the Government, had planned to murder one F, a former Minister who had recently resigned his position. Sylvester J held that, on the authority of the House of Lords ruling in *Reynolds*, there was no new category where privilege could be derived solely from the subject matter being 'political information', or from the fact that the defamatory words had been uttered during a 'political discussion'. He said:

Traditionally, English law has not drawn any distinction between politics and other forms of speech. Politicians, like ordinary people, are entitled to look to the courts to protect their reputations, and the fact that the public might be legitimately interested in their behaviour or conduct has not of itself been treated as sufficient to give rise to the defence of qualified privilege... It is recognized by all that the statements [in the instant case] were of very serious import in that [they alleged] a serious criminal offence (attempted murder and conspiracy) such as would destroy Mr Mitchell and his cabinet colleagues politically and professionally... The timing of the statement is not without significance. [The resignation of F] made the government a minority government, and it was obvious that the government must go back to the polls, either voluntarily or by a vote of no confidence.

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228 *Ibid*, p 623.

229 *Ibid*, p 626.

230 [2001] 4 All ER 115.

231 (2002) High Court, Grenada, No 704 of 1998 (unreported).

In the recent Jamaican case of *Bonnick v Morris*,<sup>232</sup> B brought an action for libel against the *Gleaner* newspaper, alleging that an article written by M, a journalist employed by the *Gleaner*, was defamatory of him. The crucial words in the article were: 'Mr Bonnick's services as managing director [of the Jamaica Commodity Trading Co (JCTC), a government-owned company] were terminated shortly after the terms of the second contract [with a Belgian company for the supply of milk powder] were agreed' and, later in the article, 'An authoritative source pointed out other departures from the norm in respect of these contracts'.

B alleged that the article bore the defamatory meaning, *inter alia*, that his services as managing director of JCTC had been terminated because of his impropriety in the formation, conclusion and implementation of very unusual contracts with the Belgian company. The trial judge, Langrin J, accepted this interpretation, holding that the offending words would be understood by the ordinary reader to mean that B had been dismissed as a result of the irregularities mentioned by the 'authoritative source'. The Jamaican Court of Appeal were divided on the issue as to whether the words were defamatory. On further appeal to the Privy Council, the Board agreed with the conclusion of Langrin J that the words, read in context, were defamatory.

However, the main issue in the case was whether the defendants were protected by qualified privilege, in the light of the decision of the House of Lords in *Reynolds*, which had been decided after Langrin J's ruling. Lord Nicholls, delivering the judgment of the Privy Council, pointed out, first of all, that s 22(1) of the Jamaican Constitution guaranteed freedom of expression subject to limitations set out in s 22(2), which included provisions 'reasonably required...for the purpose of protecting the reputations, rights and freedoms of other persons'. In the *Reynolds* case, the House of Lords had held that the law relating to qualified privilege as rationalised in that case was consistent with Art 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms; and although the wording of s 22 of the Jamaican Constitution was not identical, its effect in this context was the same. Accordingly, the instant case fell to be decided in the light of the *Reynolds* principle, which required that, in accordance with standards of responsible journalism, a newspaper should have some factual basis for the publication of a defamatory imputation.

Lord Nicholls took the view that, in applying the objective standard of responsible journalism, the court should take into account the fact that, in this case, the defamatory imputation was not express but implied. Although the Board had agreed with Langrin J that a reasonable reader would interpret the article in a defamatory sense, there was nevertheless 'room for different views on whether the article contained such an implication', and it would not be correct for the law simply to apply the objective standard of responsible journalism to the single meaning the law attributed to it when a journalist or editor might read the words in a different, non-defamatory sense. He continued:

Stated shortly, the *Reynolds* privilege is concerned to provide a proper degree of protection for responsible journalism when reporting matters of public concern. Responsible journalism is the point at which a fair balance is held between freedom of expression on matters of public concern and the reputations of individuals. Maintenance of this standard is in the public interest and in the interests of those whose reputations are involved. It can be regarded as the price journalists pay in

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232 (2002) Privy Council Appeal No 30 of 2001 (unreported).

return for the privilege. If they are to have the benefit of the privilege, journalists must exercise due professional skill and care.

To be meaningful, this standard of conduct must be applied in a practical and flexible manner. The court must have regard to practical realities. Their Lordships consider it would be to introduce unnecessary and undesirable legalism and rigidity if this objective standard, of responsible journalism, had to be applied in all cases exclusively by reference to the 'single meaning' of the words. Rather, a journalist should not be penalized for making a wrong decision on a question of meaning on which different people might reasonably take different views. Their Lordships note that in the present case the selfsame question has resulted in a division of view between members of the Court of Appeal. If the words are ambiguous to such an extent that they may readily convey a different meaning to an ordinary reasonable reader, a court may properly take this other meaning into account when considering whether *Reynolds* privilege is available as a defence. In doing so the court will attribute to this feature of the case whatever weight it considers appropriate in all the circumstances.

Applying this flexible test to the facts of the instant case, the Privy Council took into account the facts (i) that JCTC was a government-owned company whose import business affected the cost of living of the whole population and whose activities were therefore matters of considerable public concern; (ii) that the general tone of the article was restrained; (iii) that the defamatory imputation was not of grave import, as the public were well aware that from time to time senior managers were made scapegoats and, in Jamaica, the departure of senior executives from their companies was a common feature of commercial life; and (iv) that the defamatory meaning of the words used was not so glaringly obvious that any responsible journalist would be bound to realise this was how the words would be understood by ordinary, reasonable readers. The Privy Council accordingly concluded that 'although near the borderline', the article was a piece of responsible journalism and the defence of qualified privilege was available.<sup>233</sup>

### *Excess of privilege*

Privilege, whether qualified or absolute, is forfeited if it is exceeded, that is to say, if the defamatory words are published more extensively than the occasion requires. Thus, if the privilege is limited to publication to certain persons only, publication to a wider readership will not be protected. This is so whether the excess of privilege is intentional or negligent. For instance, a report which would be privileged if sent in confidence to the proper authority would be unprivileged if published in a newspaper; and a message which would be privileged if sent in a closed letter will lose the privilege if sent by telegram or fax, for then it would be published to the telegraph operator or to office employees respectively.

There are a number of examples in the Caribbean of cases in which excess of privilege was in issue. In *Briggs v Mapp*,<sup>234</sup> the appellant shopkeeper and the

233 Cf *Trinidad and Tobago National Petroleum Marketing Co Ltd v Trinidad Express Newspapers Ltd* (2002) High Court, Trinidad and Tobago, No S 862 of 1999 (unreported), where Rajnauth-Lee J held that there was no duty in the defendant newspaper to communicate to the general public the views of the Petroleum Dealers' Association as to the accounting procedures of the plaintiff, a state owned corporation; nor was there any corresponding interest in the public to receive such communication. Accordingly, an allegation that the plaintiff's account books had been 'cooked' was not protected by qualified privilege.

234 (1967) Court of Appeal, West Indies Associated States, Civ App No 2 of 1964 (St Kitts-Nevis-Anguilla) (unreported).

respondent clerk were friends. After the respondent had visited the appellant in the latter's shop one morning, the appellant asked the respondent whether she had picked up a wallet in the shop while they were together, and the respondent replied that she had not. The next morning, while the respondent was at work at another store, the appellant entered the store with a police constable and, in the presence of two other store clerks and a number of customers, pointed to the respondent and said in a loud voice to the constable, 'That is the woman who steal me wallet with me money'. The constable ordered the respondent to accompany him to the police station, where she was charged with larceny. The magistrate subsequently dismissed the charge.

It was held that the appellant was liable for slander. A report of an alleged theft to a police constable was privileged, but, in this case, by 'broadcasting' her accusation to third parties who had no legitimate interest in hearing it, the appellant had exceeded the privilege and, moreover, her conduct afforded evidence of malice.

Lewis CJ, delivering the judgment of the Court of Appeal of the West Indies Associated States, said:

In *White v Stone*,<sup>[235]</sup> McKinnon LJ was of the view that...if there were third persons present who had no interest in receiving [a defamatory] statement, then the occasion would not be privileged. The Court [of Appeal in England] held in that case that an accusation of stealing money, a felony, made in such circumstances that it was overheard on two different occasions by strangers, was not privileged, although it was made to the person who was being accused.

It will be seen, therefore, that, while the principle is clear and settled, the application of it to the facts of the present case is not very easy. In my view, so far as the policeman was concerned, the occasion was clearly privileged. In so far as the clerks were concerned, the occasion was also privileged, since the clerks at the store had an interest in receiving information as to the honesty, or otherwise, of their co-clerk. But in the particular circumstances of this case it would seem to me that in so far as the customers in the store were concerned, and the workman of whose presence the appellant herself speaks, with regard to them, the occasion could not have been privileged. The appellant went to the store knowing that customers were likely to be there, though her complaint was a personal one unrelated to the complainant's employment... In the present case, the appellant chose the place where she was going to make her accusation to the police constable, and went to the store knowing that customers were likely to be there.

In *Hoyte v Liberator Press Ltd*,<sup>236</sup> the plaintiff, a barrister, Member of Parliament and Minister of Finance in the governing PNC Party, brought an action for libel against the defendants in respect of an article published in the defendants' newspaper, *The Liberator*, which read as follows:

The Minister of Finance recently accused persons associated with *The Liberator* of robbing the Inland Revenue. Mr Hoyte did not have the courage to name the individuals. No doubt the law of libel was uppermost in his mind.

Now, as everyone knows, while Mr Hoyte practised at the Bar he enjoyed a lucrative practice. Since example is manifestly better than precept, will the Minister be good enough to disclose for public consumption his income tax returns for the last five years of his practice?

235 [1939] 2 KB 827.

236 (1973) High Court, Guyana, No 269 of 1972 (unreported).

George J held that:

- (a) the words were defamatory, as they would have conveyed to reasonable men that the plaintiff had knowingly made false statements against persons associated with *The Liberator* newspaper, and that he had, during the last five years of his practice as a barrister, been defrauding the Revenue by not submitting his tax returns or by submitting false returns;
- (b) the defence of qualified privilege was not available. There was no legal, moral or social duty to communicate to the public information concerning the plaintiff's income tax affairs, though there might have been such a duty to communicate the information to the Inland Revenue Commissioner. Nor was the allegation against the plaintiff made in reasonable self-defence of the defendants' interests, as the allegation of defrauding the Revenue went far beyond what was necessary by way of defence.

And in another Guyanese case, *Hardai v Warrick*,<sup>237</sup> the plaintiff, a married woman, was a sugar estate worker and the defendant the administrative manager of the estate on which the plaintiff and one Y lived and worked. Following information received to the effect that Y was cohabiting with the plaintiff, the defendant wrote a letter to Y, warning him to desist from such conduct. The letter contained the following words: 'It has been alleged that you are living with Finey, wife of Ramnarine [the plaintiff]; this woman admits this.' The plaintiff contended that these words were defamatory of her, in that reasonable persons would understand them to mean that she was a woman of loose and immoral character.

Bollers J held that the words were defamatory of the plaintiff but the letter was qualifiedly privileged, as the defendant, as estate manager, had a social or moral duty to communicate the defamatory matter to Y, a worker on the estate, who had a corresponding interest in receiving it, and there was no evidence of malice on the defendant's part.

### *Dictation to secretaries*

It is well established that the dictation of defamatory matter to a secretary or typist in the normal course of business is protected by the defence of qualified privilege where the occasion itself is a privileged one, for example, where a damaging reference about a former employee is dictated to a secretary before transmission to the employer requesting the reference.

An example of such a privileged occasion is afforded by *Bacchus v Bacchus*,<sup>238</sup> where Massiah J said (*obiter*):

In respect of qualified privilege, I wish to adopt the definition of 'a privileged occasion' given by Lord Atkinson in *Adam v Ward*.<sup>[239]</sup> He defined it as follows:

A privileged occasion is, in reference to qualified privilege, an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

237 [1956] LRBG 213 (Supreme Court, British Guiana).

238 [1973] LRG 115. For the facts, see above, pp 240.

239 [1917] AC 309, p 334.

In this matter, the defendant said that he considered the plaintiff's behaviour in the office to have been disgraceful. He said that, as the most senior member of the personnel department, it was his duty to make recommendations as to discipline to the Personnel Manager and that his interest in writing the report (Exhibit 'A') was to maintain a good standard of conduct and discipline in the office. During cross-examination, the defendant said that the Personnel Manager asked him to give his opinion as to what happened in the office. He also said that in the absence of the Personnel Manager he is the most senior member of the staff and, as such, it is his duty to report indiscipline that occurs in the Personnel Manager's absence.

I accepted and believed all of that evidence because it appeals to me as being sensible. It could not be that in the absence of the Personnel Manager things would be allowed to go awry and all discipline thrown overboard; and who could be better suited to preserve discipline in such a case than the next most senior member of the staff? In the performance of that function there must have been a duty cast on the defendant to make a report to the Personnel Manager, Mr Narine, of any breaches of discipline that occurred in his absence, and there must have been a corresponding duty and interest on the part of Narine to receive it. Exhibit 'A' was written only after the defendant had made an oral report to Narine and discussed the matter with him.

It is my view, therefore, that the occasion on which the report was communicated was privileged and that the matter complained of has reference to that occasion. Since the defendant's good faith has not been called in question, for there has been no evidence of express malice, the plea of qualified privilege accordingly succeeds.

Counsel for the plaintiff argued that, although it is doubtful whether the publication to Narine was made on a privileged occasion, it certainly could not be said that the publication to Savitri Prashad was privileged. The evidence is that Savitri Prashad typed the report (Exhibit 'A') which contains the offending words. It appears that she typed it from a manuscript copy which the defendant gave her, and that the defendant then submitted Exhibit 'A' to Narine.

The approach to this aspect of the case by counsel for the plaintiff was wrong. Once the communication is considered to have been made on a privileged occasion, then a publication of that communication to a typist is also sheltered by the privilege once the communication to the typist is reasonably necessary and in the ordinary course of business—see *Boxsius v Goblet Freres*<sup>[240]</sup> and *Osborn v Boulter*.<sup>[241]</sup>

In *Boxsius'* case, a solicitor, acting on behalf of his client, wrote and sent to the plaintiff a letter containing defamatory statements regarding her. The letter was dictated to a clerk in the office, and was copied into the letter-book by another clerk. It was held that the publication to the clerks was privileged, since the communication, if made direct to the plaintiff, would have been privileged...

In any case, the decision in *Boxsius'* case is commonsensical and consistent with justice, for no businessman can be expected to write all his letters himself without the aid of a typist; and how can he keep proper records unless his typist makes copies of his documents and keeps at least one copy on file? That is the reason why in *Edmondson v Birch*, Cozens-Hardy LJ said:<sup>[242]</sup>

I think that, if we were to accede to the argument for the plaintiff, we should in effect be destroying the defence of privilege in cases of this kind, in which limited companies and large mercantile firms are concerned; for it would be idle in such cases

240 [1894] 1 QB 842.

241 [1930] 2 KB 266. See also *Bryanston Finance Ltd v De Vries* [1975] QB 703.

242 [1907] 1 KB 371, pp 381, 382.

to suppose that such documents as those here complained of could, as a matter of business, be written by, and pass through the hands of, one partner or person only.

In that case, it was held that, since a letter and telegram were sent on a privileged occasion, their incidental publication to the sender's clerks was protected—the publication to them was considered to have been reasonable and in the ordinary course of business. I agree with and would follow this statement made in *Clerk and Lindsell on Torts*, 12th edn, p 825, where this subject is discussed:

The principle seems to be that, if the occasion is privileged, a publication by the person exercising the privilege to third persons is protected if it is reasonable and in the ordinary course of business... It is on this ground that publication to clerks, typists or copyists is protected. The mere fact that such third persons have no legitimate interest in the subject matter will not destroy the privilege.

The same approach is taken in *Gatley on Libel and Slander*, 5th edn, pp 251–53.

What has to be stressed, I think, is that the position would be completely different if the plaintiff, sheltering under the protective umbrella of privilege, were to publish the defamatory statement to whomsoever he wished. This is impermissible, for privilege is not a licence for irresponsible and indiscriminate publication, and, to be protected, publication to the third person must be reasonable and in the ordinary course of business.

To sum up this aspect of the case, I would say that, since the report, Exhibit 'A', was published to Narine on a privileged occasion, the incidental publication, in the ordinary course of business, to Savitri Prasad, who typed Exhibit 'A', was also made on a privileged occasion.

### *Malice*

Malice on the defendant's part destroys the defences of fair comment and qualified privilege. 'Actual malice' does not necessarily mean personal spite or ill-will, and it may exist even though there is no spite or desire for vengeance in the ordinary sense. Malice here means any indirect motive other than a sense of duty to publish the material complained of and, in essence, it amounts to making use of the occasion for some improper purpose. The onus of proving malice rests on the plaintiff.<sup>243</sup> Evidence of malice may be either *intrinsic* (that is, found in the words themselves) or *extrinsic* (that is, found in external circumstances unconnected with the publication itself). There may be intrinsic evidence of malice where the language used by the defendant is violent, insulting or utterly disproportionate to the facts.<sup>244</sup> However, it has been said that, when considering whether the actual expressions used can be treated as evidence of malice, 'the law does not weigh words in a hair balance'<sup>245</sup> and if, in the circumstances, the defendant might honestly and reasonably have believed that his words were true and necessary for his purpose, he will not lose the protection of privilege because he expressed himself in excessively strong or exaggerated language.

243 *Clark v Molyneux* (1877) 3 QBD 237; *Gransauil v De Gransauil* [1922] Trin LR 176 (High Court, Trinidad and Tobago); *Hardai v Warrick* [1956] LRBG 213 (Supreme Court, British Guiana) (above, p 287).

244 As where the plaintiff, an attorney-at-law and chairman of a committee set up to investigate alleged malpractices in a public company, was accused, in a letter addressed to the general manager of the company, of holding a 'kangaroo court' and 'witch-hunting': *Richardson v Tull* [1976] Trin LR 8 (High Court, Trinidad and Tobago).

245 *Op cit*, Winfield and Jolowicz, fn 19, p 436.

Extrinsic evidence of malice may be found, for instance, where there is proof that the defendant knew at the time he published the statement that it was false,<sup>246</sup> or that he was indifferent to its truth or falsity. On the other hand, mere carelessness as to the truth of the statement is not in itself evidence of malice, 'for what the law requires is not that the privilege should be used carefully, but that it should be used honestly'.<sup>247</sup> Also, proof of bad relations between plaintiff and defendant before the making of the statement, or hostile conduct on the part of the defendant towards the plaintiff at any time up to and including the trial itself, may be extrinsic evidence of malice.

A wider publication of the defamatory matter than was necessary may also be evidence of malice, as well as an excess of privilege.<sup>248</sup>

In the Jamaican case of *Atkinson v Howell*,<sup>249</sup> where the defendant had made a report to the police to the effect that the plaintiff had stolen his property, White JA considered the question of malice:

There is no gainsaying that the law is that a complaint to a police officer in the performance of his duties is privileged. It was conceded in argument that if the defendant/respondent honestly believed that he was making a factual report, he could not be condemned in damages for the defamatory statement. 'If the defendant honestly believed his statement to be true, he is not to be held malicious merely because such belief was not based on reasonable grounds, or because he was hasty, credulous or foolish in jumping to a conclusion, or was irrational, indiscreet, stupid or pigheaded or obstinate in his belief.'

This statement of the law in *Gatley*, 8th edn, para 774, finds further exposition in the language of Lord Diplock when he delivered the judgment of the House of Lords in *Horrocks v Lowe*.<sup>[250]</sup> That case was about defamatory words used by one local authority councillor of another, which words the trial judge found to have been spoken in honest belief of their truth, but with gross and unreasoning prejudice. The question was whether such a finding constituted malice. Lord Diplock discussed the meaning of 'honest belief'. He opined:<sup>[251]</sup>

... what is required on the part of the defamer to entitle him to the protection of the privilege is positive belief in the truth of what he published or, as it is generally though tautologously termed, 'honest belief'. If he publishes untrue defamatory matter recklessly, without considering or caring whether it be true or not, he is in this, as in other branches of the law, treated as if he knew it to be false. But indifference to the truth of what he publishes is not to be equated with carelessness, impulsiveness or irrationality in arriving at a positive belief that it is true. The freedom of speech protected by the law of qualified privilege may be availed of by all sorts and conditions of men. In affording to them immunity from suit if they have acted in good faith in compliance with a legal or moral duty or in protection of a legitimate interest, the law must take them

246 See *Carasco v Venac* (1995) Court of Appeal, OECS, Civ App No 6 of 1994 (unreported).

247 *Op cit*, Carter-Ruck, fn 170, p 135. It was held in *The Gleaner Co Ltd v Munroe* (1990) Court of Appeal, Jamaica, Civ App No 67 of 1988 (unreported), following *dicta* of Rowe JA in *The Gleaner Co Ltd v Sibbles* (1981) Court of Appeal, Jamaica, Nos 32A and 32B of 1979 (unreported), that where a newspaper editor publishes defamatory material after checking its accuracy with a senior police officer, there can be no finding of malice on the part of the newspaper.

248 See *Briggs v Mapp* (1967) Court of Appeal, West Indies Associated States, Civ App No 2 of 1964 (unreported) (above, pp 285–86).

249 (1985) Court of Appeal, Jamaica, Civ App No 38 of 1979 (unreported).

250 [1972] AC 135.

251 *Ibid*, p 150.

as it finds them. In ordinary life it is rare indeed for people to form their beliefs by a process of logical deduction from facts ascertained by a rigorous search for all available evidence and a judicious assessment of its probative value.

In greater or in less degree according to their temperaments, their training, their intelligence, they are swayed by prejudice, rely on intuition instead of reasoning, leap to conclusions on inadequate evidence, and fail to recognise the cogency of material which might cast doubt on the validity of the conclusions they reach. But despite the imperfection of the mental process by which the belief is arrived at, it may still be 'honest', that is, a positive belief that the conclusions they have reached are true. The law demands no more.

What the respondent was seeking in the circumstances of the present case was to cause an enquiry to be made, and the fact that he did not make enquiries before going to the police cannot by itself be regarded as evidence of malice: *Beech v Freeson*.<sup>[252]</sup> What the appellant had to show at the trial was that the respondent not only spoke maliciously, but did not make a *bona fide* use of the occasion.

### *Publication by several persons*

Where a defamatory statement is published jointly by several persons on a privileged occasion, or where several persons, such as the author, printer and publisher of a newspaper, take part in its dissemination, only those against whom express malice is actually proved will be liable in defamation. This was decided in the case of *Egger v Chelmsford*,<sup>253</sup> which overruled earlier authority to the contrary. Thus, whereas the malice of an agent may make his innocent principal liable on ordinary principles of vicarious liability, the malice of the principal cannot make the innocent agent liable. The agent would be liable only if express malice were proved against him personally.

## ASSESSMENT OF DAMAGES IN DEFAMATION ACTIONS

The essential aim of an award of damages in a defamation action is to compensate the plaintiff for the injury to his reputation. This would include:

...the natural injury to his feelings, the natural grief and distress which he may have felt at having been spoken of in defamatory terms, and, if there has been any kind of high-handed, oppressive, insulting or contumelious behaviour by the defendant which increases the mental pain and suffering caused by the defamation and may constitute injury to the plaintiff's pride and self confidence, these are proper elements to be taken into account.<sup>[254]</sup>

As we have seen,<sup>255</sup> in all cases of libel and in those cases of slander which are actionable *per se*, the law presumes that the plaintiff's reputation will have suffered some damage, and for this the court will award general damages;<sup>256</sup> and if the plaintiff can prove that he has incurred actual pecuniary loss as a result of the libel or slander,

252 [1972] 1 QB 14; *Suckoo v Mitchell* (1978) Court of Appeal, Jamaica, Civ App No 32 of 1978 (unreported).

253 [1965] 1 QB 248.

254 *McCarey v Associated Newspapers Ltd (No 2)* [1965] 2 KB 86, p 104, *per* Pearson LJ; *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported).

255 See above, p 228.

256 *Gonsalves v The Argosy* [1953] LRBG 61 (Supreme Court, British Guiana), p 67, *per* Bell CJ.

he will be awarded a further sum by way of special damages. Whereas special damages, being based upon proof of actual pecuniary loss, can be quantified with some accuracy, general damages are 'at large', that is, the judge is free to make his own estimate of the damage, taking all the circumstances into account. In the words of Lord Atkin:<sup>257</sup>

It is precisely because the 'real' damage cannot be ascertained and established that the damages are at large. It is impossible to track the scandal, to know what quarters the poison may reach. It is impossible to weigh at all closely the compensation which will recompense a man or woman for the insult offered or the pain of a false accusation.

Nevertheless, some attempt must be made to come to an appropriate figure and, in doing so, the judge may take into account 'the nature of the libel, the circumstances and the extent of its publication'<sup>258</sup> and the whole conduct of the defendant,<sup>259</sup> from the time when the defamatory matter was published to the time of the judgment.

Examples of matters which the judge may take into account are:

- (a) the extent of the publication, including the extent of the circulation of a newspaper<sup>260</sup> or book in which the libel was published;
- (b) the social or professional status of the plaintiff;<sup>261</sup>
- (c) the conduct and demeanour of the defendant before and during the trial;<sup>262</sup>
- (d) whether the defendant persisted in a plea of justification which eventually failed;<sup>263</sup>
- (e) whether the libel was published deliberately and wilfully, or merely by mistake or carelessness;<sup>264</sup>
- (f) whether the defendant made any apology to the plaintiff;<sup>265</sup>
- (g) whether there was express malice on the defendant's part.<sup>266</sup>

Where the damages are increased because of the defendant's malice, persistence in an ill founded plea of justification, failure to make an apology, insolent or arrogant demeanour, or other unacceptable conduct, they are said to be 'aggravated'. The

<sup>257</sup> *Levy v Hamilton* (1921) 153 LT 384, p 386.

<sup>258</sup> In *Blackman v The Nation Publishing Co Ltd* (1997) High Court, Barbados, No 474 of 1990 (unreported), Payne J pointed out that a scandalous story in a newspaper concerning school teachers who had allegedly made pornographic videos featuring young female pupils, 'having regard to the community in which we live... would have a propensity to percolate, thus enlarging the number of persons to whom the libel was published'. The defendant newspaper was liable for repetition where this was the natural and probable result of the publication.

<sup>259</sup> *Praed v Graham* (1889) 24 QBD 53, p 55, per Lord Esher MR.

<sup>260</sup> *Bonnick v Morris* (1998) Supreme Court, Jamaica, No B 142 of 1992 (unreported); *Gonsalves v The Argosy* [1953] LRBG 61 (Supreme Court, British Guiana), p 67.

<sup>261</sup> *Bonnick v Morris* (1998) Supreme Court, Jamaica, No B 142 of 1992 (unreported); *Singh v The Evening Post* (1976) High Court, Guyana, No 2754 of 1973 (unreported); *Husbands v The Advocate Co Ltd* (1968) 12 WIR 454 (High Court, Barbados).

<sup>262</sup> *Persaud v Kunar* (1978) High Court, Guyana, No 435 of 1975 (unreported); *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported); *Collymore v The Argosy* [1956] LRBG 183.

<sup>263</sup> *Forde v Shah* (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported). See also *Smart v Trinidad Mirror Newspaper Ltd* (1968) High Court, Trinidad and Tobago, No 875 of 1965 (unreported).

<sup>264</sup> McGregor, *Damages*, 15th edn, 1988, London: Sweet & Maxwell, para 1674.

<sup>265</sup> *Collymore v The Argosy* [1956] LRBG 183; *Singh v The Evening Post* (1976) High Court, Guyana, No 2754 of 1973 (unreported).

<sup>266</sup> *Singh v The Evening Post* (1976) High Court, Guyana, No 2754 of 1973 (unreported).

court has no power to make a further award of *exemplary* (or punitive) damages in such cases, unless it is proved that the case comes within the second category of exemplary damages laid down by Lord Devlin in *Rookes v Barnard*, that is, where the defendant had contemplated that the profit he would make by the publication would exceed the damages he might have to pay.<sup>267</sup> Exemplary damages were awarded on this basis by Hamel-Smith J in the Trinidadian case of *Forde v Shah and T & T Newspaper Publishing Group*,<sup>268</sup> where, as we have seen, the defendants had published in their newspaper a false and defamatory report of the alleged death of a popular singer from AIDS; though the learned judge took the view that he was 'not confined to considering simply whether the defendants calculated that, by publishing the libel, they ran a better chance of making a profit in excess of what they may have to pay in compensation', but that he was 'permitted to look at the issue from the broad perspective that "tort cannot pay"'.<sup>269</sup>

Damages may be *mitigated* (that is, decreased), on the other hand, on proof of matters such as:

- (a) the plaintiff's general bad reputation;
- (b) whether the plaintiff had already recovered damages or brought actions for the same or similar libels; and
- (c) whether an apology had already been published or offered by the defendant.<sup>269</sup>

As regards apology, in addition to the court's general jurisdiction to take this factor into account, s 9 of the Defamation Act, Cap 6:03 (Guyana), s 2 of the Libel and Slander Act (Jamaica), s 3 of the Libel and Defamation Act, Cap 131 (Belize) and s 4 of the Libel and Defamation Act, Ch 11:16 (Trinidad and Tobago) provide that the defendant in a defamation action may give evidence, in mitigation of damages, that he made or offered an apology to the plaintiff for the defamation before the commencement of the action or, where the action had commenced before there was an opportunity of making or offering the apology, as soon afterwards as he had an opportunity to do so.

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267 [1964] AC 1129, p 1226.

268 (1990) High Court, Trinidad and Tobago, No 4709 of 1988 (unreported).

269 *Op cit*, Carter-Ruck, fn 170, p 158.



## CHAPTER 11

### PASSING OFF

#### DEFINITION

The essence of passing off is the selling of goods or the carrying on of a business in such a manner as to mislead the public into believing that the defendant's product or business is that of the plaintiff, and 'the law on this matter is designed to protect traders against that form of unfair competition which consists in acquiring for oneself, by means of false or misleading devices, the benefit of the reputation already achieved by rival traders'.<sup>1</sup>

In *Warnink v Townend and Sons Ltd*,<sup>2</sup> Lord Diplock identified five essential ingredients of the tort:

- (a) a misrepresentation;
- (b) made by a trader in the course of trade;
- (c) to prospective customers of his or ultimate consumers of goods or services supplied by him;
- (d) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and
- (e) which causes actual damage to a business or goodwill of the trader by whom the action is brought, or (in a *quia timet* action) will probably do so.

These five elements must be proved to exist in any passing off action.<sup>3</sup>

Where passing off is proved, the successful plaintiff will be entitled to an injunction restraining the defendant from continuing the wrong, to damages for any loss he has incurred thereby, and to an account of profits made by the defendant in consequence of the tort.

Passing off takes various forms, the most common of which are the following.

#### Marketing a product as that of the plaintiff

It is actionable passing off for the defendant to sell merchandise with a direct statement that the goods are manufactured by the plaintiff when, in fact, they are not. Thus, for example, it would be passing off for D, a manufacturer of tyres, to advertise and sell his tyres as 'Goodyear' or 'Michelin' tyres, since this would be an obvious attempt to profit from the goodwill and reputation established by rival businesses. Similarly, it has been held actionable for a book publisher to advertise

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1 Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 382.

2 [1979] AC 731, p 742.

3 In *Ciba-Geigy Canada Ltd v Apotex Inc* [1992] 3 SCR 120 (SCC), the Supreme Court of Canada concluded that 'the three necessary components of a passing off action are...the existence of goodwill, deception of the public due to a misrepresentation, and actual or potential damage to the plaintiff.'

and sell a book of poetry with the name of Lord Byron on the title page when, in fact, that famous poet had nothing to do with its authorship.<sup>4</sup>

### Imitating the 'get-up' or appearance of the plaintiff's goods

This is a common species of conduct actionable in passing off. The leading case is *White Hudson and Co Ltd v Asian Organisation Ltd*,<sup>5</sup> where the plaintiff company manufactured 'Hacks' cough sweets in Singapore, which were sold in red cellophane wrappers and were known amongst the buying public as 'red paper cough sweets'. The defendant began to sell cough sweets in Singapore called 'Peckos', which were also covered in red paper wrappers. The plaintiff proved that most of the buyers of its sweets in Singapore could not read English and simply asked for 'red paper cough sweets'.

It was held that the court would protect the plaintiff's interest in the appearance of its product, and that the plaintiff would be granted an injunction to restrain the defendant from passing off its sweets as if they were those of the plaintiff.

The much earlier Guyanese case of *Mazawattee Tea Co Ltd v Psaila Ltd*<sup>6</sup> illustrates the same principle. In this case, the plaintiffs had, for more than 30 years, sold in British Guiana (as it then was) a brand of tea called 'Mazawattee'. The tea was sold in wrappers having a dark blue label with a narrow white and blue border, and on the label were printed the words 'Mazawattee Tea for the Millions'. The defendants began marketing a tea called 'Mazarani', which also had a dark label and a narrow white and blue border on its wrapper. On the label appeared the words 'Mazarani Tea', with a diamond shape placed between the two words. Berkeley J held that the get-up of the defendants' product was:

so similar to that adopted by the plaintiffs that it is calculated to deceive illiterate persons and more especially those of the Indian race, who are unable to read or understand English. They might very well take the defendants' tea in the belief that they were purchasing that of the plaintiffs. The defendants themselves have not given evidence and no explanation has been given why they adopted labels so similar in appearance to those of the plaintiffs.

Accordingly, an injunction was granted to restrain the passing off.

It is not passing off to imitate the appearance or shape of the plaintiff's product where such appearance or shape is necessary for the better performance of the type of product, or for greater efficiency in handling or processing it; for example, where the defendant manufactured shaving sticks, he could not be prevented from marketing a standard type of container already used by the plaintiff, since the shape of the container was dictated by purely functional considerations.<sup>7</sup> But where the appearance or shape of the plaintiff's product is 'capricious', the defendant may be liable in passing off if he imitates it.

Two other interesting examples of passing off by imitation of 'get-up' or appearance in the Commonwealth Caribbean are *Fruit of the Loom Inc v Chong Kong Man* and *Ricks and Sari Industries Ltd v Gooding*.

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4 *Byron v Johnston* (1816) 35 ER 851.

5 [1964] 1 WLR 1466.

6 [1925] LRBG 56.

7 *Williams v Bronnley* (1909) 26 RPC 765.

**Fruit of the Loom Inc v Chong Kong Man (1972) 20 WIR 445,  
High Court, Trinidad and Tobago**

The plaintiffs were manufacturers and dealers in clothing, sheets and pillowcases. The plaintiffs had registered a trade mark in Trinidad and Tobago under the Trade Marks Ordinance 1955 in respect of such goods. Since 1961, the plaintiffs' goods had been packaged and sold in plastic bags bearing a distinctive label in substantially the form of the trade mark. It comprised an ellipse, broken at the top by a bunch of mixed fruit, with the words 'Fruit of the Loom' and 'unconditionally guaranteed' printed below. From about 1967, the defendants, who were manufacturers and dealers in goods similar to the plaintiffs', began marketing their goods in plastic bags bearing a label strikingly similar to that of the plaintiffs. The defendants' label also comprised an ellipse, broken at the top by a bunch of mixed fruit and the words 'Tropical Fruit' printed in a similar type of print and in a similar position to the plaintiffs' 'Fruit of the Loom', and the words 'guaranteed to fit' were printed below.

*Held, inter alia*, the 'get-up' of the defendants' packaging was so similar to that of the plaintiffs as to be likely to cause confusion in the minds of the buying public, and the plaintiffs were entitled to an injunction to restrain passing off. McMillan J said:

As regards the claim for passing off, the plaintiffs must prove that the defendants' conduct in using the mark or similar mark or 'get-up' is likely to deceive or cause confusion and/or damage to the plaintiffs' trade by passing off other goods as theirs or by leading their customers to suppose that there is a connection between the defendants' goods and the plaintiffs' business which does not in fact exist. As stated by Lord Parker in *Spalding v AW Gamage Ltd*:<sup>[8]</sup>

The basis of a passing off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words but cases of express misrepresentation are rare. The more common case is implied in the use or imitation of a mark, trade name, or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases, the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name or get-up in question impliedly represents such goods to be goods of the plaintiff or goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark or get-up is calculated to deceive.

Thus the plaintiffs must prove their mark or get-up has become by user distinctive of their goods and none other, so that the use in relation to any goods similar to those dealt in by the plaintiffs of that mark or get-up will be understood by the trade and public in this country as meaning that the goods are the plaintiffs'. It is admitted on the pleadings that the label has become distinctive of the plaintiffs' goods and none other, so that again the issue left is whether the defendants' mark or get-up is likely to deceive or cause confusion. I have no evidence of actual confusion or of anyone being deceived, counsel for the plaintiffs being content to rely on what he asserts is the similarity in appearance of the two labels and the likelihood therefore of the public being deceived. Counsel for the defendants, however, submitted that, in the absence of such evidence, proof of a fraudulent intention to deceive is necessary. He referred to no authorities. The authorities which I have been able to discover are to the contrary and their effect is summarised in *Kerly on Trade Marks*, thus:<sup>[9]</sup>

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8 (1915) 84 LJ Ch 449, p 450.

9 Kerly, *Kerly's Laws of Trade Marks and Trade Names*, 8th edn, London: Sweet & Maxwell, p 334.

Passing off cases are often cases of deliberate and intentional misrepresentation, but it is well settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is no defence.

Indeed, proof that someone has actually been deceived by the defendants' get-up is not necessary and an injunction will be granted if the 'similarity is so great that any person acquainted with the one might readily consider the other to be only a temporary or occasional variation of it...'.<sup>[10]</sup> In that case, there was evidence by one witness experienced in the particular trade that the defendant's mark or get-up might have deceived him. I have no such evidence here. However, it seems to me that that question is one purely of fact to be decided on a comparison by this court of all the similarities and dissimilarities of the two marks or labels, and such other inferences as may be drawn from the evidence including the absence of evidence of actual confusion, and on that comparison I have come to the conclusion that the defendants' label is a colourable imitation of the plaintiffs' labels...

Counsel for the defendants sought to distinguish the defendants' mark, for example, by the use of tropical fruit and the words 'Tropical Fruit', and the differences in colour and sizes in the labels. I have no doubt that on very close examination these differences may well be apparent, but I am equally satisfied that to the average purchaser who buys over the counter the defendants' mark or get-up will be mistaken for the plaintiffs'. The arrangement is so similar that the colour tones and differences in the nature of the fruit become insignificant and the whole representation is, as I have already said, a colourable imitation of the plaintiffs' get-up or package in which they sell their goods.

### **Ricks and Sari Industries Ltd v Gooding (1986) High Court, Barbados, No 1090 of 1986 (unreported)**

The plaintiffs were manufacturers and distributors of condiments and spices. For 10 years, they had marketed and distributed curry powder in Barbados under the trade name 'Sari'. In 1986, the defendant, who had previously been employed by the plaintiffs as their agent in Barbados, began to market his own brand of curry powder under the name 'Sare Madras'. The plaintiffs brought an action for passing off based on the similarity between the names 'Sari' and 'Sare' and between the packaging of the two products.

*Held*, it was immaterial whether or not the defendant intended to pass off his goods as those of the plaintiffs. Since shoppers who had been accustomed to buying 'Sari' curry powder were likely to be misled into believing the defendant's product was the same as the plaintiffs', an injunction restraining the defendant from using the name 'Sare' would be granted. Williams CJ stated:

In *Warnink v Townend and Sons Ltd*,<sup>[11]</sup> Lord Diplock identified five characteristics which must be present in order to create a valid cause of action for passing off:

(1) a misrepresentation; (2) made by a trader in the course of trade; (3) to prospective customers of his or ultimate consumers of goods or services supplied by him; (4) which is calculated to injure the business or goodwill of another trader (in the sense that this is a reasonably foreseeable consequence); and (5) which causes actual damage to a business or goodwill of the trader by whom the action is brought or (in a *quia timet* action) will probably do so.

10 *Jay v Ladler* (1888) 40 Ch D 649, p 653, *per* Kekewich J.

11 [1979] AC 731, p 742.

The misrepresentation may be express or implied. As stated by Lord Parker in *Spalding v AW Gamage Ltd*:<sup>[12]</sup>

The basis of a passing off action being a false representation by the defendant, it must be proved in each case as a fact that the false representation was made. It may, of course, have been made in express words but cases of express misrepresentation of this sort are rare. The more common case is where the representation is implied in the use or imitation of a mark, trade name or get-up with which the goods of another are associated in the minds of the public, or of a particular class of the public. In such cases, the point to be decided is whether, having regard to all the circumstances of the case, the use by the defendant in connection with the goods of the mark, name or get-up in question impliedly represents such goods to be the goods of the plaintiff, or the goods of the plaintiff of a particular class or quality, or, as it is sometimes put, whether the defendant's use of such mark, name or get-up is calculated to deceive. It would, however, be impossible to enumerate or classify all the possible ways in which a man may make the false representation relied on.

The question, then, is whether the defendant's use of his get-up with the mark 'Sare' in relation to the curry powder which he has put on the market represents such curry powder to be that produced and marketed by the plaintiff under its get-up with the mark 'Sari'. It is for the court to decide this question by seeking to determine the likelihood of ordinary purchasers of curry powder using ordinary caution being misled or confused. As was said by Lord Denning in *Newsweek Inc v BBC*:<sup>[13]</sup>

The test is whether the ordinary, sensible members of the public would be confused. It is not sufficient that the only confusion would be to a very small, unobservant section of society...

On the other hand, this is not to be taken to mean that a defendant will escape liability by showing that a close inspection of his goods would dispense any misapprehension which might initially have arisen. As Lord Selborne LC said in *Singer Manufacturing Co v Loog*:<sup>[14]</sup>

The imitation of a man's trade mark, in a manner liable to mislead the unwary, cannot be justified by showing, either that the device or inscription upon the imitated mark is ambiguous, and capable of being understood by different persons in different ways, or that a person who carefully and intelligently examined and studied it might not be misled.

The defendant deposed that on every one of the containers of his curry powder there is endorsed in a bold red square his name, address and telephone number; whereas the plaintiff's containers have boldly endorsed on them their manufacture by Risa St Lucia Ltd with the company's St Lucia address and telephone number. He emphasises that he has deliberately placed his name, address and telephone number and used other characteristics dissimilar from the plaintiff's on all his containers in order to ensure that his goods are clearly identified as his own and to distinguish them from the plaintiff's goods.

Mr Rodrigues [the plaintiff's managing director] speaks of the similarity of the two products in tone, colour, sizes, appearance and get-up. The defendant's logo, he says, is strikingly similar in its characteristics and appearance to that used by the plaintiff on its packages. Mr Robello [the plaintiff's marketing manager] details the points of similarity. I saw packages of the two products and what struck me was that the mark

12 (1915) 84 LJ Ch 449, p 450.

13 [1979] RPC 441, p 447.

14 (1882) 8 App Cas 1, p 18.

'Sare' is prominently displayed on the defendant's products in virtually the same position as that in which the mark 'Sari' receives prominence on the plaintiff's products. And I call to mind the words of Lord Shand in *Cellular Clothing Co v Maxton and Murray*:<sup>15</sup>

There is a vital distinction in cases of this class between invented or fancy words or names, or the names of individuals such as 'Crowley' or 'Crowley Millington' attached by a manufacturer to his goods and stamped on the articles manufactured, and words or names which are simply descriptive of the article manufactured or sold. The idea of an invented or fancy word used as a name is that it has no relation, and at least no direct relation, to the character or quality of the goods which are to be sold under that name. There is no room whatever for what may be called a secondary meaning in regard to such words... The word used and attached to the manufacture being an invented or fancy name, and not descriptive, it follows that if any other person proceeds to use that name in the sale of his goods it is almost, if not altogether, impossible to avoid the inference that he is seeking to pass his goods off as the goods of the other manufacturer.

The plaintiff has been using the word 'Sari' for its condiments and spices for 42 years and, in Barbados, for the past 10 years. Presumably, the word was chosen as having an Indian connection by virtue of its being the name given to an article of clothing word by Hindu women. But it seems strange that, of all the combinations of letters from the alphabet which are possible, the defendant should choose a combination so closely resembling the plaintiff's mark. He has not sought to explain why he chose that sequence of letters and one is left to draw what seems to be the obvious inference and to view with scepticism the defendant's averment that he deliberately sought to ensure that his goods are clearly distinguishable from the plaintiff's.

In my judgment, the word 'Sare' on the defendant's products is capable of confusing or misleading the ordinary man using ordinary caution into believing that the products are those of the plaintiff; indeed, it has already confused Mr Simpson, director of JB's Master Mart, who, in a letter to the plaintiff of 7 October 1986, asked to be advised whether the two curry powder products were the same. The placing of the defendant's products on the 'Sari' shelf at the supermarket confirms that those at the supermarket were confused. So was Mrs Harding, the Barbadian housewife who swore an affidavit to that effect. I think that the following passage would indicate how members of the public generally could become confused or misled. Lord Radcliffe said in *De Cordova v Vick Chemical Co Ltd*:<sup>16</sup>

The likelihood of deception or confusion in such cases is not disproved by placing the two marks side by side and demonstrating how small is the chance of error in any customer who places his order for the goods with both the marks clearly before him, for orders are not placed, or are often not placed, under such conditions. It is more useful to observe that in most persons the eye is not an accurate recorder of visual detail and that marks are remembered rather by general impressions or by some significant detail than by any photographic recollection of the whole.

Commenting on this, the authors of *Passing Off- Law and Practice* stated:<sup>17</sup>

The test for comparison of allegedly confusing similar names, marks or other distinguishing *indicia* is not to compare them side by side but to take into account the fact that the confusion which may occur will take place when the customer has in his mind his recollection of the plaintiff's mark which may well be only

15 [1899] AC 326, pp 338, 339.

16 (1951) 68 RPC 103, p 106.

17 Drysdale and Silverleaf, *Passing Off- Law and Practice*, London: Butterworths, para 4.41.

an idea of the whole or actual mark... The court must allow for such imperfect recollection and have special regard for those parts or the idea of the mark which are likely to have stuck in the memory rather than those parts which, being commonplace or insignificant, may well have been discarded.

Confusion between 'Sari' and 'Sare' could occur because a shopper who has been accustomed to buy 'Sari' curry powder may have forgotten the precise name or spelling: see Romer LJ in *Bale and Church Ltd v Sutton*<sup>[18]</sup> (in relation to 'kleen off and 'kleen up').

The defendant avers that he did not intend to pass off his goods as those of the plaintiff. But it is immaterial whether or not he had such an intention. Sir Wilfred Greene MR said in *Draper v Trist*:<sup>[19]</sup>

There is one matter which I can get rid of at once, and that is the suggestion, which was discussed to some extent in argument, that, in a claim for damages based on passing off, it is essential to establish a fraudulent intent—which is the same of course as a dishonest intent—on the part of the defendant. I should be prepared myself to hold, if it were necessary to do, that now, both in claiming damages and in claiming purely equitable relief, whether by way of injunction or by way of account of profits, or both, fraud is not a necessary element in the transaction.

Whether or not the defendant had an intention to deceive, in my judgment the plaintiff has a substantial passing off case. The evidence points to misrepresentation calculated to injure the goodwill which the plaintiff has acquired in the trade name 'Sari'. Misrepresentation was reasonably foreseeable and, in my view, actually foreseen by the defendant.

On the question of damages, *Draper v Trist*<sup>[20]</sup> is authority for the proposition that, in a passing off action, once it is proved that deceptive goods have been put upon the market, the plaintiff is entitled to damages; so that, apart from the affidavits filed on behalf of the plaintiff, the law assumes that the presence on the market of the defendant's 'Sare' curry powder will have an adverse effect on the plaintiff's business.

Would damages be an adequate remedy? There is evidence that the defendant's curry is inferior to the plaintiff's. It is also in evidence that the plaintiff has other product lines with the mark 'Sari', and dissatisfaction with its curry powder by reason of confusion with the defendant's product could spill over to the plaintiff's other products and affect its business generally. There could be difficulty in the assessment of damages, and an injunction will be granted.

Neither the mark 'Sare' nor any mark like it should be used in the marketing of the defendant's curry powder.

### **Trading under a name so closely resembling that of the plaintiff as to be likely to mislead the public into believing that the defendant's business and that of the plaintiff are one and the same**

A well known example of this type of passing off is *Hendriks v Montagu*,<sup>21</sup> where the Universal Life Assurance Society was granted an injunction restraining the defendant's company, which was incorporated after the plaintiff company, from carrying on business under the name 'Universe Life Assurance Association'. James LJ said:<sup>22</sup>

18 (1934) 51 RPC 129, p 141.

19 [1939] 3 All ER 513, p 517.

20 *Ibid.*

21 (1881) 50 LJ Ch 456. A more recent Jamaican example is *K-Mart Corp v Kay Mart Ltd* (1997) Supreme Court, Jamaica, No K 066 of 1995 (unreported).

22 *Hendriks v Montagu* (1881) 50 LJ Ch 456, p 457.

Now, is there such a similarity between those names as that the one is in the ordinary course of human affairs likely to be confounded with the other? Are persons who have heard of the Universal likely to be misled into going to the Universe? I should think, speaking for myself, very likely indeed. Many people do not care to bear in mind exactly the very letters of everything they have heard of.

A Bahamian case in which it was alleged that the defendant was liable for passing off on this principle, as well as on the ground of imitation of get-up, is *Emeralds of Colombia Ltd v Specific Investments (Management) Co Ltd*. This case also illustrates how the courts seek to hold the balance between, on the one hand, protecting the goodwill of traders from unfair competition and, on the other, not unduly hampering robust competition which is the lifeblood of a capitalist economic system.

**Emeralds of Colombia Ltd v Specific Investments (Management) Co Ltd  
(1989) 50 WIR 27, Supreme Court, The Bahamas**

The plaintiff's shop and the defendant's shop overlooked one another across a five metre wide walkway in the Freeport International Bazaar in Grand Bahama. The shops traded under the names 'Colombian Emeralds International' and 'The Colombian Shop' respectively. Both shops sold emeralds and fine jewellery and were advertised as such. The plaintiff, whose business was established before the defendant's, alleged that the public were misled into believing that the defendant's shop and the plaintiff's shop were one and the same. The plaintiff sought an injunction to restrain the defendant from using the word 'Emeralds' in conjunction with 'Colombian' in external signs advertising his business, and from using a green colour scheme similar to that of the plaintiff's shop.

*Held*, the plaintiff was not entitled to an injunction. There were sufficient visible differences between the two businesses which satisfied the law's requirements as to avoiding confusion. Gonsalves-Sabola J said:

C [the sole shareholder of the defendant company] is a dynamic entrepreneur geared for growth and expansion. He did not scruple about taking competition literally right to the doorstep of his competitor. His bold, aggressive sign advertisement and promotion of The Colombian Shop on the virtual threshold of the plaintiff's shop was calculated to overshadow his more established conservative rival across the way and capture the attention of tourists and other potential customers and lure them into his emporium. In a free enterprise economic system, there is nothing reprehensible in robust competition once it does not run counter to the commercial mores recognised by the law. If, by his strategy of competition, C can fairly be said to have misled or be likely to mislead the public into believing that The Colombian Shop was the plaintiff's shop, and into acquiring goods in the former shop, believing that they were the goods of the latter, he will have crossed the line which separates lawful competition from tortious passing off.

In *Kerly's Law of Trade Marks and Trade Names*,<sup>[23]</sup> there is the following general definition of the nature of the action of passing off:

It is an actionable wrong for the defendant to represent, for trading purposes, that his goods are those or that his business is that of the plaintiff, and it makes no difference whether the representation is effected by direct statements, or by using some of the badges by which the goods of the plaintiff are known to be his, or any badges colourably resembling these, in connection with goods of the same

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23 *Kerly, Kerly's Laws of Trade Marks and Trade Names*, 11th edn, 1983, London: Sweet & Maxwell,

kind, not being the goods of the plaintiff, in such a manner as to be calculated to cause the goods to be taken by ordinary purchasers for the goods of the plaintiff.

*Halsbury's Laws of England*<sup>[24]</sup> notes that:

The same principles as apply to goods apply to misrepresentations relating to businesses or services, so that the misrepresentation may be that the defendant's business is the business of the plaintiff...or that the defendant...has some special relationship with the plaintiff.

Commercial morality is not necessarily co-terminous with a puritan's conception of morality. Although on religious or ethical grounds one may baulk at the idea that a trader could take deliberate, active steps to bring about the failure of his competitor's business, it is no tort where the trader, by virtue of aggressive advertisement and salesmanship, even grating on more refined sensibilities at times, so expands his own business that the inevitable result is the decline or collapse of his rival's. Sargant J in *Spalding v AW Gamage Ltd* said:<sup>[25]</sup>

It seems to me that a trader may commend or puff his own goods to an unlimited extent without giving a cause of action to another trader, although the latter, if he is more scrupulous in his statements, may have been considerably prejudiced by the glibness, or the exaggeration, of the first trader.

Keen competition between traders is the very oxygen of trade in the open market place. The law is supportive of the economic system and does not lend its aid to monopolistic practices among traders.

Lord Simonds in the *Office Cleaning Services* case<sup>[26]</sup> said that:

It is undesirable that a first user of descriptive words should be entitled to demand that a second user should differentiate by any form of limiting words. To speak of a monopoly is inaccurate, but anything that looks like a monopoly is suspect...

[His Lordship considered at length a number of authorities, in particular *My Kinda Town Ltd v Soll*,<sup>27</sup> *Cellular Clothing Co v Maxton and Murray*<sup>28</sup> and *Reddaway v Banham*,<sup>29</sup> then continued:]

... C held for the defendant company a licence from the Port Authority to carry on the business of the retail sale of Colombian manufactured goods, and goods that are characteristic of Colombia and Central America, excluding foodstuffs.

The defendant was confined by its licence to the specific site in the International Bazaar where The Colombian Shop is located. Its licence brought it into physical propinquity to the plaintiff, because the layout of the Bazaar necessitated the concentration in the Spanish Section of businesses with a Spanish flavour. The fact that the defendant was specifically licensed to retail 'Colombian manufactured goods, and goods that are characteristic of Colombia' set the stage for close-range competition for custom between it and the plaintiff, whose shop was already well on its way as a retailer of similar Colombian goods when The Colombian Shop first began its trading in them. I considered that the defendant, like the plaintiff, was forced to trade in the inescapable ambience of conducting competition while confined into small compartmentalised national sections of the International *Bazaar*. C reacted to the

24 *Halsbury's Law of England*, 4th edn, London: Butterworths, Vol 48, para 146.

25 (1913) 30 RPC 388, p 395.

26 *Office Cleaning Services Ltd v Westminster Window and General Cleaners Ltd* (1946) 63 RPC 39, p 42.

27 [1983] RPC 407.

28 [1999] AC 326.

29 (1896) 13 RPC 218.

confinement by striking out with aggressive signs to attract the best possible share of the custom in Colombian emeralds.

Assuming that the plaintiff's shop did not exist, it goes without saying that the defendant was entitled to advertise its merchandise whether by the signs and brochures and in the colours it used in precisely the way it did. Similarly, it must have been entitled to adopt for The Colombian Shop the decor it used. The only caveat here is the one raised in the statement of claim to the effect that the first defendant's use of the combination of the words 'Colombian' and 'Emeralds' and the colour green trespassed on the plaintiff's own use in trade of the said words and colour since 1980.

I fail to find anything distinctive in the descriptive words 'Colombian Emeralds' used in combination, nor has any secondary meaning of those words been proved. On the mass of evidence before me I find as a matter of fact that externally there are significant points of architectural and artistic distinction between the shops of the plaintiff and the first defendant. Internally, although in a broad general sense the two shops may have certain points of similarity, as is inevitable having regard to their common line of business, I am unable to find that the first defendant was imitating the internal decor of the plaintiff's shop either at all or, even if so to any extent, that such imitation taken either alone or in combination with the other features of the first defendant's shop, was likely to deceive members of the public into believing that there was any connection between the two shops.

The plaintiff does not trade in its own corporate name but, legitimately, as 'Colombian Emeralds International'. However, in trading under the name 'The Colombian' and exhibiting on its fascia the descriptive phrase 'Colombian Emeralds', the first defendant, I find, achieved, as a matter of words, the 'small differences' Lord Simonds spoke about in *Office Cleaning Services Ltd v Westminster Window and General Cleaners Ltd*<sup>30</sup> that a court should accept as adequate to avoid confusion... A certain degree of similarity, even imitation, may occur where a new shop commenced business on the doorstep, as it were, of another shop already successfully established in a particular line of trade. As authority has shown (for example, *Payton v Snelling, Lampard and Co*)<sup>31</sup> the new trader may fairly copy certain features from a rival business, provided that he takes care to distinguish his business from the earlier one

...

Despite the disavowal by the plaintiff of any claim to a monopoly in the use of the words 'Colombian Emeralds' and the colour green, I have reluctantly come to view the crux of its case as an assertion, perhaps unintended, of a right virtually tantamount to an exclusivity of use. My impression is that the plaintiff assumed that its established reputation as a Colombian emeralds trader in the Bazaar entitled it to automatic protection under the law against the use by a competitor of certain *indicia* of the trade by which the plaintiff had customarily advertised its business and marketed its product.

Because the plaintiff took the chance to use descriptive words like 'Colombian Emeralds' and colours common in the trade in its name and in advertisement and promotion of its business, it needs to go yet one step beyond proving its good reputation in the trade. It must go on to prove by appropriate evidence, which it did not, that its competitor's use of those words and colours in the promotion of its business had the effect on potential customers [of] a misrepresentation calculated to deceive them that the business of the competitor was the plaintiff's. On the contrary, the first defendant has been able to point to visible differences between the two businesses which, in my opinion, satisfy the law's requirements as to avoiding confusion.

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30 (1946) 63 RPC 39, p 42.

31 [1901] AC 308.

The *Emeralds of Colombia* case also shows that, as a general rule, there can be no proprietary interest in a geographical name. In another Bahamian case, *Lyford Cay Co Ltd v Lyford Cay Real Estate Co Ltd*,<sup>32</sup> the plaintiff, a property developer who traded under the name 'Lyford Cay Co Ltd', sought to restrain the defendant, his former partner in the business, from using the name 'Lyford Cay Real Estate Co Ltd' in his (the defendant's) new business. Malone J held that the 'court is unwilling to permit a company to obtain the monopoly of a local name so as to restrain others from using the name of a locality as part of their trade name'.<sup>33</sup> The plaintiff did not have any proprietary interest in what was a geographical name of long standing, and it was not passing off for the defendant to use a similar name.

**Marketing goods under a trade name already appropriated for goods of that kind by the plaintiff, or under a name so similar to the plaintiff's trade name as to be mistaken for it**

A trade name is one 'under which goods are sold or made by a certain person and which by established usage has become known to the public as indicating that those goods are the goods of that person'. Purely descriptive names, that is, names which indicate merely the nature of the goods sold and not that they are the merchandise of any particular person or company, such as 'stout',<sup>34</sup> 'vacuum cleaner',<sup>35</sup> 'cellular textiles'<sup>36</sup> or 'gripe water',<sup>37</sup> are not protected unless the plaintiff can prove—and the burden of proof is a heavy one—that the descriptive name has acquired a secondary meaning so exclusively associated with the plaintiff's product that its use by the defendant is calculated to deceive purchasers.<sup>38</sup>

The protection of trade names applies not only to manufacturers and traders, but also to any artist, writer or musician who comes to be known under a particular name which becomes part of his stock-in-trade. Thus, for example, where the plaintiff bandleader broadcast on a radio programme under the bizarre name 'Dr Crock and his Crackpots', the defendant was restrained by injunction from putting another band on the programme under the same name.<sup>39</sup>

As in the case of names appropriated to a business (as seen in the previous section), a description of goods by geographical origin will not usually give rise to a proprietary interest; so, for example, there can be no property right in the description 'Moroccan Leather', 'Worcestershire Sauce', or 'Yorkshire Relish'. However, if the geographical description is part of the plaintiff's goodwill then it may be passing off for the defendant to use it. The leading case is *Bollinger v Costa*

32 (1988–89) 2 Carib CLR 93.

33 *Ibid*, p 97.

34 *Raggett v Findlater* (1873) LR 17 Eq 29.

35 *British Vacuum Cleaner Co Ltd v New Vacuum Cleaner Co Ltd* [1907] 2 Ch 312.

36 *Cellular Clothing Co v Maxton and Murray* [1899] AC 326.

37 *Re Woodward's Trade Mark* (1915) 85 LJ Ch 27.

38 See *Reddaway v Banham* (1896) 13 RPC 218. In *De Cordova v Vick Chemical Co Ltd* (1951) 68 RPC 103, the Privy Council held that the term 'vapour rub' was not a merely descriptive one, but had become in Jamaica (though not in England) exclusively associated with the plaintiff's product.

39 *Hines v Winnick* [1947] Ch 708.

40 [1961] 1 WLR 277. See also *John Walker and Sons Ltd v Henry Ost and Co Ltd* [1970] 1 WLR 917 ('Scotch Whisky').

*Brava Wine Co Ltd*.<sup>40</sup> There, the plaintiffs were champagne producers from the Champagne region of France. They sought an injunction to restrain the defendants, who were wine merchants in Spain, from putting on the market as ‘Spanish Champagne’ a sparkling wine which was not produced in the Champagne district. It was held that the word ‘Champagne’ was not merely a geographical description but was actually part of the plaintiffs’ goodwill, which was entitled to protection.

### Marketing goods with the trade mark of the plaintiff or with any deceptive imitation of such mark<sup>41</sup>

A trade mark is any design, picture, mark, name or other arrangement affixed to goods which identifies those goods with the manufacturer or vendor. Trade marks receive protection not only under the law of passing off, but also, if registered, under the relevant trade marks legislation, under which most actions are brought.<sup>42</sup>

### DEFENDANT’S CONDUCT MUST BE ‘CALCULATED TO DECEIVE’

It is well settled that a defendant may be liable for passing off, even though his conduct was entirely honest and innocent, in the sense that he had no intention to deceive.<sup>43</sup> Liability in this tort is strict, and all the plaintiff needs to show is that the defendant’s activities are ‘calculated’, that is ‘likely’, to deceive the public. The following passage from *Kerly on Trade Marks*<sup>44</sup> was cited by McMillan J in *Fruit of the Loom Inc v Chong Kong Man*.<sup>45</sup>

Passing off cases are often cases of deliberate and intentional misrepresentation, but it is well settled that fraud is not a necessary element of the right of action, and the absence of an intention to deceive is no defence.

However, the presence or absence of fraud on the part of the defendant is not entirely irrelevant, since:

- (a) where fraud is proved, the burden of showing likelihood of damage is comparatively light, for ‘the court will readily assume that the defendant will succeed in accomplishing that which he has set himself to accomplish’,<sup>46</sup> but where there is no fraud, the burden is a heavier one; and

41 A modern, and analogous, activity which may constitute passing off is the registering of internet domain names as variations of the names of well known companies (eg, a variation of burgerking.com), followed by the offering of the domain names for sale to those companies at exorbitant prices with an expressed or implied threat to allow them to be used for deception or to block legitimate registration. See *BT plc v One in a Million Ltd* [1999] 1 WLR 903.

42 See *Fruit of the Loom Inc v Chong Kong Man* (1972) 20 WIR 445 (above, pp 297, 298). See also *Colgate-Palmolive v Pattron* [1978] RPC 635, where it was held that the use of the mark ‘Tringate’ for toothpaste marketed in Trinidad and Tobago infringed the trade mark ‘Colgate’ and amounted to passing off, since ordinary consumers might conclude that ‘Tringate’ toothpaste was in fact ‘Colgate’ toothpaste manufactured in Trinidad.

43 *Baume and Co Ltd v Moore Ltd* [1958] Ch 907; *Ricks and Sari Industries Ltd v Gooding* (1986) High Court, Barbados, No 1090 of 1986 (unreported) (see above, pp 298–302); *Fruit of the Loom Inc v Chong Kong Man* (1972) 20 WIR 445 (see above, pp 297, 298).

44 *Op cit*, Kerly, fn 9, p 334.

45 (1972) 20 WIR 445.

46 *Op cit*, Heuston and Buckley, fn 1, p 385.

(b) it has been suggested, but not conclusively decided, that, where passing off is 'innocent', only nominal damages may be awarded.<sup>47</sup>

It is not necessary to prove that deception has actually taken place. It is sufficient for the plaintiff to show that deception is likely to occur in the future; and if he can show this, he may obtain a *quia timet* injunction.

In determining whether confusion is likely, the court will take into account the experience, perceptiveness and standards of literacy of prospective purchasers of the goods, and the standard of awareness to be expected of a purchaser is not that of an observant person making a careful examination, but that of a casual and unwary customer. As Lord Macnaghten once graphically put it: '...thirsty folks want beer, not explanations.'<sup>48</sup> Thus, for example, in *Bollinger v Costa Brava Wine Co Ltd*,<sup>49</sup> it was to be expected that the ordinary members of the public who bought champagne might confuse the defendants' 'Spanish Champagne' with the genuine article produced in the Champagne region of France, and this entitled the plaintiffs to an injunction to restrain the use by the defendants of the word 'Champagne' as a description of their sparkling wine.

#### USE OF DEFENDANT'S OWN NAME

There is some uncertainty as to the extent to which it is a defence for a defendant to plead in a passing off action that he was merely making use of his own name. According to Salmond and Heuston:

It would appear...that, subject to certain qualifications, an individual is entitled to trade under his own name regardless of the fact that his business may be thereby confused with a business of some other person bearing the same or a similar name. Nor does it make any difference in such a case that a trader using his own name is well aware of the fact that his business will be confused with that of a rival trader, and intends to take the advantage which such confusion will confer upon him. This can be very inconvenient, but not necessarily wrongful.<sup>50</sup>

The right of a manufacturer to use his own name in marketing his product received a severe jolt in *Parker-Knoll Ltd v Knoll International Ltd*.<sup>51</sup> In this case, both parties were furniture manufacturers and both belonged to the Knoll family. The plaintiffs were well established in the UK, where they sold their furniture under the brand name 'Parker-Knoll'. When the defendants later commenced selling furniture under the name 'Knoll International', the plaintiffs sought an injunction to restrain use of the name in the UK, on the ground that the public might be deceived into believing that the defendants' goods were manufactured by the plaintiffs. The House of Lords upheld the plaintiffs' contention. A distinction was drawn between using a personal name as a *business name*, which will not be restrained, provided the defendant acts honestly, and using it as a *mark for goods*, which will be restrained if confusion is likely to result. The justification for this odd distinction is allegedly that some other mark can easily be found for marketing goods.

47 *Draper v Trist* [1939] 3 All ER 513, pp 518, 525, 528.

48 *Montgomery v Thompson* [1891] AC 217, p 225.

49 [1961] 1 WLR 277.

50 *Op cit*, Heuston and Buckley, fn 1, p 386.

51 [1962] RPC 265. See Kodilinye, G (1975) 26 NILQ 177.

## COMMON FIELD OF ACTIVITY

Where the plaintiff and the defendant are not engaged in the same trade, it is much more difficult to show that the public is likely to be confused by the defendant's activity. It was once stated to be the rule that there can be no passing off unless the plaintiff and the defendant share a 'common field of activity';<sup>52</sup> but nowadays, it seems that the position is more flexible, and the courts tend to grant relief in cases where the trade connection is more tenuous than would formerly have been accepted. The Australian courts in particular have cast doubt on the validity of the 'common field of activity' rule.<sup>53</sup> Clarke J in *Robert Marley Foundation v Dino Michelle Ltd*,<sup>54</sup> in the Jamaican Supreme Court, preferred the Australian view.

Two cases which illustrate the 'common field of activity' principle are *McCullough v May*<sup>55</sup> and *Granada Group Ltd v Ford Motor Co Ltd*.<sup>56</sup> In the former case, the plaintiff was a well known children's broadcaster who used the name 'Uncle Mac' on his radio programme. He sought to restrain the defendant from calling its breakfast cereal 'Uncle Mac's Puffed Wheat'. The action failed, since there was no common field of activity between the parties and, therefore, no risk of confusion in the minds of the public. Similarly, in the *Granada* case, the plaintiff company, a large entertainment and leisure organisation, was unable to obtain an injunction to restrain the defendant from calling its new car 'Granada', since there was no risk that the public would confuse the two very different businesses.

## INJURY TO GOODWILL

Since passing off is based on injury to the plaintiff's goodwill, he must show that his product has acquired a reputation in the particular jurisdiction. In the Bahamian case of *Bombay Spirits Co Ltd v Todhunter-Mitchell and Co Ltd*, this requirement was lacking.

### **Bombay Spirits Co Ltd v Todhunter-Mitchell and Co Ltd (1965–70) 1 LRB 143, Court of Appeal, The Bahamas**

The appellants acquired a substantial reputation for their 'Bombay Dry Gin' in the US. The respondents had begun to distil and sell gin in Grand Bahama under the name 'Bombay Brand Dry Gin' a few months before the appellants began to market their gin there. The appellants sought an injunction in The Bahamas to restrain the sale of the respondents' gin under the name 'Bombay Brand Dry Gin' on the ground, *inter alia*, that, since much of the gin sold in Grand Bahama was sold to tourists from the US, where the appellants had advertised and sold their product, the appellants were entitled to protect the goodwill they had implanted in the minds of such visitors.

*Held*, the appellants had not established any reputation or goodwill in The Bahamas entitling them to an injunction, and there was insufficient evidence of any 'migratory' goodwill. Sinclair P said:

52 *McCullough v May* [1947] 2 All ER 845.

53 *Henderson v Radio Corp* [1960] SR (NSW) 576.

54 See below, pp 310–13.

55 [1947] 2 All ER 845.

56 [1972] FSR 103.

Before the appellants could succeed in the action, it was necessary for them to establish that their Bombay gin had acquired in The Bahamas a reputation as their gin, for the action for passing off is based on injury to the plaintiff's goodwill.

In order to obtain redress in an action for passing off, the trader who sues must prove that his goods are known to and recognised by the public, or by a particular section of the public who deal in that type of goods, by a particular name, mark, get-up or other accompaniment, which is associated in their mind with his goods alone. It is immaterial whether the name or mark is a registered trade name or a registered trade mark, or whether the get-up includes a registered design, or whether the actions of the trader who is sued do or do not constitute infringement (Kerly, *The Law of Trade Marks*, 7th edn, 1951, pp 387, 550)...

A trader has no property in a trade name, trade mark or particular get-up. The object of the action is to protect the goodwill of the trader who sues. Goodwill, being invisible, is represented by visible symbols such as trade names, trade marks, get-up and other accompaniments associated with goods of a particular trader. Every article which is sold by such a trade name, or bears such a trade mark, get-up or accompaniment, has behind it an element of the particular trader's goodwill and reputation, and a rival or second trader by adopting that trade name, trade mark, get-up or accompaniment, or a substantial part of it, with the result that the public are misled into thinking that the goods of the second trader are the goods of the first trader, commits an actionable wrong and appropriates to himself part of the goodwill of the first trader.<sup>[57]</sup>

The question for decision is whether, by April 1964, when the respondents made the first sales of their Bombay gin, the appellants had acquired a sufficient reputation for their brand in The Bahamas to succeed in an action for passing off.

It is common ground that, so far as sales of their respective brands of gin in The Bahamas are concerned, the respondents were first in the field, the first sales of the appellants' brand not being until the middle of May, 1964. But to establish the reputation of their Bombay gin in the Bahamas, the appellants relied, first, on advertisements in trade directories and in American magazines, which, it was said, have a circulation in the Bahamas, and, secondly, on the large sales of gin to tourists from the US, where it was said the appellants' brand of gin is well known to the public...

As to this the Chief Justice said that any goodwill and repute which the appellants might have acquired amongst Bahamians by advertising could only have been minimal. I am in entire agreement with that finding. As to the advertisements in trade directories, there was no evidence as to the circulation of such directories in The Bahamas other than the evidence of Mr Sands, the owner of four liquor stores, who said that he read the 1964 Trade Annual Diary but did not see the appellants' advertisement in it. In any event, I do not think there was any real possibility of deception in the trade...

I now turn to the more important question whether a reputation or goodwill was established in relation to the American tourists as a particular section of the public in The Bahamas. It may well be that, though they are transitory, they could be considered as a particular section of the public in The Bahamas, and for the purposes of this appeal I shall treat them as such, though I make no decision on the point.

The Chief Justice found that the goodwill and repute which the appellants may have acquired by implanting a desire for their Bombay gin in the minds of American tourists was of too nebulous a character to be taken into consideration. Again, I can find no good ground for disagreeing with that finding. It was not in dispute that, at least up to the date of the action, more gin was sold to American tourists than to the local

people, but the appellants' share of the American market was small compared with brands such as 'Gordon's' and 'Beefeater', also imported from England. In 1964, for instance, two million cases of 'Gordon's' gin were sold in the US, and three-quarters of a million cases of 'Beefeater' gin were sold in 1965, whereas the appellants sold under 18,000 cases in 1964. As the Chief Justice observed, the appellants were minnows among Titans. In Florida, from which a substantial proportion of the American tourists would probably come, the number of cases sold in 1964 was only 300. Furthermore, the only evidence of actual knowledge of 'Bombay' gin among American tourists came from Mr Ramsay, the manager of a liquor store, who said that in 1962 he heard of 'Bombay' gin from an American customer. In my view, the evidence falls far short of establishing the necessary reputation and goodwill in respect of the appellants' Bombay gin among American tourists in the Bahamas.

On the other hand, in *Robert Marley Foundation v Dino Michelle*, the goodwill attached to the music and songwriting 'business' of the late Bob Marley was clearly established in Jamaica.

**Robert Marley Foundation v Dino Michelle (1994)**  
**Supreme Court, Jamaica, No CL R-115 of 1992 (unreported)**

The plaintiff's business included selling T-shirts bearing reggae star Bob Marley's name, image or likeness, and licensing persons to use such name, etc, on T-shirts in Jamaica. The defendant commenced manufacturing and selling T-shirts in Jamaica bearing Bob Marley's image and the words 'Bob, 1945–1981'. The defendant's T-shirts were alleged to be of inferior quality to the plaintiff's.

*Held*, goodwill was attached to Bob Marley's name and likeness and this goodwill had been acquired by the plaintiff. The defendant's conduct was calculated to mislead the public into believing that a commercial arrangement existed between the plaintiff and the defendant. Since the plaintiff's goodwill was likely to be damaged thereby, the defendant was liable in passing off. Clarke J said:

[Passing off] is committed where a trader so conducts his business as to lead the public to believe that his goods or business are the goods or business of, or are associated with, another trader as a result whereof the business or goodwill of the latter is really likely to be damaged. In this area of the law, the term 'trader' is wide, especially where, as here, the defendant's activities are of a commercial nature. The term includes incorporated non-profit and charitable bodies which, like the plaintiff, sell or distribute goods in connection with the activities they were formed to promote (see *Lagos Chamber of Commerce Inc v Registrar of Companies*<sup>58</sup>) and *National Incorporated Association v Barnardo Amalgamated Industries Ltd*<sup>59</sup>), and, although the plaintiff is a company formed for promoting art, science, religion or charity, the law and the company's very constitution sanction its trading activities. So, Mr Grant's submission that such a company has no business interest to be protected by the doctrine of passing off has only to be stated to be rejected.

*Warnink v Townend and Sons Ltd*<sup>60</sup> is a leading case on the passing off action. That case went up to the House of Lords. The plaintiffs had for many years manufactured and distributed in Britain a popular liquor called 'advocaat'. Made in the Netherlands by a number of manufacturers, including the plaintiffs, it had been sold in Britain for

58 (1956) 72 RPC 263.

59 (1950) 66 RPC 103.

60 [1979] AC 731.

many years, where it had acquired a substantial reputation and goodwill as a distinct and recognisable beverage. The defendants made and marketed in England a similar (but differently constituted) drink described as 'Keeling Old English Advocaat'. Although it could not be shown that it was mistaken for Dutch advocaat, it captured a substantial part of the plaintiffs' English market.

The plaintiffs' passing off action succeeded. The defendants, it was held, were seeking to take advantage of the goodwill attached to the name 'advocaat' as a description of the Dutch product by misrepresenting that their product was related or connected to that product. The leading speeches, Lord Diplock's and Lord Fraser's, make it plain that a product, which had gained a reputation in the market by reason of its recognisable and distinctive qualities of name and composition and had thereby generated the relevant goodwill, should be protected from deceptive use of its name by competitors. The injunction granted at first instance was restored because all the tests for a passing off action were met.

By combining the tests propounded by Lords Diplock and Fraser, a learned editor has, in my view, correctly analysed the essential ingredients of a passing off action as follows:

- (1) that the plaintiff's business comprises selling in [Jamaica] a class of goods to which the particular trade name [face, likeness or image] applies;
- (2) that the name [face, likeness or image] is distinctive of the plaintiff's goods;
- (3) that goodwill is attached to the name [face, likeness or image] and is the plaintiff's;
- (4) that the defendant has made a representation;
- (5) that he has done so in the course of trade to customers or ultimate recipients of the goods;
- (6) that the business or goodwill of the plaintiff is really likely to be damaged (see *Clerk and Lindsell on Torts*, 16th edn, London: Sweet & Maxwell, pp 30–39).

There can therefore be no valid cause of action for passing off if there is no invasion of the goodwill of a trader's business by a false representation made by another trader in the course of trade.

As far as concerns the question of misrepresentation, the plaintiff in the instant case obviously has no cause of action for passing off in the classic form of a trader representing his goods as the goods of another. Mr Grant submitted before me that if the misrepresentation is not so limited it is unavailing. That was what counsel for the respondent had unsuccessfully submitted before the House of Lords in the *Warnink* case. That is, of course, not the law. The law has developed at least to the point where it is enough that the misrepresentation is calculated to give one trader the benefit of another's goodwill.

This development has been engendered by Lord Parker's seminal identification of the nature of the proprietary right 'the invasion of which is the subject of...passing off actions' as the 'property in the business or goodwill likely to be injured by the misrepresentation'.<sup>[61]</sup>

In the instant case, the misrepresentation is not in dispute. By manufacturing and selling T-shirts bearing Bob Marley's image or likeness and the appellation 'Bob, 1945–1981', the defendant has misled the public to believe that an association, be it commercial or otherwise, exists between the plaintiff and the T-shirts being sold by the defendant.

That is, however, not all. The statement of claim must plead not only facts showing the defendant's acts of misrepresentation, but must also plead facts leading to the

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61 *Spalding v AW Gamage Ltd* (1915) 84 LJ Ch 449, p 450.

conclusion that the plaintiff is entitled to the relevant goodwill. This, Mr Grant submitted, had not been done.

Although goodwill as a concept is wide, 'goodwill as the subject of proprietary rights is incapable of subsisting by itself. It has no independent existence apart from the business to which it is attached': *Star Industrial Co Ltd v Yap Kwee Kor*.<sup>[62]</sup> It is, as Lord Macnaghten once said, 'the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom'.<sup>[63]</sup>

Now, the late Bob Marley was a musician and songwriter of international stature. Millions of copies of the songs he wrote and recorded have been sold worldwide both before and after his death in 1981. From these primary facts I conclude that he was a celebrity who had a music and songwriting 'business' of international proportions. And whilst it has not been shown that he was involved in manufacturing and/or selling T-shirts, he had...the sole or exclusive right (subsequently acquired by the plaintiff) to use or license other persons to use in Jamaica his name and likeness for commercial gain.

The plaintiff's business includes: (a) selling T-shirts bearing Marley's name and image or likeness, etc; and (b) licensing persons to use Marley's name, image or likeness, etc, on T-shirts or otherwise. The plaintiff, 'whose existence and purposes are a matter of public knowledge', has in fact licensed, and is negotiating to license, various persons in Jamaica to use Marley's name and likeness as aforesaid. Indeed, two non-exclusive licence agreements, made between the plaintiff and third persons for valuable consideration, were admitted in evidence. So, the clear and reasonable inference must be that 'because of the good name, reputation and connection of [the plaintiff's] business' various persons have for commercial purposes paid, or are prepared to pay the plaintiff for use on T-shirts, etc. Bob Marley's name and likeness or other *indicia* of his personality. These are clearly 'the attractive force which brings in custom'. Add to that the allegations, admitted by the defendant, that its use of Bob Marley's name and likeness on T-shirts it sells has led to the public's mistaken belief that there is a connection between its goods and the plaintiff, resulting in loss and damage to the plaintiff.

The facts as pleaded therefore lead to the inescapable conclusion that goodwill is attached to Bob Marley's name and likeness in connection with the plaintiff's business. And that goodwill belongs to the plaintiff. It has been invaded by the defendant's aforesaid misrepresentation.

The detriment suffered by the plaintiff by this invasion of its goodwill is underscored by this, that the defendant has employed goods of inferior quality to the plaintiff's in making the false representation according to which the public has been misled into believing that a commercial arrangement exists between the plaintiff and the defendant. So I disagree with Mr Grant's submission that, in manufacturing and selling the said T-shirts, the defendant was merely satisfying a popular demand.

Mr Grant submitted that, in any event, an action in passing off is not maintainable as, according to him, the facts show that the parties are not engaged in a common field of activity. A number of things must be said about that submission. First of all, although only the plaintiff licenses persons to utilise in Jamaica Bob Marley's name and likeness, both parties sell T-shirts with Bob Marley's name and likeness printed thereon. Secondly, as the businesses of the parties therefore overlap, this case does not violate

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62 [1976] FSR 256, p 269, *per* Lord Diplock.

63 *IRC v Muller and Co* [1901] AC 213, pp 223, 224.

64 [1947] 2 All ER 845 (see above, p 308).

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the principle of the decision of the English Court of Appeal in *McCullough v May*<sup>[64]</sup> (relied on by Mr Grant) that, in a passing off action, the parties must have a common field of activity, on the basis that otherwise they would not be business rivals. Thirdly, with great respect, I am not persuaded that I ought to accept that proposition for, even though it has not been violated in the instant case, as Evatt CJ and May J reasoned in rejecting it in the Full Court of the Supreme Court of New South Wales in *Henderson v Radio Corp.*<sup>[65]</sup>

...if deception and damages are proved, it is not easy to see the justification for introducing another factor as a condition of the court's power to intervene.

In that case, the plaintiffs were well known professional ballroom dancers. Their photographs had been used, without consent, by the defendants on the cover of a gramophone record of dance music. Even though a common field of activity was found to exist, there is much force in the learned judges' reasoning and I respectfully adopt it.

From the foregoing analysis, I consider it plain that the facts presented by the statement of claim disclose a cause of action for passing off.

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65 [1960] SR (NSW) 576, p 592.



## CHAPTER 12

### VICARIOUS LIABILITY

#### DEFINITION

The expression 'Vicarious liability' refers to the situation where D2 is liable to P for damage caused to P by the negligence or other tort of D1. It is not necessary that D2 should have participated in the tort or have been in any way at fault. D2 is liable simply because he stands in a particular relationship with D1. That relationship is normally one of master and servant or, in modern parlance, 'employer and employee'.

In early medieval times a master was held responsible for all the wrongs of his servants. Later, as the feudal system disintegrated, the 'command theory' emerged, under which a master was liable only for those acts of his servants which he had ordered or which he had subsequently ratified.<sup>1</sup> Later still, with the development and expansion of industry and commerce, the 'command theory' fell into disuse for two main reasons: first, under modern conditions, it was no longer practicable for an employer always to control the activities of his employees, especially those employed in large businesses; and, secondly, the greatly increased hazards of modern enterprises required a wider range of responsibility on the part of employers than that which had been imposed in earlier times. The theory of vicarious liability which eventually emerged was that a master is liable for any tort committed by his servant in the course of the servant's employment, irrespective of whether the master authorised or ratified the activity complained of, and even though he may have expressly forbidden it.

The modern theory of vicarious liability is based not on fault but on considerations of social policy.<sup>2</sup> It may seem unfair and legally unjustifiable that a person who has himself committed no wrong should be liable for the wrongdoing of another; on the other hand, it may be argued that a person who employs others to advance his own economic interests should be held responsible for any harm caused by the actions of those employees,<sup>3</sup> and that the innocent victim of an employee's tort should be able to sue a financially responsible defendant,<sup>4</sup> who may in any case take out an insurance policy against liability. The cost of such insurance will, of course, ultimately be passed on to the public in the form of higher prices. However, care should be taken not to hamper business enterprise unduly by imposing too wide a range of liability on employers. Therefore, there is the requirement that a master will be liable only for those torts which his servant committed during the course of his employment—that is, while the servant was doing the job he was employed to do.<sup>5</sup>

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1 For a history of the doctrine, see Holdsworth, *History of English Law*, 7th edn, 1956–72, Vol III, London: Sweet & Maxwell, pp 472 *et seq.* On State liability in the Caribbean, see Rawlins, H (1997) 7 Carib LR 497.

2 *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, p 686.

3 *Duncan v Finlater* (1839) 7 ER 934, p 940, *per* Lord Brougham.

4 In most cases, the employee will not have the resources to pay the plaintiff's damages, and so will not be worth suing.

5 The onus of proving the existence of a master/servant relationship and the commission of the tort during the course of the servant's employment rests on the plaintiff.

## SERVANTS AND INDEPENDENT CONTRACTORS

A person who is employed to do a job may be either a servant or an independent contractor. It is important to decide which category he comes into, for whilst an employer is liable for the torts of his servants, he is generally not liable for those of his independent contractors.<sup>6</sup> The traditional test for determining this question is that of *control*:

A servant may be defined as any person employed by another to do work for him on the terms that he, the servant, is to be subject to the control and directions of his employer: an independent contractor is one who is his own master. A servant is a person engaged to obey his employer's orders from time to time; an independent contractor is a person engaged to do certain work, but to exercise his own discretion as to the mode and time of doing it—he is bound by his contract, but not by his employer's orders.<sup>7</sup>

A servant is employed under a contract of *service*, whereas an independent contractor is employed under a contract *for services*:

The distinction between the contract for services and the contract of service can be summarised in this way: in the one case the master can order or require what is to be done; while in the other case he can not only order or require what is to be done but how it shall be done.<sup>8</sup>

Thus, for example, a maid in a private house would be under the control of her employer as to how she did her job, and she would therefore be employed under a contract of service; whereas an electrician or plumber employed to do a particular job in the house would be under the control of his employer only as to what he must do, not as to how he should do it, and he would therefore act under a contract for services. Again, a man who was employed as a regular driver would be the servant of his employer, whereas a taxi driver engaged for a particular journey or journeys would be an independent contractor of the person who engaged him.

However, although the control test may be satisfactory in the most basic domestic situations, it has proved to be quite inadequate in the context of modern business enterprise, where large organisations commonly employ highly skilled professional persons under contracts of service, and yet do not or cannot control the manner in which they do their work. For example, it would be absurd to suggest that a pilot who was employed by BWIA could be controlled as to the manner in which he flew a plane, or that a surgeon in the UWI Teaching Hospital in Jamaica could be controlled as to the manner in which he performed an operation; nevertheless, the pilot and the surgeon would be the servants of the airline and the hospital respectively.

A useful alternative to the control test, and one which is more in keeping with the realities of modern business, is what may be called the 'organisation test'.<sup>9</sup> This test was explained by Denning LJ thus:<sup>10</sup>

6 *Quarman v Burnett* [1835–42] All ER Rep 250. See, generally, Bacchus, R, in Kodilinye, G and Menon, PK (eds), *Commonwealth Caribbean Legal Studies*, 1992, London: Butterworths, pp 287–311.

7 Heuston and Buckley, *Salmond and Heuston on the Law of Torts*, 21st edn, 1996, London: Sweet & Maxwell, p 435.

8 *Collins v Hertfordshire CC* [1947] KB 598, p 615, *per* Hilbery J.

9 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 344.

10 *Stevenson, Jordan and Harrison Ltd v Macdonald and Evans Ltd* [1952] 1 TLR 101, p 111.

Under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it.

On this test, the following are examples of servants of the organisations which employ them: hospital doctors and nurses, university lecturers, school teachers, bank clerks, office clerical staff, airline pilots, newspaper editors, factory workers and hotel staff; and the following are examples of independent contractors: freelance journalists and photographers, attorneys, architects and engineers in private practice, self-employed electricians, carpenters, plumbers and taxi drivers driving their own vehicles.

A third test which has been suggested is that of MacKenna J in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions*.<sup>11</sup> This is known as the ‘multiple’ or ‘mixed’ test. The three conditions suggested by MacKenna J for the existence of a contract of service or employment are:

- (a) the employee agrees to provide his work and skill to the employer in return for a wage or other remuneration;
- (b) the employee agrees, expressly or impliedly, to be directed as to the mode of performance to such a degree as to make the other his employer; and
- (c) the other terms of the contract are consistent with there being a contract of employment.

In applying the test, however, the courts do not confine themselves to the three listed factors; rather, they consider a wide range of factors, including the degree of control over the worker’s work; his connection with the business; the terms of the agreement between the parties; the nature and regularity of the work; and the method of payment of wages.

The Jamaican Court of Appeal in *Harris v Hall*<sup>12</sup> adopted the guidelines suggested by Cooke J in *Market Investigations Ltd v Minister of Social Security*,<sup>13</sup> to the effect that:

Control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor... Factors which may be of importance are such matters as whether the man performing the services provides his own equipment, whether he hires his own helpers, what degree of financial risk he takes, what degree of responsibility for investment and management he has, and whether and how far he has an opportunity of profiting from sound management in the performance of his task.

## LENDING A SERVANT

Where X, the general employer of Y, agrees to ‘lend’ Y to Z, and whilst in the temporary service of Z, Y commits a tort, the general employer will remain liable, unless he can prove—and the burden of proof is a heavy one—that, at the time the tort was committed, he had temporarily divested himself of all control over the

<sup>11</sup> [1968] 2 QB 497.

<sup>12</sup> (1997) Court of Appeal, Jamaica, Civ App No 31 of 1993 (unreported).

<sup>13</sup> [1968] 3 All ER 732, p 737.

servant.<sup>14</sup> In *Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd*,<sup>15</sup> the appellants employed Y as a driver of a mobile crane. They hired out the crane, together with Y as driver, to the respondents, a stevedoring company, for use in unloading a ship. The contract between the appellants and the respondents provided that Y was to be the servant of the respondents, but Y was paid by the appellants, who alone had the power of dismissal. Whilst loading the cargo, Y was under the immediate control of the respondents, in the sense that they could tell him which boxes to load and where to place them, but they had no power to tell him how to manipulate the controls of the crane. In the course of loading a ship, a third party was injured through Y's negligent handling of the crane. The House of Lords had to decide whether it was the appellants or the respondents who were vicariously liable for Y's negligence, and the answer to this question depended upon whether he was the respondents' or the appellants' servant at the time of the accident. Lord Porter said<sup>16</sup> that, in order to make the respondents liable, it was not sufficient to show that they controlled the *task* to be performed: it must also be shown that they controlled the *manner*<sup>17</sup> of performing it. And, 'where a man driving a mechanical device, such as a crane, is sent to perform a task, it is easier to infer that the general employer continues to control the method of performance, since it is his crane and the driver remains responsible to him for its safe keeping'. The court therefore held that the appellants alone were vicariously liable.

In *Texaco Trinidad Inc v Halliburton Tucker Ltd*,<sup>18</sup> Corbin JA emphasised that:

...there is a presumption against there being a transfer of a servant so as to make the temporary employer responsible for his acts, and a heavy burden rests upon an employer who seeks to establish such a transfer. The test has sometimes been concisely expressed as being whether the servant or the benefit of his work was transferred.

These principles were applied in the Bahamian case of *Joseph v Hepburn*.<sup>19</sup> In this case, H engaged an independent contractor, S Ltd, to clear his land of bush. In the course of clearing the land, A, a tractor driver employed by S Ltd, encroached upon the plaintiff's adjacent land and destroyed a number of fruit trees. The main issue in the case was whether S Ltd, as general employer of A, was liable for A's tort, or whether, as S Ltd alleged, the responsibility for the tort had been shifted to H as special employer. The contractual arrangement between H and S Ltd showed that H had identified the general area in which work was to be done and S Ltd arranged for its project manager to accompany H to the site to see what was required. S Ltd had delegated the tractor driver, A, to take instructions from H, but A's wages were paid by S Ltd.

14 It is easier to show that the hirer had control where the servant is an unskilled labourer under a labour only contract than where he is borrowed along with a complicated piece of machinery which he is to operate (eg, the crane driver in the *Mersey Docks* case): *Garrard v AE Southey & Co Ltd* [1952] 2 QB 174, p 179.

15 [1947] AC 1.

16 *Ibid*, p 17.

17 See also *Courage Construction Ltd v Royal Bank Trust Co (Jamaica) Ltd* (1992) 29 JLR 115, p 119, *per* Rowe P.

18 (1975) Court of Appeal, Trinidad and Tobago, Civ App No 80 of 1970 (unreported).

19 (1992) Supreme Court, The Bahamas, No 762 of 1989 (unreported).

Thorne J said that whether A was to be regarded as the servant of the general employer, S Ltd, 'or whether he became *pro hac vice* the servant of his particular employer [H] is a question of fact and depends upon an interpretation of the agreement made between [S Ltd and H]'. His Lordship held that S Ltd had 'failed to discharge the heavy burden on it to shift to [H] its *prima facie* responsibility for the acts of the driver, and so, [A] remained the servant of [S Ltd]. To use the language adopted in many of the cases, what was transferred was not the servant but the use and benefit of his work'. Thorne J ultimately held, however, that H had been negligent in his failure to give clear instructions to A with respect to the extent of his boundaries, and S Ltd was entitled to recover from H 10% of the damages that it was liable to pay to the plaintiff.

### COMMISSION OF A TORT BY THE SERVANT

For the master to be vicariously liable, the plaintiff must first prove the commission of a tort by the servant. As Denning LJ explained:<sup>20</sup> '...to make a master liable for the conduct of his servant, the first question is to see whether the servant is liable. If the answer is "yes", the second question is to see whether the employer must shoulder the servant's liability'

In other words, vicarious liability of the master arises only on the primary liability of the servant.

### *RES IPSA LOQUITUR*

Sometimes, it may be difficult or impossible to prove affirmatively which one of several servants was negligent. For instance, if the plaintiff complains of negligent treatment during an operation in hospital, it may be impossible for him to show which one or more of the team of surgeons, anaesthetists and nurses involved in the operation were careless. As far as the liability of hospitals is concerned, it was established in *Cassidy v Ministry of Health*<sup>21</sup> that, where the plaintiff has been injured as a result of some operation in the control of one or more servants of a hospital authority, and he cannot identify the particular servant who was responsible, the hospital authority will be vicariously liable, unless it proves that there was no negligent treatment by any of its servants; in other words, *res ipsa loquitur* applies. In the absence of authority to the contrary, there seems to be no reason why this principle should not apply to other master/servant relationships.

### THE COURSE OF EMPLOYMENT

A master will not be vicariously liable for his servant's tort unless the plaintiff shows that the servant committed the tort during the course of his employment. A tort comes within the course of the servant's employment if:

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20 *Young v Box and Co Ltd* [1951] 1 TLR 789, p 793.

21 [1951] 1 All ER 575.

- (a) it is expressly or impliedly authorised by his master; or
- (b) it is an unauthorised manner of doing something authorised by his master; or
- (c) it is necessarily incidental to something which the servant is employed to do.<sup>22</sup>

Although this definition is easy enough to state, the second and third circumstances in particular have proved to be very difficult to determine in practice, and it is now accepted that the question of whether a servant's act is within the course of his employment is ultimately one of fact in each case.<sup>23</sup> We must now examine some of the relevant factors which the courts will take into account when considering the question.

### **Manner of doing the work the servant was employed to do**

A master will be liable for the negligent act of his servant if that act was an unauthorised mode of doing what the servant was employed to do. The classic example is *Century Insurance Co Ltd v Northern Ireland Road Transport Board*.<sup>24</sup> There, the driver of a petrol tanker, whilst transferring gasoline from the vehicle to an underground tank at a filling station, struck a match in order to light a cigarette and then threw it, still alight, on the floor. His employers were held liable for the ensuing explosion and fire, since the driver's negligent act was merely an unauthorised manner of doing what he was employed to do, that is, to deliver gasoline.

On the other hand, in *Beard v London General Omnibus Co*,<sup>25</sup> the employers of a bus conductor who took it upon himself to turn a bus around at the terminus and, in so doing, negligently injured the plaintiff, were held not liable because the conductor was employed to collect fares, not to drive buses, and his act was entirely outside the scope of his employment.

### **Authorised limits of time and place**

A relevant factor in determining whether or not a servant's tort is within the course of his employment is the time or place at which it is committed. As regards time, where a tort is committed during working hours or within a reasonable period before or after, the court is more likely to hold the employer liable for it. Thus, where a clerk turned on a tap in the washroom 10 minutes after office hours and forgot to turn it off before going home, his employers were held liable for the consequent flooding of adjoining premises. The use of the washroom by the clerk was an incident of his employment and the negligent act took place only a few minutes after working hours.<sup>26</sup> As regards the place where the tort is committed, a difficult question which has frequently come before the courts is whether a driver/servant is within the course of his employment where he drives negligently after making a detour from his authorised route. The principle to be applied in these cases was laid down by Parke B in *Joel v Morrison*:<sup>27</sup>

22 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 703.

23 *United Africa Co Ltd v Owoade* [1957] 3 All ER 216, p 218, per Lord Oaksey.

24 [1942] 1 All ER 491.

25 [1900] 2 QB 530. But the employer may be liable for the negligence of his driver in failing to keep proper control. See below, pp 332–34.

26 *Ruddiman and Co v Smith* (1889) 60 LT 708.

27 (1834) 172 ER 1338.

If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a *frolic of his own*, without being at all on his master's business, the master will not be liable.

Whether a detour by the servant amounts to a 'frolic of his own' is a question of degree, and both the extent of the deviation and its purpose will be taken into account. Thus, for example, where a servant, who was in charge of a horse and cart throughout the day, drove them to his house without permission for his midday meal, the employer was held liable for damage caused by the horse when, having been carelessly left unattended outside the servant's home, it ran away. In this case, the servant had deviated only a quarter of a mile off his authorised route, and the purpose of the detour—to obtain refreshment—was reasonably incidental to his employment.<sup>28</sup> On the other hand, where a driver had been sent to deliver wine and collect empty bottles and, on the return journey, deviated from his route in order to pick up a cask at the house of a friend and take it somewhere else for the friend's private purposes, the employer was held not liable for the driver's negligent driving on the way to the friend's house, for he was clearly on a frolic of his own.<sup>29</sup>

In the Jamaican case of *Dunkley v Howell*,<sup>30</sup> R was employed to drive Mrs W in the defendant/appellant's car to May Pen and thereafter to Mrs W's home at Mocho, where the car was to be garaged. On reaching May Pen, Mrs W remained there, but R drove the car to Thompson Town for his own private purposes. On his way back from Thompson Town, R negligently ran into the back of the plaintiff's car, causing damage. The resident magistrate held that, as R's mission would not have been completed until he garaged the car at Mocho, which he was 'on his way to do', he must be taken to have been acting within the course of his employment or agency at the time of the accident. The Jamaican Court of Appeal, however, overruled the magistrate, holding, in effect, that R was on a frolic of his own at the material time. Graham-Perkins JA said:<sup>31</sup>

The implication is clear that since Reid's mission would not have been completed until he had garaged the car, the extent of that mission was to be determined not by reference to the explicit instructions and authority given him by the defendant/appellant, and which the magistrate had found to be limited to a particular and precise journey, but rather by reference to whichever place Reid elected to visit. Let it be assumed that Reid had chosen to go to Negril, either at the direction of Mrs Wynter or of his own volition, having taken Mrs Wynter to, and left her at, May Pen. Would he, in the face of his instructions and authority, have been acting as the agent or servant of the appellant? His 'mission' would not, in the view of the resident magistrate, have ended until he had returned from Negril and parked the car in the Wynter's garage. Any such conclusion necessarily does violence to language and begs the very question posed by the evidence, namely: what was Reid's mission? That mission, in our view, ended at Mocho, where he ought to have parked the appellant's car. Beyond that point, he was driving the appellant's car neither as his agent nor as his servant. To hold otherwise is to make the relationship between principal and agent or between master and servant depend not on what the agent or servant was employed to do, but rather on what the servant or agent chooses to do.

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28 *Whatman v Pearson* (1868) LR 3 CP 223.

29 *Storey v Ashton* (1869) LR 4 QB 476.

30 (1975) 24 WIR 293.

31 *Ibid*, p 295.

More recently, Lord Lowry in *Smith v Stages* analysed the position in the form of the following propositions:<sup>32</sup>

- an employee who is travelling from his home to his regular place of work or vice versa is not within the course of his employment,<sup>33</sup> but if the employee is required by his contract of employment to use the employer's transport then he will normally be regarded as being within the course of his employment when travelling to work;
- an employee who is travelling between workplaces<sup>34</sup> or is in the course of a peripatetic occupation is within the course of his employment;
- an employee is within the course of his employment if he travels in his employer's time from his home to a workplace which is not his regular place of work, or to the scene of an emergency;
- a deviation from a journey undertaken in the course of employment will take the employee outside the course of his employment for the duration of the deviation, unless the deviation is merely incidental to the journey;
- receipt of wages rather than a travelling allowance suggests that the journey is for the benefit of the employer and, therefore, within the scope of the employment.

### Express prohibition

A master may be liable for his servant's act even though he expressly forbade such act; for if it were the rule that disobedience to express orders necessarily took the servant outside the course of his employment, 'the employer would only have to issue specific orders not to be negligent in order to escape liability for his servant's negligence'.<sup>35</sup> The existence of an express prohibition is, however, a factor to be taken into account, and it is now established that a distinction must be drawn between:

- (a) prohibitions which limit the sphere of employment; and
- (b) prohibitions which merely deal with conduct within the sphere of employment.

Only a breach of the first type of prohibition will take the servant outside the course of his employment and thus relieve the master from liability: his liability will be unaffected by a breach of the second type of prohibition.<sup>36</sup>

Thus, for example, where a bus driver had been given express instructions not to race with or obstruct the buses of rival companies and, in disobedience to this order, he obstructed the plaintiff's bus and caused a collision which damaged it, the driver's employers were held liable because the express prohibition did not limit the sphere of the bus driver's employment, but merely sought to control his conduct within the scope of his employment.<sup>37</sup>

32 [1989] 1 All ER 833, p 851.

33 See *Hunt v National Insurance Board* (1997) Supreme Court, The Bahamas, No 620 of 1996 (unreported), where Sawyer CJ also held that the fact that the employee received a travel allowance was not conclusive of the issue.

34 See *REMS Co Ltd v Frett* (1996) Court of Appeal, British Virgin Islands, Civ App No 4 of 1995 (unreported).

35 Brazier, *Street on Torts*, 9th edn, 1993, London: Butterworths, p 500.

36 *Plumb v Cobden Flour Mills Co Ltd* [1914] AC 62, p 67.

37 *Limpus v London General Omnibus Co* (1862) 158 ER 993.

Similarly, where the defendants expressly prohibited their staff from driving uninsured cars on the company's business, and one of their employees drove an uninsured car in disobedience of the order and negligently injured the plaintiff, the defendants were held liable, since:

...it was not the acting as driver that was prohibited, but the non-insurance of the motor car, if used as a means incidental to the execution of the work which he was employed to do. It follows that the prohibition merely limited the way in which, or the means by which, the servant was to execute the work which he was employed to do, and that breach of the prohibition did not exclude the liability of the master to third parties.<sup>38</sup>

On the other hand, in the Bahamian case of *Clarke v William Brewer Co Ltd*,<sup>39</sup> there was a prohibition which limited the sphere of the servant's employment, disobedience to which absolved the employer from liability. In this case, the company's truck drivers had been expressly forbidden to drive trucks on Sundays, unless they were instructed to do so. In disobedience to this rule, H, a driver, drove one of the company's trucks on a Sunday without permission and on personal business. Holding the company not liable for the death of another motorist caused by H's careless driving of the truck, Adam J said:

In *Canadian Pacific Rly Co v Lockhart*,<sup>[40]</sup> the Privy Council's judgment was delivered by Lord Thankerton, who said that all cases of master and servant relationships fell under three heads, of which the first was where the servant was using his master's time or his master's place or his master's houses, vehicles, machinery or tools for his own purposes. In such a case, the master was not responsible. The situation in the instant case falls under this head and is distinguished from that in *Rose v Plenty*,<sup>[41]</sup> where the milk roundsman's disregard of his employers' instructions was a wrongful performance of his employers' business, and not for his own purposes, and was therefore inside the scope of his employment.

I find that the driver was not using the truck for the owner's purposes and was not driving it under delegation of a task or duty. He was not acting as the company's agent. The [driver] was under a prohibition which limited the sphere of his employment. The [employer] is therefore not liable for the [driver's] tort.

### Giving lifts to unauthorised passengers

A particular difficulty arises in cases where a driver/servant, in defiance of express instructions, gives a lift in his employer's vehicle to an unauthorised person, such as a friend or a stranger, and that person is injured through the servant's negligent driving.

Clearly, where the giving of the lift involves a substantial detour from the driver's authorised route, or where the journey is unauthorised from the outset, the driver will have gone on a frolic of his own; but where he gives the lift in the course of driving on his employer's business and without deviating from his proper route, it might be thought that the employer will be liable, since the prohibition would appear not to limit the sphere of the driver's employment but merely to regulate his conduct within the sphere of employment. This view has not, however, found favour with the courts.

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38 *Canadian Pacific Rly Co v Lockhart* [1942] AC 591.

39 (1983) Supreme Court, The Bahamas, No 27 of 1980 (unreported).

40 [1942] AC 591.

41 [1976] 1 All ER 97.

A well known case is *Twine v Bean's Express Ltd.*<sup>42</sup> The plaintiff's husband, T, was given a lift in a van driven by X, the defendants' employee. T was killed by the negligent driving of X. X had been instructed that no one, other than those employed by the defendants, should be allowed to travel in the van, and there was a notice to that effect inside the van. Uthwatt J held that the defendants owed a duty of care only to persons who might reasonably be anticipated by the defendants as being likely to be injured by negligent driving of the van at the time and place in question, and that, in the circumstances of the case, T was a trespasser in the van, to whom no duty of care was owed, because the defendants could not reasonably have anticipated his presence in the van at the material time. The decision of Uthwatt J<sup>43</sup> was upheld by the Court of Appeal, but Lord Greene used a different reasoning from that of the lower court, preferring to decide the question according to whether or not the driver was acting within the course of his employment at the material time. On the facts of the case, his Lordship reasoned that:

[The servant] was in fact doing two things at once. He was driving his van from one place to another by a route that he was properly taking...and as he was driving the van he was acting within the scope of his employment. The other thing that he was doing simultaneously was something totally outside the scope of his employment, namely, giving a lift to a person who had no right whatsoever to be there.<sup>44</sup>

The *Twine* case was distinguished in *Rose v Plenty*,<sup>45</sup> where, contrary to express instructions from his employer, a milkman took a 13 year old boy on board his milk float to assist him in delivering milk. Owing to the milkman's negligence, the boy was injured. It was held that the employer was vicariously liable for the milkman's negligence, on the ground that the prohibition against permitting boys to ride on the milk float had not restricted the scope of the milkman's employment; it merely affected the manner in which the milkman did his job. *Twine* was distinguished by Lord Denning MR on the ground that the giving of the lift in that case was not for the benefit of the employer, whereas in *Rose* the plaintiff's presence on the milk float was to further the employer's business.

Questions relating to the giving of lifts to unauthorised passengers have been discussed in several Commonwealth Caribbean cases, where the circumstances have been diverse. In *Subhaga v Rahaman*,<sup>46</sup> for instance, the defendant's servant, E, whilst driving the defendant's truck back to the latter's factory, gave a lift to the plaintiff, an unauthorised passenger. As a result of E's negligent driving, the truck struck a bridge and the plaintiff was injured. There was no evidence that E had been expressly forbidden to give lifts to strangers. Bollers J pointed out<sup>47</sup> that:

...the defendant was seeking to bring the facts of this case within the principle laid down in *Twine v Bean's Express Ltd.* In *Twine's* case, however, express instructions that no unauthorised person was allowed on the van were given and a notice to that effect was put up in the vehicle. In the present case, no such position obtained.

42 [1946] 1 All ER 202; on appeal (1946) 62 TLR 458 (CA).

43 [1946] 1 All ER 202, p 204.

44 (1946) 62 TLR 458, p 459. For a critique of Lord Greene's judgment, see Newark, FH (1954) 17 MLR 102.

45 [1976] 1 All ER 97.

46 [1964] LRBG 112, High Court, British Guiana.

47 *Ibid*, p 114.

The learned judge then continued:<sup>48</sup>

It is well settled that, where the relationship of master and servant exists, the master is liable for the torts of the servant committed in the course of his employment. The tort or wrongful act is deemed to be done in the course of the employment if it is either: (1) a wrongful act authorised by the master; or (2) a wrongful mode of doing some act authorised by the master... It follows, then, that the master is liable even for acts which he had not authorised, provided that, when all the surrounding circumstances are considered, they are so connected with acts which he has authorised that they may be regarded as modes, although improper modes, of doing them. The submission of counsel for the defence in this case was that the driver's duties did not include the conveyance of passengers and, therefore, such conveyance was not incidental to his duties. With this submission I could not agree.

Bollers J was of the view that the giving of a lift to an unauthorised passenger was merely a wrongful mode of doing what the driver was employed to do and was, therefore, not sufficient to take him outside the scope of his employment. He thus held the defendant liable.

In *Battoo Bros Ltd v Gittens*,<sup>49</sup> there was similarly no express prohibition against giving lifts to unauthorised persons, yet the court nevertheless purported to follow the reasoning of Uthwatt J in *Twine v Bean's Express Ltd*<sup>50</sup> in finding the driver's employer not liable. In this case, the appellants operated a car hire service throughout Trinidad. Some of their cars were licensed for private use, whilst others carried a hired registration licence. One evening, AS, a driver employed by the appellants, was instructed to drive one of the company's private cars to Piarco Airport to pick up a despatcher and some documents and return with them to the company's Port of Spain office. On the way to the airport, AS was waved down by G and three other persons, with whom he agreed, for the payment of \$2, to take them to their destination. This would have necessitated deviating a distance of several miles off the airport route. Before turning off the airport route, AS negligently collided with another car, killing both himself and G.

It was held that the appellants were not liable for the death of G, since no duty of care was owed by them to an unauthorised passenger whose presence in the vehicle could not reasonably have been anticipated. Rees JA explained:

The driver of [the] car was the servant of the company, and the general principle is that when a vehicle belonging to the employer is entrusted to the servant, the employer is liable if the servant is negligent while using the vehicle in the course of his employment. But counsel for the company contended that the taking up of passengers for reward in the private car of the company was an unauthorised and wrongful act, and consequently the servant was not acting in the course of his employment. There is no doubt that Smith deviated from his employer's orders in taking up passengers for reward whose destination was Mausica College, but as this is a case of negligence brought by a passenger, the question is whether the person against whom the claim is made owed a duty of care to the passengers who were travelling in the car at the time and place of the accident.

It is a well settled principle that the duty owed by an employer to persons who may be injured by the negligent driving of his servant is limited to those who can reasonably

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48 *Ibid.*

49 (1975) Court of Appeal, Trinidad and Tobago, Civ App No 7 of 1973 (unreported).

50 [1946] 1 All ER 202.

be anticipated as being possible subjects of injury. In the circumstances of this case, the company could not have anticipated the presence of any passengers in the car because the car was not one registered for hire, nor were directions given by the employer to the driver to take up passengers for reward.

Reference was made to *Twine v Bean's Express Ltd*,<sup>[51]</sup> in which the employers expressly instructed their drivers that no one was to be allowed to travel on their van. Twine, a mail porter, took a lift in the van with the assent of the driver. Owing to the driver's negligent driving, an accident occurred and Twine was fatally injured. It was held that the duty of the driver's employers to take care in the driving of the van was only to persons who might reasonably be anticipated by the employers as likely to be injured by negligent driving of the van at the time and place in question, but that, in the circumstances of the case, Twine was a trespasser in the van in relation to the employers. They therefore owed no duty to Twine to take care in the driving of the van, because they could not reasonably anticipate that he would have been a passenger in the van at the time and place of the accident.

The distinction between that case and the present one is that, in this case, the passengers were picked up by a driver to whom no contrary instructions had been specifically given. The question for determination is whether, in these circumstances, the persons who were taken up as passengers by the driver fell within the class of persons to whom a duty to take care was owed by the employers. Could the company, as employers, have anticipated the presence of passengers in the car? I think that this is a question of fact to be determined in all the circumstances of the case. The evidence here was that the driver of a private motor car was despatched by his employers on private business not connected with the hiring of the vehicle. As was stated by a witness for the appellant, '[drivers] have specific instructions when they are sent on these jobs'. Nor was there any evidence to suggest that the employers had any reason to believe that the driver would pick up passengers during the course of his assignment.

The driver was sent to Piarco in a private car for the specific purpose of picking up a despatcher and some documents for the Port of Spain office, but, unknown to his employers, he took up passengers for reward in order to make \$2 for himself. I do not think that the company could reasonably have anticipated that the driver, who was expected to carry out his duties faithfully, would have had passengers in the car at the time and place of the accident. Consequently, they are not liable in negligence.

In the *Battoo Bros* case, as we have seen, there was no express prohibition against giving lifts to unauthorised passengers, but in two other Commonwealth Caribbean decisions there were such prohibitions. In *Zepherin v Gros Islet Village Council*,<sup>52</sup> A (the second defendant/respondent) was employed by the Council (the first defendant/respondent) as a truck driver, one of his duties being to convey corpses for burial. He had been expressly prohibited from carrying passengers on the tray of the truck. One day, he was instructed by his employers to transport a corpse from the house of mourning at Monchy to Gros Islet for burial. Contrary to the prohibition, he took 16 mourners, as well as the corpse, on the tray of the truck to Gros Islet and, instead of parking the truck there at the end of the day, as he was ordered to do, he set off to return to Monchy with the mourners. On the way back to Monchy, he negligently collided with the plaintiff, who was riding his horse along the highway. The plaintiff was injured and he claimed that the Council was vicariously liable for A's negligent driving. It was held that the Council was not

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51 *Ibid.* See Kodilinye, G (1977) 6 Anglo-Am LR 18.

52 (1978) 26 WIR 561, Court of Appeal, West Indian Associated States, on appeal from the Supreme Court, St Lucia.

vicariously liable, since the return journey to Monchy was not undertaken for any business of the Council, and A was acting outside the course of his employment at the time of the accident.

In the course of his judgment, Davis CJ cited and purported to follow three cases<sup>53</sup> in which unauthorised passengers had been killed or injured by a driver's negligence, without emphasising that, in the *Zepherin* case, it was not the unauthorised passenger who was harmed, but another user of the highway. The presence or absence of an unauthorised passenger in the vehicle should have been treated as irrelevant to the question of whether the driver's employers were liable to the plaintiff. However, the decision can easily be justified, on the ground that the journey in question was not undertaken for the Council's business; it was entirely unauthorised; the driver was 'on a frolic of his own', and he was not acting in the course of his employment at the material time.

A more straightforward case is the decision of the Court of Appeal of the Eastern Caribbean States in *Alfred v Thomas*.<sup>54</sup> Here, T was employed as a truck driver and engaged in the transportation of sand. T was given express instructions not to carry passengers on the vehicle, but there was no sign to that effect affixed to the vehicle. In disobedience to the prohibition, T gave a lift to the plaintiff. Whilst descending a hill with a heavy load of sand, T lost control, the truck capsized and the plaintiff was seriously injured. It was held, following, *inter alia*, *Twine v Bean's Express Ltd*,<sup>55</sup> that the employer was not liable for T's negligence because (a) the plaintiff was a trespasser to whom the employer owed no duty to take care as to the proper driving of the truck; and (b) T was not acting within the scope of his employment at the time of the accident.

Finally, in *Haye v Bruce*,<sup>56</sup> Fox JA suggested that, in an appropriate case, the Jamaican courts should feel free to depart from the principle in *Twine v Bean's Express Ltd* on policy grounds, for 'however acceptable the principle in *Twine* may have been in 1951, it is doubtful whether it is compatible with the especial responsibility which the law is now determined to put upon the owner of a motor vehicle who allows it to go on the road in charge of someone else'.<sup>57</sup> More particularly, whereas the argument that an injured passenger was a trespasser on the vehicle might be material to a claim based on the unsafe condition of the vehicle, it was 'irrelevant in a claim arising from the negligent manner in which it was driven'.

The proper basis of liability in cases of injury to unauthorised passengers thus remains uncertain. As Harrison J pointed out in *Jackson v High View Estate*,<sup>58</sup> modern case law favours deciding such cases according to whether or not the driver was acting in the course of his employment at the material time, rather than according to whether the passenger was a trespasser in the vehicle; but there are still no clear criteria for determining when a driver is or is not driving within the course of his employment. It may be argued, on a cynical view, that in each case the court decides

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53 *Twine v Bean's Express Ltd* [1946] 1 All ER 202; *Rose v Plenty* [1976] 1 All ER 97; *Hilton v Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74.

54 (1982) 32 WIR 183.

55 [1946] 1 All ER 202.

56 (1971) 18 WIR 313.

57 *Ibid.*, p 317.

58 (1997) Supreme Court, Jamaica, No J 283 of 1991 (unreported).

which party should succeed, and then selects the appropriate label to justify its decision.

### Connection with employer's business

Where a servant does an act which he has no express authority to do, but which is nonetheless intended to promote his master's legitimate interests, the master will be liable in the event of its being tortious, unless the act is so extreme or so outrageous that it cannot be regarded as incidental to the performance of the servant's allotted duties. For instance, 'a servant has implied authority upon an emergency to endeavour to protect his master's property if he sees it in danger or has reasonable ground for thinking that he sees it in danger';<sup>59</sup> but 'where the servant does more than the emergency requires, the excess may be so great as to take the act out of the [course of employment]'.<sup>60</sup> Thus, for example, the employer of H was held liable where H, reasonably believing that a boy was stealing sugar from his employer's passing truck, struck the boy, who fell and sustained injuries. The act of H was in protection of his employer's property and was not so excessive as to be outside the scope of his employment.<sup>61</sup>

On the other hand, where a garage attendant, after accusing a customer of driving off without paying for gasoline supplied to him, assaulted the customer, the attendant's employers were held not liable, since the act of the attendant was extreme and not 'so connected with the acts which the servant was expressly or impliedly authorised to do as to be a mode of doing those acts'.<sup>62</sup> Similarly, where, in the course of a fight in a dance hall, B, a security guard, first assaulted a customer in the mistaken belief that he (B) was being attacked, and later struck the customer again outside the hall long after the fight had ended, the employers of B were held liable for the first assault, since it was reasonably incidental to B's duty to maintain order in the premises, but they were not liable for the second, since that was an act of personal vengeance unconnected with B's duties.<sup>63</sup> But somewhat surprisingly, in the Bahamian case of *Herrnicht v Green*,<sup>64</sup> where the manager of a disco violently assaulted a patron who had allegedly insulted him, Georges CJ held the manager's employer liable, on the ground that the manager's action was merely an unauthorised mode of doing what he was employed to do, which was, *inter alia*, to maintain order in the premises. This decision seems hard to justify on the facts, for the assault by the manager was more in the nature of a revenge attack than a genuine attempt to maintain order in the premises.

Another decision which shows that the courts in the Commonwealth Caribbean are ready to hold employers liable for violence perpetrated by 'bouncers' is the Trinidadian case of *Sudan v Carter*.<sup>65</sup> Here, the plaintiff, a student at the University of

59 *Poland v Parr* [1927] 1 KB 236, p 240, *per* Bankes LJ.

60 *Ibid.*, p 245.

61 *Ibid.*

62 *Warren v Henly's Ltd* [1948] 2 All ER 935. Similarly, in *Kernel Bus Co Ltd v Ahmad* [1974] 2 All ER 700, the employers of a bus conductor were held not liable for the conductor's assault of a passenger who had complained about the conductor's use of obscene language. See, generally, Rose, FD (1977) 40 MLR 420.

63 *Daniels v Whetstone Entertainments Ltd* [1962] 2 Lloyd's Rep 1.

64 (1989) Supreme Court, The Bahamas, No 737 of 1985 (unreported).

65 (1992) High Court, Trinidad and Tobago, No 1735 of 1990 (unreported).

the West Indies, sought to gain entry to a disco, but was refused entry by T, who was employed as a doorman and had authority to permit or refuse entry to anyone. Believing that T was operating a racist policy in deciding who could and who could not enter, the plaintiff complained and commented that 'this is not South Africa'. T, a karate 'black belt', struck the plaintiff a violent blow in the face, which knocked him unconscious. Hosein J held T's employers vicariously liable for the assault, on the ground that T was employed to keep control in the premises and had been selected for his martial arts skills, which his employers regarded as an asset in the job, and his actions were within the scope of his employment. Further, T's act was done 'for the purposes of the business of the employers.

Again, as in *Herrnicht v Green*, it is arguable that the act of T was outrageous and too extreme to be considered reasonably incidental to what T was employed to do, bearing in mind that the assault was unprovoked and quite unnecessary to the task of keeping order in the premises.<sup>66</sup> It has to be admitted, however, that, on policy grounds, the decision may be applauded, as employers of vicious thugs should be required to pay the price for wilful acts of violence perpetrated by them.

On the other hand, the decision of the Jamaican Court of Appeal in *AG v Reid*<sup>67</sup> shows that there are limits to how far the courts will go in imposing vicarious liability for the criminal acts of employees. In this case, a female tourist was attacked in a hotel washroom and seriously wounded by a knife-wielding and gun-toting member of the Jamaican Constabulary Force. A security guard employed by the hotel who came to the woman's rescue was shot and wounded by the assailant. Both victims brought actions against the Jamaican Government on the basis of vicarious liability. The Court of Appeal held that the Government was not liable, since the acts which the constable was assigned to do were 'in complete contradiction to the wrongful acts which he committed' against the plaintiffs. Wright JA explained the decision thus:

Constable Thompson was assigned duties at the hotel, having been issued with a firearm; his duties there were specifically to prevent the harassment of visitors, to accost drug pushers, whores and pimps, and arrest them if it became necessary to eject them from the hotels which were in the area of his assignment. Apart from his specific assignment at the relevant time, Constable Thompson's duties and powers are set out in the Constabulary Force Act, as it applies to all police constables. Section 13 states:

The duties of the police under this Act shall be to keep watch by day and by night, to preserve the peace, to detect crime, apprehend or summon before a justice, persons found committing any offence or whom they may reasonably suspect of having committed any offence, or who may be charged with having committed any offence, to serve and to execute all summons, warrants, subpoenas, notices and criminal processes issued from any court of criminal justice or by any justice in a criminal matter and to do and perform all the duties appertaining to the office of a constable, but it shall not be lawful to employ any member of the

66 Carberry JA has stated that what the cases illustrate is that, 'depending on how closely connected the wrongful act is with the servant's employment, a master may be held liable, though it is clear that the wrongful act could in no way be regarded as being done in the execution of the servant's duty, or the intended execution of that duty': *Bryan v Undo* (1986) 23 JLR 127, p 137 (Court of Appeal, Jamaica).

67 (1994) Court of Appeal, Jamaica, Civ App No 107 of 1992 (unreported). See also the similar cases of *AG v Bernard* (2000) Court of Appeal, Jamaica, Civ App No 67 of 2000 (unreported), and *Hartwell v AG* (2000) High Court, British Virgin Islands, No 152 of 1994 (unreported).

Force in the service of any civil process, or in levying of rents, rates or taxes for or on behalf of any private person or incorporated company.

To be successful in their claims against the Government, the respondents had to prove on a balance of probabilities that the acts of felonious wounding committed on the parties by Constable Thompson were so connected with the above-stated authorised acts that they could be considered modes of doing that which he was authorised to do. Mr Robinson contended that the circumstances of this case took it outside of the normal employer/employee relationship, as this was a police officer whose duties and responsibilities are delineated by statute, and consequently he is a special creature clothed by the Government with special powers and authority for the protection of the public. He further argued that a criminal act by a policeman, if so closely connected with his status as a policeman that the court can find on the facts that the act could not have been committed but for the fact that the criminal was a policeman, then the Government, his master, would be vicariously liable for the act. He maintained that Constable Thompson was able to gain access to the hotel and to all its areas, including the ladies' room, without challenge by the security guards, for the sole reason that he was a policeman. In addition, that having been issued with a firearm by virtue of being a policeman, he used it in the execution of these criminal acts and, as Miss Cummings pointed out, he shot the respondent with that firearm, which she argued was an unauthorised mode of using the firearm which he was authorised to use.

This argument, though attractive, particularly in these circumstances, where the plaintiffs through no fault of theirs have been subjected to serious injuries causing great pain and suffering and affecting the future conduct of their lives, is nevertheless one with which I cannot agree.

It is true that were the police officer not assigned duties at the hotel, he would not have had the opportunity to commit these wrongs. The fallacy of Mr Robinson's submissions, however, becomes evident when one examines the false foundations on which they rest, that is, that the acts, being so closely connected with the status of a policeman that they could not have been committed but for the fact that he was a policeman, would result in the Government, as his master, being vicariously liable. The principles to be gleaned from the cases do not establish that the act must be connected with the status of the offender, except in so far as he was, by virtue of that status, doing the things which he was employed to do...

If Mr Robinson is correct in his contention, it would have chaotic results. The Government would be liable for any wrongful act of a police officer committed while he is on duty, even if such acts are outside the scope of his employment and independent of what he was employed to do. The mere fact that the officer used an opportunity, given to him by virtue of being a policeman, to commit an act independently of those authorised by the Government cannot, in accordance with settled principles, create a vicarious liability in the Government.

In my view, the answer to the real issue in this case, that is, whether the wrongful acts were so connected to acts which he was authorised to do, so as to be deemed a wrongful mode of doing authorised acts, cannot be resolved in the manner contended for by the respondents.

It is clear that the wrongful acts were not authorised. Were they, then, closely connected with the class of acts which a police officer is authorised to do? There is really no evidence to support such a view. Constable Thompson, though assigned to the hotel, was assigned to do acts which are in complete contradiction to the wrongful acts which he committed on the plaintiffs. In my view, the evidence supports a finding that the Constable was acting independently of what he was employed to do and I would state, as Diplock J said about the facts in the case of *Hilton v Thomas*

*Burton (Rhodes) Ltd*,<sup>[68]</sup> 'this seems to me to be a plain case of what, in the old cases, was sometimes called going out on a frolic of their own'.

Regrettably, given the tragic consequences caused by the wrongful acts committed on the plaintiffs, and as much as I would in the circumstances have liked to find otherwise, I am of the opinion that the appeal should not be allowed. However, I cannot leave this appeal without expressing the view that this is indeed an ideal case for an *ex gratia* payment<sup>[69]</sup> to be paid by the Government to both respondents. The respondent Engerbretson is a tourist, who no doubt chose her vacation destination as a result of the many and varied invitations that we put out to entice visitors to our island, and for whose safety, while on our shores, we must feel a sense of responsibility. She has suffered severely, and I do hope that these few words may help to convince those in authority to compensate her for her pain and suffering. No less should be done for the respondent Reid, who, in answer to a call for help, suffered the gunshot wounds at the hands of a police officer with whom he felt a sense of security, which was suddenly, without notice, changed into an attack upon him.

In the recent case of *Lister v Hesley Hall Ltd*,<sup>70</sup> the three plaintiffs had been sexually abused by the warden of a children's home, owned by the defendant, where they had lived previously. It was not clear whether the substance of the claim was that the defendant had actual or constructive knowledge of the abuse and had been negligent in failing to take steps to prevent it, or whether it was one in which the victims sought to make the defendant, as employer of the warden, vicariously liable for the warden's wilful wrongdoing. Ultimately, the House of Lords held that the defendant was vicariously liable for the abuse since 'there was a sufficient connection between the work that [the warden] had been employed to do and the acts of abuse that he had committed for those acts to be regarded as having been committed within the scope of his employment'. In coming to this conclusion, Lord Steyn stated that the suggestion that the greater the fault of the servant, the less the liability of the master, reflected the wrong approach, while Lord Clyde expressed the view that the defendant 'should' be vicariously liable to the plaintiffs, given the authority provided by the defendant to the abuser, which implies that the law ought to reflect the social responsibility placed on the employer in such circumstances as these. Lastly, it was stated by Lord Hobhouse that the claim in negligence was based on the abuser's breach of duty which, according to his Lordship, included doing the opposite of what it was a person's duty to do. This approach is at variance with that taken by the Privy Council in the Jamaican case of *General Engineering Services Ltd v Kingston and St Andrew Corp*<sup>71</sup> where, it will be seen, the defendant was held not vicariously liable for the actions of the firemen which the court described as 'the very negation of carrying out some act authorised by the employer'.<sup>72</sup>

It is respectfully submitted that, as so often happens with judgments in the House of Lords, where their Lordships employ differing lines of reasoning, it is difficult to identify the precise basis of the decision, other than the well established

68 [1961] 1 All ER 74.

69 Another Jamaican case in which an *ex gratia* payment was recommended (by the trial judge, Harrison J) is *Wellington v AG* (1997) Supreme Court, Jamaica, No W034 of 1992 (unreported), where a bystander had been accidentally shot by a constable in the act of chasing armed criminals.

70 [2001] 2 All ER 769.

71 [1988] 3 All ER 867, see below, pp 337–38.

72 *Ibid*, p 870.

principle that an employer is vicariously liable for the wrongful acts of his employee where there is a sufficient connection between those acts and what the wrongdoer was employed to do.

### IMPROPER DELEGATION

Where a servant improperly and without authorisation delegates his task to a third party and, through the negligence of that third party, the plaintiff is injured, the master will not be liable for the negligence of the third party, but he may be liable for the failure of the servant to exercise sufficient control so as to ensure that the task was carefully performed. The typical case is where a driver/servant allows an unauthorised and incompetent person to drive his master's vehicle and a person is injured by the negligence of the substitute driver.

It has been suggested<sup>73</sup> that the basis of the master's liability in such a case is that his servant permitted an incompetent person to drive, and it was foreseeable that damage might be caused thereby; as, for example, where the driver of a bus allowed the conductor to drive the vehicle and the conductor negligently injured a person on the sidewalk.<sup>74</sup> Another example is the Guyanese case of *Persaud v Verbeke*.<sup>75</sup> Here, the defendant had engaged J as his agent to operate the defendant's vehicle as a hire car. The car became hooked on to a refuse box in the street, with its rear wheel embedded in mud. In his attempt to extricate the car, J asked E, an unauthorised person, to drive the car forward while J lifted it up at the rear. In the course of this operation, the car accelerated forward, mounted the sidewalk and struck and killed B, an elderly fruit vendor. It was held that the defendant was vicariously liable for J's negligence in failing to ascertain whether E was a competent driver before allowing him to drive the car. As Khan J explained:

Having admitted that Johnson was his agent, the question to be resolved is whether Johnson, in engaging Eleazer to assist him in the operation of unhooking the car, in all the circumstances was within the scope of Johnson's authority. In *Engelhart v Farrant and Co*,<sup>76</sup> it was held that:

There is no rule of law to prevent a master being liable for negligence of his servant whereby opportunity was given for a third person to commit a wrongful or negligent act immediately producing the damage complained of. Whether the original negligence was an effective cause of the damage is a question of fact in each case.

In that case, the defendant employed a man to drive a cart, with instructions not to leave it, and a lad, who had nothing to do with the driving, to go in the cart and deliver parcels to the customers of the defendant. The driver left the cart, in which the lad was, and went into a house. While the driver was absent, the lad drove on and came into collision with the plaintiff's carriage.

In an action to recover for damage caused by the collision, it was held that the negligence of the driver in so leaving the cart was the effective cause of the damage, and that the defendant was liable:

<sup>73</sup> *Ilkiw v Samuels* [1963] 1 WLR 991.

<sup>74</sup> *Ricketts v Thomas Tilling Ltd* [1915] 1 KB 644.

<sup>75</sup> [1971] LRG 1 (High Court, Guyana).

<sup>76</sup> [1897] 1 QB 240.

Lord Esher MR stated:<sup>[77]</sup>

If a stranger interferes, it does not follow that the defendant is liable; but equally it does not follow that, because a stranger interferes, the defendant is not liable if the negligence of a servant of his is an effective cause of the accident.

In *Ricketts v Thomas Tilling Ltd*,<sup>[78]</sup> a bus belonging to the defendants had just completed its journey and discharged its passengers. It then proceeded to commence its return journey, driven by the conductor, at whose side the defendants' licensed driver was sitting. While thus being driven, it suddenly mounted the pavement and injured the plaintiff.

At the trial, the case was withdrawn from the jury on the ground that there was no negligence against the defendants, and judgment was entered for the defendants.

On appeal, it was held that the driver owed a duty to his employers to see that if he allowed another person to drive the omnibus, that person drove properly, and that it was a question of fact to be left to the jury whether the driver was guilty of negligence if he failed to see that the person whom he had allowed to drive was a competent driver. A new trial was therefore ordered.

In the course of his judgment, Pickford LJ said:<sup>[79]</sup>

In this case, it is admitted that the driving was negligent. It is admitted that the driver was sitting by the man who was driving, and he could see all that was going on... It seems to me that the fact that he allowed somebody else to drive does not divest him of the responsibility and duty he has towards his masters to see that the omnibus is carefully, and not negligently, driven. I asked Mr Charles whether there was any case in which the driver was present when the negligent driving went on, and in which the master had been held not liable. Apparently there is not one.

In *Ilkiw v Samuels*,<sup>[80]</sup> the defendants' lorry was driven to the premises of the plaintiff's employers to load bags of sugar. The defendants' driver, Waines, put the lorry under a conveyor and then stood in the back of the lorry to load bags from the conveyor. When sufficiently loaded, the lorry had to be moved. Samuels, a fellow employee of the plaintiff and not employed by the defendants, offered to move it. Waines allowed him to do so without asking whether he could drive, and, after starting the lorry, he could not stop it. It crushed the plaintiff, who was working nearby, causing him serious injuries. Waines remained in the back of the lorry throughout. He had been expressly forbidden by his employers to let anyone other than himself drive the lorry. It was held that Waines was negligent in allowing Samuels to drive without enquiring whether he was competent. The defendants were vicariously liable for his negligence because it was a mode, though an improper one, of performing the duties for which he was employed, namely, to have charge and control of the lorry. It was therefore a negligent act within the scope of his employment.

In the instant case, Johnson was entrusted with the defendant's motor car to drive, and to be in charge of it. The defendant admitted that Johnson was engaged in supervising an operation of unhooking the car which was fastened to a refuse box.

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77 *Ibid*, p 243.

78 [1915] 1 KB 644.

79 *Ibid*, p 650.

80 [1963] 1 WLR 991.

He engaged Eleazer to assist him in this operation by putting Eleazer at the wheel. Johnson did so without first ascertaining whether Eleazer was competent to drive.

In all the circumstances, it appears to me that Johnson acted within the scope of his authority in attempting to extricate the car which was hooked on the refuse box and fastened in the mud. In carrying out this exercise of extricating the car, he obtained the assistance of Eleazer. The exercise was a joint operation, Johnson lifting at the back of the car while Eleazer accelerated forward. Johnson did not ascertain whether Eleazer was a competent driver. Johnson carried out this operation negligently, resulting in the death of the deceased. His principal, the defendant, is therefore vicariously liable for Johnson's negligence.

It was emphasised, however, by Fox JA in the Jamaican case of *Brown v Brown*,<sup>81</sup> that the proper basis of the master's liability in cases of improper delegation is not that the servant delegated his task to an incompetent person, but that the servant was present at the time and remained under a duty to control the driving of the vehicle. In *Brown*, the driver/servant had allowed an unauthorised third party, who was in fact 'a competent and licensed driver', to drive his employer's van. Through the substitute driver's negligence, the van collided with the plaintiff's car and caused damage. Fox JA held the employer of the driver/servant liable for the damage, on the grounds that the vehicle was being used for the employer's purposes and the driver/servant 'was present when the negligent driving was going on, and in a position to control the substitute driver'.<sup>82</sup> The submission that 'the owner of a vehicle is liable only if his authorised driver allows an incompetent substitute to drive the vehicle' was rejected.

## LIABILITY OF BAILEES

Where goods are entrusted to a bailee, he will be liable for any loss or damage to the goods caused by his servant, whether the servant was acting within the course of his employment or not.<sup>83</sup>

*Bowen v Phillips*<sup>84</sup> illustrates the position. In this case, B took his car to P's garage to have it greased and sprayed. On the directions of P, B left the car with H, who was employed by P to do such work. Some time later, H drove the car out of the garage for his own purposes and damaged it. Rennie J held that there was a relationship of bailor and bailee for reward between B and P. Since P had entrusted his servant, H, with the responsibility for custody of the car, P was liable for the damage, notwithstanding that H was 'on a frolic of his own'. He said:

In directing the bailor to deliver the car to the servant, the master must be taken to have entrusted the servant with the responsibility of custody of the car. Once that has been established and it can be shown that the servant did something which was inconsistent with the bailment and which resulted in damage to the thing bailed, the master will be liable for such damage and it matters not that the damage was done while the servant

81 (1972) 12 JLR 883.

82 *Ibid.*, p 885.

83 The bailee is also liable for the default of an independent contractor to whom he entrusts the goods. It is not sufficient for the bailee to plead that he entrusted the goods to an apparently reputable contractor: *Kelly v Big Ben Ltd* (1986) Supreme Court, The Bahamas, No 404 of 1980 (unreported), *per* Georges CJ.

84 (1957) 7 JLR 94 (Court of Appeal, Jamaica).

was engaged on a frolic of his own. This seems to us to be the effect of the decisions in *Aitchison v Page Motors Ltd*<sup>[85]</sup> and *Coupe Co v Maddick*.<sup>[86]</sup> Dealing with this branch of the law, *Paton on Bailment in the Common Law*, 1952 edition, p 182, states:

There has been much confusion concerning the liability of a bailee for the acts of a servant. If a chauffeur, without authority and on a frolic of his own, takes out his master's car and negligently injures a pedestrian, the master is not liable, as the servant is acting outside the course of employment. If the car is one bailed to the master, and the servant, again on a frolic of his own, takes out the car and damages it, the master is liable or not according to whether he entrusted that servant with the responsibility of custody. If the servant was not charged with the responsibility of keeping that car, the master is not liable if the servant takes it out in an unauthorised way; but if the responsibility has been entrusted to the servant, the very act of taking the car is a breach of the implied terms of the bailment.

In (1936) 52 LQR 310, [it is stated] as follows:

*Aitchison v Page Motors Ltd*<sup>[87]</sup> belongs to that type of case in which the result of the judgment is inevitable from the standpoint of convenience and common sense, but which, nevertheless, requires some rather difficult legal reasoning before it can be reached. The plaintiff sent her car to the defendants, garage proprietors, to be repaired, and they, with her consent, sent it to the manufacturers. When it had been repaired, the defendants' service manager went to fetch it back from the manufacturers, but, instead of returning at once, he used the car for his own purposes, with the result that it was wrecked four hours later in an accident. Were the defendants liable for the loss of the car? At the time of the accident, the manager obviously was not acting as the defendants' servant: if he had negligently injured a third person, the defendants would not have been liable. This, however, did not relieve the defendants of liability to the plaintiff, for their breach of duty to her had begun four hours back. As bailees of the car, it was their duty to use reasonable care to see that the car was kept safely and this duty they had delegated to the service manager: therefore, at the moment when he took the car for his own purposes, the defendants became absolutely liable for any injury which the car might sustain. It was as if the manager had, in breach of his duty of care, allowed a third person to borrow the car. The defendants were therefore liable, not because the manager had driven the car negligently, but because he had not carried out his duty of returning the car to the garage. In his interesting judgment, Macnaghten J referred to the Scots case, *Central Motors (Glasgow) Ltd v Cessnock Garage and Motor Co*,<sup>[88]</sup> in which a nightwatchman in charge of the defendants' garage took out a car for his own purposes and damaged it in a collision. It was held in that case that the defendants were liable, as they had delegated to the watchman their duty of keeping the car safely and he had failed to do so. *Sanderson v Collins*,<sup>[89]</sup> which at first sight seems to reach a different conclusion, can be distinguished, as in that case the defendant's coachman, who took out for his own purposes the dog cart which had been lent to the defendant by the plaintiff, had not been entrusted with the care of the cart.

There exist in the instant case all the factors that go to establish liability in the bailee—the entrusting of custody to the servant and the doing by the servant of

85 (1936) 52 TLR 137.

86 [1891] 2 QB 413.

87 (1936) 52 TLR 137.

88 1925 SC 796.

89 [1904] 1 KB 628.

something which is inconsistent with the bailment, from which damage resulted to the thing bailed.

At one time it was thought that an employer was not liable for his servant's fraud or theft committed against the plaintiff, if such wrongful act were carried out solely for the servant's own benefit and not for that of his employer.<sup>90</sup> But the leading case of *Lloyd v Grace, Smith and Co*<sup>91</sup> settled that the employer may indeed be liable in such circumstances.<sup>92</sup> The facts of that case were that the defendants, a firm of solicitors, employed a managing clerk, who was authorised to do conveyancing work for the firm. The clerk induced the plaintiff, who owned a number of properties, to instruct him to sell the properties. He then persuaded her to execute two documents, which he falsely told her were necessary for the sale, but which in fact were conveyances of the properties to himself. He then dishonestly sold the properties and misappropriated the proceeds. The House of Lords held that the defendants were liable for the fraud of their servant. It was immaterial that the fraud was perpetrated by the clerk for his own purposes and that the defendants derived no benefit from it.

The principle in the *Lloyd* case was applied by the Privy Council to a quite different set of circumstances in *United Africa Co Ltd v Owoode*,<sup>93</sup> Here, the defendant, a transport contractor, sought business from the plaintiffs. He introduced to them two men whom he said were his driver and clerk, and stated that whenever the plaintiffs had any goods to be transported they should give the goods to the two men. Goods were later given by the plaintiffs to the two men for carriage to one of the plaintiffs' branches up-country, but they were never delivered, and the driver and clerk were subsequently convicted of stealing the goods. The plaintiffs claimed that the defendant was vicariously liable for the conversion of the goods by his servants, and the Privy Council, reversing the West African Court of Appeal and agreeing with the trial judge, held that he was liable. In the words of Lord Oaksey:<sup>94</sup>

*Lloyd v Grace, Smith & Co* establishes the principle that a master is liable for his servant's fraud perpetrated in the course of the master's business, whether the fraud was committed for the master's benefit or not. The only question is whether the fraud was committed in the course of the servant's employment. In that case, it was clearly in the course of the servant's employment, since it was the fraud of a solicitor's clerk in the solicitor's office on the business of the solicitor's client... In the present case, the fair inference from the facts proved is that the goods were committed expressly to the defendant's servants and that they converted the goods whilst they were on the

90 *Barwick v English Joint Stock Bank* [1861–73] All ER Rep 194.

91 [1912] AC 716.

92 In *Bryan v Lindo* (1986) 23 JLR 127 (Court of Appeal, Jamaica), Carberry JA (p 136) explained the basis of an employer's vicarious liability for the deliberate criminal conduct of his employee thus: 'What is at issue is the question: When, if ever, is a master liable for deliberate criminal action of his servant? A study of the cases seems to show that the master may be so liable if the act is one which arises either in the course of the servant's employment or is within his real or ostensible authority, or is so closely connected with the work that the servant is employed to do that it may fairly be regarded as a wrongful and unauthorised way of doing it. It can thus be said that over the years there has been a growing tendency to hold the master liable, even where the act was not only not one for his benefit, but was done entirely for the servant's benefit.'

93 [1957] 3 All ER 216.

94 *Ibid*, p 217. The onus of disproving that bailed goods were lost as a result of their being stolen by an employee of the bailee rests on the bailee: *National Commercial Bank of Trinidad and Tobago Ltd v Sentinel Security Services Ltd* (1996) 50 WIR 442, p 445, per de la Bastide CJ.

journey which the defendant had undertaken to carry out... The conversion, therefore, was...in the course of the employment of the defendant's servants.<sup>95</sup>

## OTHER INTENTIONAL WRONGFUL ACTS

In some more recent cases involving intentional wrongdoing by employees, the courts have been more than ready to hold that such employees were acting outside the course of their employment, thus absolving the employers from liability. In one case, where a cleaner who was employed by the defendants used the plaintiff's telephone to make unauthorised international calls to the tune of £1,411, it was held that the defendants were not vicariously liable because the employee was employed to clean telephones, not to use them, and, in making the calls he had done an unauthorised act which was entirely outside the scope of his employment.<sup>96</sup>

Another example is the Jamaican case of *General Engineering Services Ltd v Kingston and St Andrew Corp.*<sup>97</sup>

### **General Engineering Services Ltd v Kingston and St Andrew Corp [1988] 3 All ER 867, Judicial Committee of the Privy Council, on appeal from the Court of Appeal, Jamaica**

The fire brigade was called to a fire at the plaintiff's premises. In furtherance of an industrial dispute, the firemen deliberately drove slowly, sometimes stopping, and, by the time they arrived at the scene, the building and its contents were completely destroyed. If they had taken the normal time to reach the fire (about three and a half minutes), it could have been extinguished with little damage to the property. The trial judge held that the wrongful act and breach of duty on the part of the firemen was not within the course of their employment and the defendant was, therefore, not vicariously liable. The Jamaican Court of Appeal upheld this decision. The Privy Council affirmed the decision of the Court of Appeal. Lord Ackner said:

It is of course common ground that a master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. Further, it is well established that the act is deemed to be so done if it is either: (1) a wrongful act authorised by the master; or (2) a wrongful and unauthorised mode of doing some act authorised by the master. Mr Cotran [counsel for the plaintiff/appellant] contended that the conduct of the members of the fire brigade could properly be categorised as a wrongful and unauthorised mode of doing some act, that is, driving to the scene of a fire, which was authorised by the defendants, their employer. He relied upon the much quoted and approved passage in *Salmond and Heuston on the Law of Torts*, 19th edn, p 521:

But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes—although improper modes—of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. If a servant does negligently that which he was

95 A carrier whose servant or agent destroys, damages or steals goods bailed to the carrier may also be liable as bailee of the goods: *Morris v CW Martin and Sons Ltd* [1966] 1 QB 716; *Balkaran v Purneta* (1967) High Court, Trinidad and Tobago, No 1262 of 1965 (unreported).

96 *Heasmans v Clarity Cleaning Co Ltd* [1987] IRLR 286. See also *Irving v The Post Office* [1987] IRLR 289.

97 See Cumberbatch, J (1992) 24 Bracton LJ 70.

authorised to do carefully, or if he does fraudulently that which he was authorised to do honestly, or if he does mistakenly that which he was authorised to do correctly, his master will answer for that negligence, fraud or mistake. On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for, in such a case the servant is not acting in the course of his employment but has gone outside of it.

Their Lordships have no hesitation in agreeing with the unanimous decision of the Court of Appeal, upholding that of Malcolm J, that the members of the fire brigade were not acting in the course of their employment when they, by their conduct described above, permitted the destruction of the building and its contents. Their unauthorised and wrongful act was so to prolong the time taken by the journey to the scene of the fire as to ensure that they did not arrive in time to extinguish it before the building and its contents were destroyed. Their mode and manner of driving—the slow progression of stopping and starting—was not so connected with the authorised act, that is, driving to the scene of the fire as expeditiously as reasonably possible, as to be a mode of performing that act...

Here, the unauthorised and wrongful act by the firemen was a wrongful repudiation of an essential obligation of their contract of employment, namely, the decision and its implementation not to arrive at the scene of the fire in time to save the building and its contents. This decision was not in the furtherance of their employer's business. It was in furtherance of their industrial dispute, designed to bring pressure upon their employer to satisfy their demands, by not extinguishing fires until it was too late to save the property. Such conduct was the very negation of carrying out some act authorised by the employer, albeit in a wrongful and unauthorised mode. Indeed, in preventing the provision of an essential service, members of the fire brigade were, by virtue of the provisions of the Jamaican Labour Relations and Industrial Disputes Act, guilty of a criminal offence.

## VEHICLE OWNERS AND CASUAL AGENTS

As we have seen, generally a person will be vicariously liable only where the tortfeasor is that person's servant acting in the course of his employment, and several examples have been considered of the liability of vehicle owners for the negligent driving of their servants, for example, van and truck drivers employed as such.<sup>98</sup> However, an important extension of the doctrine of vicarious liability has been developed on grounds of public policy in order to fix liability upon the owner of a vehicle for damage caused by the negligent driving of such vehicle by persons who are not servants but merely 'casual agents' of the owner, such as the owner's wife, son, daughter, friend or stranger, where the agent drives wholly or partly for the purposes or business of the owner. As Denning LJ explained:<sup>99</sup>

It has often been supposed that the owner of a vehicle is only liable for the negligence of the driver if that driver is his servant acting in the course of his employment. That is not correct. The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes.

<sup>98</sup> See above, pp 319 *et seq.*

<sup>99</sup> *Ormrod v Crosville Motor Services Ltd* [1953] 2 All ER 753, pp 754, 755.

The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver.

### Wholly or partly on the owner's business

Just as a master's liability for his servant's tort is limited to acts committed during the course of the servant's employment, so is the vehicle owner liable only where the casual agent was driving *for some purpose of the owner*. Thus, for example, if a father asks his son to drive to a store in the father's car to pick up some crates of beer for the father, the father will be liable for any damage caused by the son's careless driving to or from the store; but he will not be liable where the son, with or without his permission, uses the car for some purpose of the son's. For example, in *Hewitt v Bonvin*,<sup>100</sup> where a father allowed his son to use his car to take the son's girlfriend home, the father was held not liable for injury caused by the son's negligent driving.

In *Nicholls v Tutt*,<sup>101</sup> The Court of Appeal of the Eastern Caribbean States held that the owner of a car was vicariously liable for the negligent driving of a mechanic who had been asked by the owner to test drive the vehicle after carrying out repairs. The basis of the owner's liability was that the mechanic was driving as his agent.

In *Harris v Hall*,<sup>102</sup> on the other hand, the defendant left her car with a garage owner for body repairs. When the body work had been completed, the car was being driven to another location for 'ducoing', when it mounted the sidewalk and knocked the infant plaintiff down. The accident was caused solely by the negligence of the driver, an employee of the garage owner. It was held by the Jamaican Court of Appeal that the defendant was not liable for the negligence of the driver, as the latter was not driving as her agent at the material time. Forte JA explained the position thus:

In the instant case, there is no evidence that could base a finding that the owner either expressly or impliedly permitted the driver to drive her car... Here, the owner had, at the time of leaving her car for repairs, given over control and custody of the car to the garage owner, who thereafter had the right and duty of control over it. The responsibility for any act of negligence in driving the car while it was in the custody of the garage owner would not attach to the owner, as those were circumstances in which the owner had abandoned her right and given up possession and control to the garage owner. The evidence accepted by the learned judge shows that the owner was unaware of the system at the garage and was satisfied that all the repairs would take place at the site on Gold Street, where she had turned over her car and its keys to the garage owner. She did not expect the car to be removed from the premises, and specifically, not knowing that the painting would take place elsewhere, did not give any permission for the car to be driven to those other premises. She did not know the driver, and consequently had never spoken to him, the only person she did her transaction with being the garage owner.

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100 [1940] 1 KB 188.

101 (1992) 41 WIR 140 (judgment delivered by Floissac CJ).

102 (1997) Court of Appeal, Jamaica, Civ App No 31 of 1993 (unreported); cf *Emanuel v Grove* (1991) High Court, Dominica, No 94 of 1989 (unreported).

Accordingly, it was the garage owner in this case who was vicariously liable for the act of negligent driving, not the owner of the car.

It was held in *Ormrod v Crosville Motor Services Ltd*<sup>103</sup> that it is sufficient for liability if the driver was driving *partly* for the owner's purposes at the material time. In this case, the owner of a car, who had asked a friend to drive the car from Liverpool to Monte Carlo, where they were to begin a continental holiday together, was held liable for the negligent driving of the friend during the course of the journey. The basis of the court's decision was that the journey was undertaken partly for the purposes of the owner.

On the other hand, the leading case of *Morgans v Launchbury*<sup>104</sup> established that, in order to make the owner of a vehicle vicariously liable, it was not sufficient to show that the owner had an 'interest or concern' in the safety of the driver and/or the vehicle. Rather, it was necessary to show that the driver was driving on the business, wholly or partly, of the owner, 'under delegation of a task or duty'. In *Morgans*, Mrs M lent her car, which was registered and insured in her name, to her husband, M, so that M could go out with his friends on a 'pub crawl'. M had promised Mrs M that, should he ever become unfit to drive through drink, he would ask another person to drive. During the outing, M asked C to drive. C drove carelessly and, in an ensuing accident, M and C were killed and the plaintiffs, who were passengers, were injured. They sought to hold Mrs M liable as owner of the vehicle.

The Court of Appeal held Mrs M liable.<sup>105</sup> Lord Denning MR based his reasoning on the 'family car' or 'matrimonial car' principles, which have been widely adopted in the US. According to the family car principle, the owner of a vehicle will be vicariously liable for the negligent driving of any member of his or her family to whom he or she lends the vehicle; alternatively, under the matrimonial car principle, a spouse who owns a car will be vicariously liable for the negligent driving of that car by the other spouse. The 'family' and 'matrimonial' car principles are designed to ensure that the victim of negligent driving will be able to sue the person who has third party insurance cover, which, invariably, will be the owner of the vehicle.

The reasoning of Lord Denning was, however, decisively rejected by the House of Lords, which held that the court was not entitled to sanction so radical a departure from the established principle, which was that the owner of a vehicle will be vicariously liable only where the driver was driving for some purpose of the owner. In the court's view, any such change in the law would have to be introduced by the legislature, after due investigation into the implications for insurance practice. On the facts of the case, Mrs M was not vicariously liable, as the pub crawl was undertaken solely for the purposes of M and his friends, and it was insufficient that Mrs M had an 'interest or concern' in the safe return of M and the vehicle.

Two Caribbean examples of the application of these principles are *Hopkinson v Lall* and *Avis Rent-A-Car v Maitland*.

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103 [1953] 2 All ER 753.

104 [1973] AC 127.

105 *Launchbury v Morgans* [1971] 2 QB 245.

**Hopkinson v Lall (1959) 1 WIR 382, Federal Supreme Court,  
Civil Appellate Jurisdiction, British Guiana**

The plaintiff/appellant was injured when a car in which he was a passenger and which was being driven by R, a friend of his, collided with a concrete post. The appellant sought to make the defendant/respondent, the owner of the car, liable for R's negligent driving, contending that R was, at the time of the accident, acting as the respondent's agent. There was no evidence as to the purpose for which R had borrowed the car from the respondent, but it was proved that, on the night of the accident, R had driven himself and the appellant to a club in Georgetown, where they had dinner, and that it was whilst returning from the club to the place where he was to meet the respondent that the accident happened.

*Held*, since the journey was undertaken solely for the purposes of the appellant and R, and not for any purposes of the respondent, the respondent was not vicariously liable for the negligence of R. Lewis J said:

It was urged on behalf of the appellant that, on the authority of *Barnard v Sully*,<sup>[106]</sup> in the absence of any other evidence as to the purpose for which Rodrigues took the car from Queen's College, he must be presumed to have been driving it as the respondent's agent, and that, as in this case the respondent had not called or given evidence in rebuttal of that presumption, the agency must be deemed to have continued up to the moment of the collision. In my view, *Barnard's* case only applies where the court finds that a vehicle was negligently driven and that the defendant was its owner, and is left without further information. That is not the position in this case, for it was clearly proved, and admitted in argument, that the drive from the appellant's home along the East Coast and to the Cactus Club was undertaken solely for the pleasure of Rodrigues and the appellant and in no way on the business of the respondent.

But, it is said, there is evidence that the respondent had told Rodrigues to 'turn up' or to 'come back' for him at Queen's College, and it may be inferred from this that Rodrigues was carrying out the instructions of the respondent to bring the car back for the respondent's use, so that at any rate the respondent would have an interest in the return journey. It was submitted that in such circumstances the respondent would be liable for Rodrigues' negligence. In support of this proposition, counsel for the appellant relied on the case of *Ormrod v Crosville Motor Services Ltd...*<sup>[107]</sup>

I regard the facts of this case as being materially different from those of *Ormrod's* case, where the main purpose for which the driver set out on his journey was to comply with the owner's request that he should drive the car, containing the owner's suitcase, from Birkenhead to Monte Carlo. I do not read *Ormrod's* case as laying down a rule that, wherever it is intended that on the completion of one journey a vehicle is to be used for the joint purposes of the owner and the driver, the owner must be deemed to have such an interest in the first journey as to make him liable for the driver's negligence. The instant case appears rather to fall within the exception mentioned by Lord Denning, where he says:<sup>[108]</sup>

The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern: see *Hewitt v Bonvin*.<sup>[109]</sup>

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106 (1931) 47 TLR 557.

107 [1953] 2 All ER 753.

108 *Ibid.*, p 755.

109 [1940] 1 KB 188.

**Avis Rent-A-Car v Maitland (1980) 32 WIR 204,  
Court of Appeal, Jamaica**

FH hired a car from the appellant for an unspecified period. He was required to bring the car for checking at the end of each week. He was also required to make a weekly payment for the hiring. While FH was driving the car on a 'mission', namely, carrying out private investigation work, the car went out of control and crashed. FH's passenger, GH, was killed. The accident was caused entirely by the negligence of FH. The trial judge held that FH was driving the car as the appellant's agent, since 'where a car rental firm hires a car to any person by way of business and under an arrangement as the one proved in this case, the hirer would not be driving merely for his own benefit. ... The driving of the car is of benefit to the firm renting the car'.

*Held*, on appeal, FH was not driving on the appellant's business at the material time and he was not the appellant's agent. Zacca P (Ag) stated:

The plaintiff/respondent argued that: (a) the driver of the car was driving not only for his benefit but also for the benefit of the owner, in that the owner would be making a profit whilst the car was being driven and that he was obliged to bring in the car once weekly for checking; and (b) the appellant delegated the task of driving its vehicle to persons who hire it. In these circumstances, it was argued that Henry was the agent of the appellant.

In our view, the respondent's case must fail on the facts of this case. The fact that the appellant may be making a profit whilst the car was being driven by Henry does not mean that he was driving the car for the owner's purposes in pursuance of a task or duty delegated by the company to him. The law is stated thus in *Halsbury's Laws of England*, 3rd edn, Vol 28, para 71, p 71:

The owner is, however, responsible only where he has delegated to the driver the execution of a purpose of his own over which he retains some control and not where the driver is a mere bailee, engaged exclusively upon his own purpose.

*Morgans v Launchbury*<sup>[110]</sup> is the leading case on this question. The law is accepted as being well settled. Lord Wilberforce states:<sup>[111]</sup>

For I regard it as clear that in order to fix vicarious liability upon the owner of a car in such a case as the present, it must be shown that the driver was using it for the owner's purposes, under delegation of a task or duty. The substitution for this clear conception of a vague test based on 'interest' or 'concern' has nothing in reason or authority to commend it. Every man who gives permission for the use of his chattel may be said to have an interest or concern in its being carefully used, and, in most cases if it is a car, to have an interest or concern in the safety of the driver, but it has never been held that mere permission is enough to establish vicarious liability... I accept entirely that 'agency' in contexts such as these is merely a concept, the meaning and purpose of which is to say 'is vicariously liable', and that either expression reflects a judgment of value—*respondet superior* is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted

110 [1973] AC 127.

111 *Ibid*, p 135.

rules) if he has no control over the actor, has not authorised or requested the act, or if the actor is acting wholly for his own purposes. These rules have stood the test of time remarkably well. They provide, if there is nothing more, a complete answer to the respondent's claim against the appellant.

It is to be observed that Lord Denning MR, in his judgment in the Court of Appeal in the same case of *Launchbury v Morgans*, had this to say:<sup>[112]</sup>

One word of caution, however, I must give about this principle. The words 'principal' and 'agent' are not used here in the connotation which they have in the law of contract (which is one thing), or the connotation which they have in the business community (which is another thing). They are used as shorthand to denote the circumstances in which vicarious liability is imposed. Stated fully, the principle is as I stated it in *Ormod v Crosville Motor Services Ltd*,<sup>[113]</sup> slightly modified to accord with the way in which Devlin J put it<sup>[114]</sup> and approved by Diplock LJ in *Carberry v Davies*:<sup>[115]</sup>

The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his wife, his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or in the owner's interest, the owner is liable for any negligence on the part of the driver. The owner only escapes liability when he lends it out or hires it out to a third person to be used for purposes in which the owner has no interest or concern.

When a company or an individual in the course of its business hires a motor vehicle to a person on terms that, during the period of hire, the vehicle should be driven by the servant or agent of the owner, responsibility for the negligent driving of that motor vehicle will in ordinary circumstances devolve upon the owner (*Mersey Docks and Harbour Board v Coggins and Griffith (Liverpool) Ltd*).<sup>[116]</sup> An entirely different situation arises in law when such a company or individual hires the motor vehicle on the condition that the motor vehicle can be driven by the hirer for purposes exclusively determined by the hirer, in which the benefits of the venture accrue wholly to the hirer. In this second case, there is no joint interest between owner and hirer in the outcome of the venture, and the hireage is not dependent upon or affected by the profitability or otherwise of the venture. Such is the position in the instant case, where the owner retained an interest in its motor vehicle, charging a fee for wear and tear and stipulating for adequate maintenance but otherwise entirely disinterested in the purposes for which the motor vehicle was used. We accept the views on the law of vicarious responsibility expressed in *Morgan's* case as the correct principle to be followed.

We are of the opinion that legislation is urgently necessary to protect members of the public who may suffer personal injury and damage due to the negligence of drivers of 'U-Drive' cars. The legislature has the provisions of the Motor Vehicle Insurance (Third Party Risks) Law which can act as a guide for future legislation, and we are of the opinion, as the court was in *Morgan's* case, that it is too late now for the courts to extend the boundaries of agency to compensate one in the respondent's position for the injury done to him.

We hold that the appellant is not vicariously liable for the negligent driving of Henry. On the facts of this case, Henry cannot be said to have been driving as the agent of the appellant.

112 [1971] 2 QB 245, p 255.

113 [1953] 2 All ER 753, p 755.

114 [1953] 1 All ER 711, p 712.

115 [1968] 2 All ER 817, p 819

116 [1947] AC 1.

## THE PRESUMPTION OF SERVICE OR AGENCY

Where the plaintiff seeks to recover damages from the owner of a vehicle in respect of the negligent driving of that vehicle by a person other than the owner, the plaintiff has the burden of proving:

- (a) that the negligent driver was the servant or agent of the owner; and
- (b) that the act of negligent driving occurred during the course of the driver's employment or agency.

The plaintiff's task may be assisted, however, by a rule of evidence first propounded in *Barnard v Sully*<sup>117</sup> and later adopted by the Jamaican Court of Appeal in *Matheson v Soltau*,<sup>118</sup> to the effect that where a plaintiff in an action for negligence proves that damage has been caused to him by the defendant's vehicle, *the fact of ownership of the vehicle is prima facie evidence that the vehicle was being driven at the material time by the servant or agent of the owner, or by the owner himself*. In other words, there is an initial presumption of service or agency which the defendant owner must rebut if he is to avoid liability.

There are many cases in the Commonwealth Caribbean in which the rule in *Barnard v Sully* or *Matheson v Soltau* has been invoked, of which *South v Bryan and Confidence Bus Service Ltd* is an example; and the scope and effect of the principle was reviewed by the Privy Council in *Rambarran v Gurrucharran*.

### **South v Bryan and Confidence Bus Service Ltd [1968] Gleaner LR 3, Court of Appeal, Jamaica**

B was employed by the bus company as a driver. He had general authority to drive the company's vehicle, such authority not being limited to driving on the official route. Whilst reversing the bus at a gas station about a quarter of a mile from the nearest point on his normal route, B negligently collided with and damaged articles belonging to the plaintiff.

*Held*, the company was vicariously liable for B's negligence. Moody J said:

There is no precise evidence as to what took the driver of this bus to this gas station, and there is no evidence to indicate that he was acting on a frolic of his own... The presumption in *Matheson v Soltau*<sup>[119]</sup> that the vehicle was on the business of the master was not rebutted... The case of *Storey v Ashton*<sup>[120]</sup> can readily be distinguished on the basis that the evidence was clear that the driver was engaged on the business of the clerk. There is no such clarity in the circumstances of this case, and the mere fact that a driver deviates from his fixed route in order to carry out some business of his own which is not stated would not remove the liability of the master in respect of the negligence of the driver on such an occasion.

<sup>117</sup> (1931) 47 TLR 557.

<sup>118</sup> [1933] JLR 72.

<sup>119</sup> *Ibid.* Similarly, in *Alphonso v Ramnath* (1997) 56 WIR 183, p 188, Satrohan Singh JA, in the Court of Appeal of the Eastern Caribbean States, pointed out that: 'there is a presumption that a vehicle is being used for the master's purposes if the servant has authority to use it at all. The onus then shifts to the owner to show that the employee was acting outside that scope (*Laycock v Grayson* (1939) 55 TLR 698). This makes good sense because Knowledge of the purpose of such use would be peculiarly within the bosom of the owner.'

<sup>120</sup> (1869) LR 4 QB 476.

**Rambarran v Gurrucharran [1970] 1 All ER 749, Judicial  
Committee of the Privy Council, on appeal from the  
Court of Appeal, Guyana**

A car belonging to the defendant/appellant, a farmer, collided with and damaged the plaintiff/respondent's car, owing to the negligent driving of the appellant's son, L. The car was originally purchased by the appellant for the use of his whole family, and L and his three brothers had a general permission to use it at any time. The appellant was not aware that L had taken the vehicle out on the day of the accident. The Court of Appeal of Guyana held that the presumption that L was driving the car as agent of the appellant had not been rebutted, since the appellant had not given evidence as to the purpose of the journey which was being made when the collision occurred. Furthermore, in the opinion of the court, the presumption had been strengthened by the fact that, on the day of the collision, L was driving with the appellant's permission, under an 'ever-existing authority'.

*Held*, on appeal to the Privy Council, ultimately the question of agency is one of fact and the burden of proof of agency lies on the party who alleges it. In the present case, the inference of agency arising from proof of ownership was displaced by the evidence that L had a general permission to use the car, since it was impossible to assert, merely because the appellant owned the car, that L was not using it for his own purposes as he was entitled to do. Lord Donovan said:

In *Barnard v Sully*,<sup>[121]</sup> Mr Barnard sued Mr Sully in the county court for damage done to his van through the negligent driving of Mr Sully's motor car. It seems to have been accepted that Mr Sully was not driving himself, and he denied that the driver was his servant or agent. In the absence of evidence contradicting this denial, the county court judge withdrew the case from the jury. Mr Barnard appealed to a Divisional Court of the King's Bench, but Mr Sully did not appear and was not represented. Allowing the appeal, Scrutton LJ, with whom Greer and Slesser LJJ concurred, said:

No doubt, sometimes motor cars were being driven by persons who were not the owners, nor the servants or agents of the owners... But, apart from authority, the more usual fact was that a motor car was driven by the owner or the servant or agent of the owner, and therefore the fact of ownership was some evidence fit to go to the jury that at the material time the motor car was being driven by the owner of it or by his servant or agent. But it was evidence which was liable to be rebutted by proof of the actual facts.

Where no more is known of the facts, therefore, than that, at the time of an accident, the car was owned but not driven by A, it can be said that A's ownership affords some evidence that it was being driven by his servant or agent. But when the facts bearing on the question of service or agency are known, or sufficiently known, then clearly the problem must be decided on the totality of the evidence.

In *Hewitt v Bonvin*,<sup>[122]</sup> a motor car driven by the son of Mr Bonvin was involved in an accident and a passenger in the car was killed as a result. The administrator of the deceased sued Mr Bonvin senior for damages. Owing to a previous accident, Mr Bonvin senior told both his sons that they were never to drive his car without his permission. He did, however, authorise his wife to give such permission, and on this occasion she gave it to the son concerned, who wished to take home two girlfriends whom neither the father nor the mother knew. Lewis J held that, in the circumstances, the son, John

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121 (1931) 47 TLR 557.

122 [1940] 1 KB 188.

Bonvin, was driving the car as the servant or agent of his father, and gave judgment against the father. This was reversed in the Court of Appeal. It was there held: (1) that if the plaintiff were to make Mr Bonvin senior liable, he must establish that the son was driving the car at the time as the servant or agent of the father; (2) that this cannot be established by mere proof that the son was driving a vehicle which at the time was the property of his father, although, in the absence of any further explanation, that might be some evidence of the proposition; (3) the evidence in the case showed no more than that the son was lent the father's car, and the father had no interest or concern in what the son was doing; (4) the fact that the son drove with the consent of the father (given through the mother) did not of itself establish service or agency; (5) ultimately, the question of service or agency is always one of fact.

A case raising an issue similar to that in the instant case arose in New Zealand in *Manawatu County v Rowe*.<sup>[123]</sup> There, the wife of Mr Rowe, while driving her husband's car with his consent, was in collision with a vehicle driven by one of the appellant county's servants. Mr Rowe brought an action against the county, claiming damages. The trial judge held that both drivers were guilty of negligence, Mr Rowe's wife being 75% to blame. The question then arose whether her negligence could operate to reduce the damages otherwise recoverable by her husband; and this depended on whether at the time of the accident the wife was driving as the servant or agent of her husband. It was held both by the trial judge and a majority of the New Zealand Court of Appeal that she was not and that Mr Rowe was entitled, therefore, to recover the damages awarded against the county in full.

After considering the English cases of *Barnard v Sully* and *Hewitt v Bonvin* and certain New Zealand and Australian cases dealing with the same problem, the Court of Appeal stated the principles which it deduced therefrom thus: (1) the onus of proof of agency rests on the party who alleges it; (2) an inference can be drawn from ownership that the driver was the servant or agent of the owner, or, in other words, that this fact is some evidence fit to go to a jury. This inference may be drawn in the absence of all other evidence bearing on the issue or if such other evidence as there is fails to counterbalance it; (3) it must be established by the plaintiff, if he is to make the owner liable, that the driver was driving the car as the servant or agent of the owner and not merely for the driver's own benefit and on his own concerns. It is also interesting to observe that Hutchinson J, one of the majority who gave judgment for Mr Rowe, remarked in the course of his judgment that the fact that his wife had the right to use the car whenever she pleased went a long way to destroy any presumption of agency on her part. In coming to their conclusion, the New Zealand Court of Appeal cited certain Australian decisions, where the like approach to similar problems has been adopted.

Their Lordships might also make reference to a recent Australian decision, *Jennings v Hannon*,<sup>[124]</sup> in which the New South Wales Court of Appeal (Walsh, Jacobs and Holmes JJA) seem to have decided that agency can in some cases be properly inferred from ownership, but that such inference is rebuttable...

In the present case, it is clear that any inference, based solely on the appellant's ownership of the car, that Leslie was driving as the appellant's servant or agent on the day of the accident would be displaced by the appellant's own evidence, provided it were accepted by the trial judge, which it was. Leslie had a general permission to use the car. Accordingly, it is impossible to assert, merely because the appellant owned the car, that Leslie was not using it for his own purposes as he was entitled to do. The occasion was not one of those specified by the appellant as being an occasion when,

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123 [1956] NZLR 78.

124 (1969) 89 WN (Pt 2) (NSW) 232.

for one of the appellant's own purposes, a son would drive it for him. He was ignorant of the fact that the son had taken the car out that day; and he did not hear of the accident until a fortnight after it happened. In the face of this evidence, the respondent clearly did not establish that Leslie was driving as the appellant's servant or agent. He had to overcome the evidence of the appellant, which raised a strong inference to the contrary. The burden of doing this remained on the respondent and the trial judge held that he had failed to discharge it. His conclusion on this point was one of fact and he had ample evidence to support it.

In the Court of Appeal, Sir Kenneth Stoby C said that, to rebut the *prima facie* evidence of service or agency, 'the defendant who alone knows the facts must give evidence of the true facts'; and Persaud JA commented that:

...the court is left without further information, in the sense that the [appellant] has not...given any evidence as to the journey which was being made at the time of the accident.

These passages in the judgment of the majority of the Court of Appeal would seem to endorse one of the respondent's grounds of appeal, namely, that the appellant:

...failed to lead any evidence whatever to show the circumstances in which his motor car...was being used at the time of the accident, and that such matters must be peculiarly within the knowledge of himself and his family and his servants and/or agents.

The argument based on this assertion was misconceived. The appellant, it is true, could not, except at his peril, leave the court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of such supporting evidence as was available to him.<sup>125</sup> If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant. In any event, the complaint that the appellant led no positive evidence of the purpose of Leslie's journey comes strangely from the respondent, who could have found it out by making Leslie a co-defendant and administering interrogatories, or compelled his attendance as a witness and asked him questions about it. He did none of these things.

In his dissenting judgment, Cummings JA said:

In the instant case, as in *Hewitt v Bonvin*, the Court was not, as in *Barnard v Sully*, without further information. There was ample information to justify the inferences drawn by the learned trial judge and his conclusion that the [respondent] had failed to establish the requirements as laid down in *Hewitt v Bonvin*. Indeed, I am myself unable to draw any different inferences or arrive at any other conclusion.

Their Lordships take the same view; and while, out of respect for the learned judges of the Court of Appeal who took a different view, they have gone into this case in some detail, they can nevertheless summarise their conclusion by repeating that the question of service or agency on the part of the appellant's son, Leslie, was ultimately

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125 See, eg, *Baboolal v Bharath* (1999) High Court, Trinidad and Tobago, No S-77 of 1991 (unreported); *Glasgow v Stanley* (1999) High Court, Trinidad and Tobago, No CV 234 of 1993 (unreported).

a question of fact; and that there was ample evidence on which the trial judge could find as he did.

## LIABILITY INSURANCE

In all jurisdictions, statutory provisions require the owner of a vehicle who puts it on the road first to obtain an insurance policy covering liability to third parties.<sup>126</sup> Such policies commonly provide insurance cover for the owner and any qualified driver whom he permits to drive the vehicle. If the negligent driver is a person covered by the policy, it will not be necessary for the plaintiff to invoke the doctrine of vicarious liability in order to make the owner of the vehicle liable, as the insurance company will compensate the plaintiff under the terms of the policy. However, it may be necessary to fix the owner with vicarious liability if the offending driver or the circumstances of the journey are not covered by the policy (for example, where the driver has been disqualified from driving by a court of law, or where at the material time he was using the vehicle for business purposes but the policy covers only use for social, domestic or pleasure purposes). Alternatively, where the owner of a vehicle allows a person who is uninsured to drive the vehicle, the owner may be liable to the plaintiff for breach of statutory duty if the negligent driver cannot satisfy an award of damages to the plaintiff.<sup>127</sup>

## LIABILITY FOR INDEPENDENT CONTRACTORS

The employer of an independent contractor is generally not liable for any torts committed by the contractor or his employees in the course of the job for which he is engaged. The law considers that, since the employer cannot control the way in which the contractor does the work, it is the contractor alone who is in a position to guard against any risks incidental to the work and who must, therefore, alone be answerable for any damage caused to third parties as a result of his failure to take due precautions. Furthermore, the risk of accidents will normally be incidental to the contractor's business rather than to the employer's, and it is therefore more convenient to allow any loss resulting from damage caused to third parties to fall on the contractor, who will usually be better equipped to insure against such loss and who can easily pass on the cost of this insurance in the form of higher prices charged for his work.<sup>128</sup>

There are, however, a number of exceptions to the principle of non-liability for the torts of independent contractors, and these must now be considered briefly.

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<sup>126</sup> Eg, Motor Vehicles Insurance (Third Party Risks) Act, Ch 48:51, s 4(1) (Trinidad and Tobago); Motor Vehicles Insurance (Third Party Risks) Act, s 4(1) (Jamaica); Motor Car Insurance (Third Party Risks) Act 1943, s 3(1) (Bermuda). See *Harris v Hall* (1997) Court of Appeal, Jamaica, Civ App No 31 of 1993 (unreported); *Araujo v Smith* (1997) Court of Appeal, Bermuda, Civ App No 6 of 1997 (unreported); *Namdeo v Citizens Insurance Co Ltd* (2001); High Court, Trinidad and Tobago, No 1121 of 1999 (unreported).

<sup>127</sup> *Monk v Warbey* [1935] 1 KB 75; *Harris v Hall* (1997) Court of Appeal, Jamaica, Civ App No 31 of 1993 (unreported).

<sup>128</sup> See, generally, McKendrick, E (1990) 53 MLR 770.

## Authorisation of tort

Where X authorises, directs or instigates Y to commit a tort, both X and Y will be liable for it. This primary liability of X is not restricted to cases where Y is X's independent contractor, but applies equally where Y is X's servant or where he is a stranger to X. An example commonly given of liability for authorising an independent contractor's tort is that of the passenger in a taxi who orders the driver to drive fast or to take other risks. In such a case, both the taxi driver and the passenger will be liable for any damage caused by the former's reckless driving. Similarly, as we saw in Chapter 2, if X directs or authorises Y to arrest the plaintiff unlawfully, both X and Y will be liable for false imprisonment.

An example of such liability is the Trinidadian case of *Ramessar v Trinidad and Tobago Electricity Commission*.<sup>129</sup> Here the defendants employed a tree felling contractor to clear an area of trees and vegetation in the course of preparation for the erection of power lines. The contractor felled a number of trees in such a way as to cover the plaintiff's timber, which was lying on the ground, thus depriving the plaintiff of access to the timber for several days. The plaintiff sued the defendants for negligence.

Rees J held that the plaintiff's action was statute-barred, but the defendants would otherwise have been liable for the negligence of their independent contractor because the acts complained of were precisely what the contractor had been employed to do. He said:

It is well established that the essential ingredients of the tort of negligence are: (a) the existence of a duty to take care owing to the plaintiff by the defendant; (b) committing a breach of that duty; and (c) consequential damage. As the Commission is an artificial person created by law, it is not capable of acting *in propria persona*, but only through its servants and/or agents, and, as the facts in this case clearly indicate that Rampersad and his workmen were the actors, it becomes necessary, at the outset, to ascertain if the Commission is responsible for the acts of Rampersad and his workmen. He had engaged and paid his workers on his own behalf and not as agent for the Commission, and this in itself raises a strong presumption that Rampersad was an independent contractor. But he says that he took his orders from Rostant [the supervisor employed by the Commission], whom he considered his immediate boss. I have no doubt that Rostant paid regular visits to the forest, checking up on what work was being done from time to time, pointing out the direction in which the trees should be cut, and supervising the work generally, but that he at no time had control over the manner in which Rampersad and his workmen were to execute the work. That being so, I hold that Rampersad was an independent contractor.

Counsel for the Commission submits that an employer is not liable for the negligence of an independent contractor. Generally speaking, this is so, but I think that an employer has always been held to be liable for the contractor's negligence in the doing of the very thing he has contracted to do. As can be seen from the letter accepting the tender in the present case, the Commission engaged the services of Rampersad to cut trees along the route of its transmission lines and nothing more. It was not, therefore, any part of Rampersad's contract to remove the felled trees from the ground, and, as far as I can see, the Commission made no provision for this part of the work to be carried out. If, then, the Commission is under a duty to use care in the felling of

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129 (1966–69) 19 Trin LR (Pt IV) 103 (High Court, Trinidad and Tobago).

the trees and to see that they were not left covering the property of other licensees in the area, it cannot escape from the responsibility attaching on it by delegating the work to an independent contractor. This is how Denning LJ, as he then was, puts the matter in *Cassidy v Ministry of Health*:<sup>130</sup>

I take it to be clear law, as well as good sense, that, where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether the delegation be to a servant under a contract of service or to an independent contractor under a contract for services.

In the instant case, I hold that the Commission was responsible for the acts of Rampersad and his workmen, notwithstanding that Rampersad was an independent contractor.

It is submitted with respect that although this case admirably illustrates the principle that a person may be held liable for those acts of his independent contractor which he has authorised, the actual loss complained of—the deprivation of access to the plaintiff's timber for several days—would appear to be purely economic and, in the absence of proof of physical damage to the timber, should not in any event have been actionable in negligence (see above, pp 112–13).

### Torts of strict liability

The employer of an independent contractor will be liable where the contractor commits a tort of strict liability, such as under the rule in *Rylands v Fletcher*<sup>131</sup> or under liability for dangerous animals.<sup>132</sup>

### Negligence

In some circumstances, a duty to take care is said to be 'non-delegable',<sup>133</sup> that is, a person does not discharge his duty of care merely by appointing, instructing or supervising a competent contractor. Non-delegable duties arise where the projected work is intrinsically dangerous or hazardous and involves a high risk requiring special precautions.<sup>134</sup> One example of this principle is *Waithe v Natural Gas Corp*,<sup>135</sup> where the corporation, being authorised by statute to dig up the highway and to lay pipes thereunder, employed an independent contractor to do the work. Owing to the contractor's negligence, a hole formed in the road after pipes had been laid, and the plaintiff cyclist rode into the hole, fell and sustained injuries. Hanschell J held both the contractor and the corporation liable. He said:<sup>136</sup>

The corporation employed Duguid, an independent contractor, to excavate the highway; this work was likely to involve danger to persons using the highway. The law cast upon the corporation a duty to take care that persons passing along the

130 [1951] 1 All ER 575, p 586.

131 See above, Chapter 8.

132 See above, Chapter 9.

133 See, however, Williams, G [1956] CLJ 180.

134 *Honeywill v Larkin Bros* [1934] 1 KB 191.

135 (1960) 3 WIR 97, Supreme Court, Barbados. See also *Campbell v Kingston and St Andrew Corp* (1992) 29 JLR 476; *Dayes v Chong* (1999) Supreme Court, Jamaica, No CL D201 of 1995 (unreported).

136 *Waithe v Natural Gas Corp* (1960) 3 WIR 97, Supreme Court, Barbados, pp 98–101.

highway were not injured by the negligent performance of this work. The contractor, Duguid, may be regarded as the agent of the corporation in the performance of this duty and the corporation is liable for Duguid's negligence in his performance. In *Penny v Wimbledon UDC*,<sup>137</sup> it was said:

When a person employs a contractor to do work in a place where the public are in the habit of passing, which work will, unless precautions are taken, cause damage to the public, an obligation is thrown upon the person who orders the work to be done to see that the necessary precautions are taken, and, if the necessary precautions are not taken, he cannot escape liability by seeking to throw the blame on the contractor...

...Here, the corporation was not only under a duty to take care, but also to see that care was taken.

Another example of the principle is *Sattaur v Rapununi Development Co Ltd*,<sup>138</sup> where a stray-catcher (who was held to be an independent contractor) was employed to drive a herd of cattle along a busy public street. Owing to the stray-catcher's failure to control the cattle, a steer escaped and injured the plaintiff. The employer of the stray-catcher was held liable for the latter's negligence. Bell CJ said:<sup>139</sup>

It seems to me that the work of driving these particular cattle through the Stelling Road on the morning of 9 September 1948 in the circumstances in which they were so driven was, in the light of the facts as I have found them, necessarily dangerous or was from its nature likely to cause danger to others, unless precautions were taken to prevent such danger, and I cannot see that the defendant can escape liability by arguing that the independent contractor and his servants should have adopted a less dangerous way of carrying out such work. On the contrary, it seems to me that, notwithstanding the existence of his standing contract with the independent contractor, the defendant should have taken steps to see that due precautions were taken by the independent contractor to prevent the dangers which were attendant upon the driving of those particular cattle through the Stelling Road on that particular day.

A third example of the principle is *Seeraj v Dindial*.<sup>140</sup> In this case, D agreed to sell a large Balata tree which stood on his land to J, and they jointly employed a woodcutter to fell the tree. Owing to the woodcutter's negligence, the tree fell onto the plaintiff's house and destroyed a substantial part of it. Davis J held that the woodcutter was an independent contractor. The defendants (D and J) were liable for his negligence, because the felling of the tree so close to the plaintiff's property was an inherently dangerous operation and the defendants were under a non-delegable duty to ensure that proper care was taken. Davis J explained:

Where a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owner of that property for damage resulting to it from the failure to take proper care and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise, to do that work for him.

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137 [1899] 2 QB 72, p 76.

138 [1952] LRBG 113. See also above, p 223. Cf *Hussain v East Coast Berbice Village Council* (1979) High Court, Guyana, No 308 of 1976 (unreported).

139 *Sattaur v Rapununi Development Co Ltd* [1952] LRBG 113, p 116.

140 (1985) High Court, Trinidad and Tobago, No 469 of 1982 (unreported).

In *Brooke v Boo*<sup>[141]</sup>...the defendant let to the plaintiff a lock-up shop on the ground floor of a house adjoining that in which he himself resided. It was arranged that the defendant might enter the shop after the plaintiff had left it for the day to see that it was secure. One night, a lodger informed the defendant that he thought he smelt gas coming from the shop, and the defendant thereupon entered the shop, followed by the lodger. In the shop, a gas pipe passed down a wall and terminated in a burner. The defendant, who was old, examined the lower part of the pipe with a naked light, and the lodger, who was much younger, then got upon the counter and examined the upper part of the pipe with a naked light, when an explosion occurred which did damage to the plaintiff's goods. The defendant admitted that he desired to examine the upper part of the pipe and that he welcomed the lodger's help. It was held that the defendant was liable to the plaintiff for the damage done to her property by the negligent act of the lodger on [the ground, *inter alia*] that the defendant, having undertaken the examination, was under a duty to take reasonable care to avoid danger resulting from it, and that he could not escape liability for the consequences of his failure to do so by getting someone else to make the examination or part of it for him.

[Talbot J] stated:<sup>[142]</sup>

In my opinion, the defendant, having undertaken this examination, was under a duty to take reasonable care to avoid danger resulting from it to the shop and its contents, and, if so, he cannot escape liability for the consequences of failure to discharge this duty by getting, as he did, someone to make the examination, or part of it, for him, whether that person is an agent, or a servant, or a contractor, or a mere voluntary helper... The principle is that if a man does work on or near another's property which involves danger to that property unless proper care is taken, he is liable to the owner of the property for damage resulting to it from the failure to take proper care, and is equally liable if, instead of doing the work himself, he procures another, whether agent, servant or otherwise to do it for him.

I might add that even if the agreement between the defendants was to the effect that the second defendant was to cut the tree at his own risk, that provision could not operate to defeat the first defendant's liability to the plaintiff on the principle I have stated above. The most that such a provision could do is to enable the first defendant to claim an indemnity from the second defendant if he is found guilty of negligence (see *Bower v Peate*).<sup>[143]</sup>

It was contended by counsel for the first defendant that there is nothing inherently dangerous in the cutting down of trees, and hence the first defendant could not be guilty of negligence on the basis of the principle enunciated above. He relied on the decision in *Salsbury v Woodland*<sup>[144]</sup> to support this contention. In my view, the decision in that case lays down no such general principle as contended for by counsel for the first defendant. What that case decided was that the removal of a hawthorn tree in the circumstances in which it was removed, and having regard to its height and proximity to the highway, was not an inherently dangerous operation so as to attract the principle that the employer of an independent contractor is liable for the negligence of such contractor where the contractor is employed to do inherently dangerous work and he does it negligently. One has but to read the judgment of Sachs LJ in that case to see that he makes this point quite clearly. He says:<sup>[145]</sup>

141 [1928] 2 KB 578.

142 *Ibid*, p 587.

143 (1876) 1 QBD 321.

144 [1970] 1 QB 324.

145 *Ibid*, p 348.

In the present case, it seems clear to me that there was nothing ‘inherently dangerous’ in the operation of removing this particular hawthorn tree. Any competent workman could do it perfectly safely and without the slightest risk to the telephone wires, to the house, or to any other property, if he tackles it in the standard way; nor could any occupier of land normally foresee that there was any danger involved in such an operation or that a competent contractor could be prone to what was described as ‘extreme stupidity’. The whole position as regards ‘inherent danger’ might be very different if the case was concerned with the removal of a 60 ft tree. The appropriate operation in the instant case was, incidentally, as different from what is usually termed ‘tree felling’, as a hawthorn tree differs from the single-trunk, tall trees to which, of course, the word ‘felling’ is normally an appropriate word to apply.

I think in the circumstances of this case the appropriate word to apply to the activity embarked upon by these defendants and their workmen was ‘tree felling’. They in fact set out to fell a single-trunk tree, estimated by the second defendant (whose evidence in this connection I accept) to be about 60 to 80 ft tall, with a girth of between eight to 10 ft, and stated by the plaintiff to be a large Balata tree, standing some 10 to 15 ft from the plaintiff’s house. If that situation is not inherently dangerous, then, I ask, what is? I find and hold that these defendants embarked upon an inherently dangerous operation.



## CHAPTER 13

### GENERAL DEFENCES

The two main general defences to actions in tort are contributory negligence and *volenti non fit injuria*.

#### CONTRIBUTORY NEGLIGENCE

Contributory negligence is basically carelessness on the part of the plaintiff which combines with the defendant's negligence or breach of duty in bringing about the plaintiff's damage. In many cases, the plaintiff's negligence will have been a contributing cause of the accident which led to the damage, for example, where he steps into the road without keeping a proper lookout and is struck by a car being negligently driven by the defendant; or where the plaintiff's and the defendant's vehicles collide head-on as a result of both drivers' careless overtaking of other vehicles. But the essence of contributory negligence in law is not that the plaintiff's carelessness was *a cause of the accident*; rather, it is that it *contributed to his damage*. Thus, for example, where a plaintiff car driver carelessly rests his arm on the outside of his vehicle as he is driving, and another motorist negligently collides with the car and injures the plaintiff's arm,<sup>1</sup> or where a plaintiff motorcyclist is knocked down by a negligent motorist and suffers head injuries, owing to the fact that he is not wearing a crash helmet,<sup>2</sup> the carelessness of each plaintiff is not a cause of the accident but it does contribute to his damage. In Denning LJ's words:<sup>3</sup>

A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Contributory negligence does not involve any breach of duty owed by the plaintiff to the defendant, for 'it does not necessarily connote activity fraught with undue risk to *others*, but rather failure on the part of the person injured to take reasonable care of himself in his *own* interest'.<sup>4</sup>

A person is thus contributorily negligent if, for example, he takes a lift in a vehicle driven by a person whom he knows to be under the influence of alcohol<sup>5</sup> or in a car which he knows to have defective brakes.<sup>6</sup>

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1 *Khan v Bhairoo* (1970) 17 WIR 192, Court of Appeal, Guyana (see below, pp 364–67); *Premasagar v Rajkumar* (1978) High Court, Trinidad and Tobago, No 244 of 1974 (unreported) (see below, p 367).

2 *O'Connell v Jackson* [1972] 1 QB 270.

3 *Jones v Livox Quarries Ltd* [1952] 2 QB 608, p 615.

4 Fleming, *The Law of Torts*, 6th edn, 1983, Sydney: LBC Information Services, p 241.

5 *Owens v Brimmell* [1976] 3 All ER 765. See Symmons, CR (1977) 40 MLR 350; Gravells, NP (1977) 93 LQR 581.

6 *Gregory v Kelly* (1978) *The Times*, 15 March. See also *Dawrant v Nutt* [1960] 3 All ER 681 (passenger contributorily negligent in riding in the side-car of a motorcycle without a head light).

In a recent Trinidadian case, *Gunness v Ramdeo*,<sup>7</sup> the plaintiff and the defendant had indulged in a three-hour beer-drinking session, and some time later set off in the defendant's car with the defendant driving. The defendant lost control of the vehicle, which crashed into a wall causing injuries to the plaintiff. Marcus J held that the plaintiff had been contributorily negligent in remaining in the car when he knew the defendant was unfit to drive, and reduced the plaintiff's damages by 20%. He said:

In the instant case the plaintiff was not acting under the pressure of any legal or social duty in remaining in the car with the defendant... The risk of injury to the plaintiff's person by the defendant's perilous driving far outweighed the difficulties he probably would have encountered in obtaining alternative transportation and... dictated that the plaintiff should not have remained in the defendant's vehicle.

In *Webb v Rambally*,<sup>8</sup> a pedal cyclist was held to have been contributorily negligent in failing to move out of the path of an oncoming vehicle which was being driven recklessly by the defendant, when he had ample time in which to do so. As Theobalds J in the Jamaican Supreme Court explained:

Although it is clear from my findings that this defendant was primarily at fault, still, the plaintiff, by his own fault, was one of the causes of the injury suffered by him. Fault is used in the wider sense of an omission or failure. He failed to move out of the path of the oncoming vehicle when he had ample time in which to do so. His damages must be reduced accordingly. A clear message should be sent to pedal cyclists and pedestrians (the most vulnerable sector of the road users) that callous indifference to their own safety will not be condoned or encouraged by a full award of damages. Of course, a timely reminder is that a motorist should also exercise reasonable consideration for pedestrians and cyclists. Total lack of consideration for other road users is fast becoming endemic in our society. This plaintiff's damages are accordingly reduced by 30%. Where a man was part author of his own injury, he could not call on the other party to compensate him in full: *per* Denning LJ in *Davies v Swan Motor Co Ltd*.<sup>9</sup>

## Seat belts

It was established in *Froom v Butcher*<sup>10</sup> that a driver or front seat passenger in a car who failed to wear a seat belt and was injured in an accident was guilty of contributory negligence if his injuries could have been avoided or minimised by wearing a seat belt, even though, at that time in the UK, there was no statutory regulation making the wearing of belts compulsory. In a Cayman case, *Woods v Francis*,<sup>11</sup> a motorist was killed in a collision caused solely by the defendant's negligence. The deceased was not wearing a seat belt at the time. Summerfield CJ was of the opinion that it was 'more likely than not that the accident would have killed the deceased even if he had been wearing a seat belt', and it was not, therefore, a case where the deceased could have been held guilty of contributory negligence. However, he expressed the view that drivers and front seat passengers were under a duty to take reasonable precautions for their own safety by wearing seat belts. He said:<sup>12</sup>

7 (2001) High Court, Trinidad and Tobago, No S 1606 of 1995 (unreported).

8 (1994) Supreme Court, Jamaica, No W 101 of 1990 (unreported).

9 [1949] 1 All ER 620.

10 [1975] 3 All ER 520.

11 [1985] CILR 510 (Grand Court, Cayman Islands).

12 *Ibid*, pp 522, 523.

Although, following a recent intensive campaign to encourage the wearing of seat belts, one does see the odd driver or front seat passenger wearing his—perhaps one in 100 or less—at the time of the accident, the wearing of seat belts was about as rare as palm fringed beaches in the Antarctic... I recognise, of course, that the wearing of seat belts is not compulsory in these Islands. Nevertheless, in my view, there is a duty on drivers and front seat passengers to exercise prudence and to take all available precautions to minimise injury and diminish the chances of death in the event that there is an accident. Failure to do so should be grounds for reducing the award of damages.

In the Bahamian case of *Thurston v Davis*,<sup>13</sup> the defendant's truck collided with the plaintiff's car, due solely to the defendant's careless driving. After the collision, the plaintiff was found slumped over the steering wheel. The whole front of the car was pushed in and the windscreen was smashed. The plaintiff suffered lacerations to her face and body and lost three front teeth. The defendant alleged that the plaintiff was guilty of contributory negligence, in that she had not been wearing her seat belt at the time of the collision. Thorne J held that, in order to rely on the defence of contributory negligence, it must be shown: (a) that the injured person failed to wear a seat belt when one was available; and (b) that the wearing of the seat belt would have prevented or minimised the injuries. In the present case, there was no evidence that any of the plaintiff's injuries would have been prevented or lessened if she had worn her seat belt, and so the defendant could not rely on contributory negligence.

Finally, in a recent Cayman case, *E v H*,<sup>14</sup> the plaintiff's car was negligently struck from behind by the defendant's vehicle, causing the plaintiff severe 'whiplash' injuries to her neck. The plaintiff was not wearing a seat belt, and one of the issues in the case was whether the plaintiff's injuries would have been lessened if she had been wearing a belt, in the light of evidence that the force of the collision had severed the driver's seat from the chassis of the car. Smellie CJ held that a reduction of 10% of the damages, rather than the customary 15% to 20%, was appropriate for the plaintiff's contributory negligence, 'to reflect the debatable extent to which the seat belt would have operated in the way designed and intended, given that the driver's seat did separate from the chassis of the vehicle'.

### Standard of care

The standard of care for his own safety expected of the plaintiff is that of a reasonable, prudent man. However, in the cases of children and workmen, a lower standard is accepted.

#### *Children*

A lower standard of care for his own safety is to be expected of a young child. Thus, for example, where D sold some gasoline to a nine year old boy after being told by the boy that his mother wanted it for her car, and the boy played with it and was consequently badly hurt, D was held fully liable for the injury. The court held that D had been negligent in supplying gasoline to so young a child, and the

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13 (1992) Supreme Court, The Bahamas, No 1146 of 1988 (unreported).

14 [2000] CILR 347 (Grand Court, Cayman Islands).

child was not guilty of contributory negligence, for he did not know and could not be expected to have known of the inflammable properties of gasoline.<sup>15</sup>

Another illustration of the principle is the Guyanese case of *Ghanie v Bookers Shipping (Demerara) Ltd.*<sup>16</sup> In this case, G, a five year old child, was hanging on to the back of a cart as it proceeded along a road. A car was following close behind. As the driver of the car started to overtake the cart, G jumped off the cart and, without looking back, dashed across the road. The car struck G's left foot and G was severely injured.

On the question of whether G could be guilty of contributory negligence, Persaud JA said:

In *Lynch v Nurdin*, Lord Denman CJ, in dealing with the question of contributory negligence on the part of an eight year old child and whether such contributory negligence must deprive the child of his remedy, said:<sup>17</sup>

Ordinary care must mean that degree of care which may reasonably be expected from a person in the plaintiff's situation; and this would evidently be very small indeed in so young a child.

In the more recent case of *Gough v Thorne*, Lord Denning MR said:<sup>18</sup>

A very young child cannot be guilty of contributory negligence.<sup>19</sup> An older child may be. But it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as to be expected to take precautions for his or her own safety, and then he or she is only to be found guilty if blame should be attached to him or her. A child has not the road sense or the experience of his or her elders. He or she is not to be found guilty unless he or she is blameworthy.

In that case, the injured child was 13 years old, and the trial judge held that the driver of the vehicle concerned was negligent, in that he drove too fast in the circumstances.

In the instant case, it is conceded that had the plaintiff been an adult, the proposition that the defendant would be liable in these circumstances would be untenable. I understand this to mean that it is admitted that the child's conduct would have amounted to negligence in an adult. And this is how the matter is put in *Charlesworth on Negligence*:<sup>20</sup>

When a child is negligent, in the sense that he could by exercise of reasonable care have prevented or avoided the damage in question, he cannot recover; but in considering what is 'reasonable care', the age of the child must be considered. Infancy as such is not a 'status-conferring right', so that the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportioned to the age of the child.

There is no age below which, as a matter of law, it can be said that a child is incapable of contributory negligence. Expressions are to be found referring to children 'too young to be capable of contributory negligence' or 'of such a tender

15 *Yachuk v Blais* [1949] AC 386.

16 (1970) 15 WIR 403 (Court of Appeal, Guyana).

17 (1841) 113 ER 1041, p 1043.

18 [1966] 1 WLR 1387, p 1390.

19 See *Cooper v Ronald A Albury Ltd* (1995) Supreme Court, The Bahamas, No 146 of 1989 (unreported); *Straker v Edey* (1990) High Court, Barbados, No 545 of 1986 (unreported).

20 Charlesworth and Percy, *Charlesworth on Negligence*, 4th edn, 1962, London: Sweet & Maxwell, para 1129.

age as to be regarded in law as incapable of contributory negligence', but these must be taken to be referring to children found on the facts of a particular case to be so young that contributory negligence cannot be attributed to them.

The law, it seems, is that where a child is of tender years, the courts will not be prepared to find contributory negligence. The only defence available in such cases would, it seems, be that the defendant was not negligent, or that his negligence was not the cause of the accident, even though in some jurisdictions it has been said:

It is quite settled that there may be contributory negligence on the part of a child of tender age. Whether there has or has not been such negligence is a question of circumstances,<sup>[21]</sup>

On the other hand, an older child may be guilty of contributory negligence if he fails to act with the degree of alertness and perception normally expected of a child of his age. This is illustrated by *Perch v Transport Board*,<sup>22</sup> where the plaintiff, a 12 year old schoolgirl, was seriously injured while attempting to board one of the defendants' buses outside the school which she attended. Douglas CJ held that the accident was caused by the negligence of the driver in failing to stop immediately when school children tried to board the bus while it was in motion. The defendants contended that the plaintiff had been guilty of contributory negligence in attempting to board a moving vehicle. His Lordship continued:

It is pleaded on behalf of the defendants that the injuries suffered by the plaintiff were caused wholly or in part by her own negligence in boarding or attempting to board the bus while it was in motion. The rule is that, in determining the degree of care which may reasonably be expected of a person in the plaintiff's situation, regard must be had to that person's age and knowledge (see *Lynch v Nurdin*,<sup>[23]</sup> approved by Lord du Parc in *Yachuk v Blais*,<sup>[24]</sup> a decision of the Privy Council). The plaintiff was 12 years old when the accident occurred and of normal alertness and intelligence. She must have realised that attempting to board a moving vehicle was dangerous, and, indeed, a school rule of which she was aware prohibited any such behaviour on her part.

In my view, the accident was caused by the driver of the bus failing to stop immediately that school children, including the plaintiff, were trying to board the bus while it was still in motion. The defendants cannot be excused for being unaware of the children boarding, because the conductor was in a position to see them and was equipped with the means of signalling the driver to stop. I hold further that the plaintiff contributed to her own injury by attempting to board the bus while it was moving, and her contributory negligence I assess at 20%.

### Workmen

It seems that a lower standard of care for his own safety is expected of a workman who is injured as a result of his employer's breach of statutory duty, or perhaps

21 See *Cass v Edinburgh and District Tramways Co* (1909) SC 1068. In *Hamilton v Singh* (1978) High Court, Guyana, No 2460 of 1975 (unreported), Bishop J expressed the view that it is unwise to state any rigid principles concerning the appropriate standard to which children, as a class, are expected to conform with respect to their own safety, since child psychologists emphasise that the capacities of individual children not only vary with age, but also vary among individual children of similar age groups.

22 (1981) 16 Barb LR 102 (High Court, Barbados). See also *Morales v Ecclestone* [1991] RTR 151, where an 11 year old boy, who was injured when he ran out into the road without looking and was hit by a passing vehicle, was held to be 75% to blame for his injuries.

23 (1841) 113 ER 1041.

24 [1949] AC 386.

also through a breach of his employer's common law duties to provide a competent staff of men, adequate plant and equipment, a safe place of work, and a safe system of working with effective supervision. It has been said that the court has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that he ought to be held guilty of contributory negligence.<sup>25</sup> Thus, the court will take into account the fact that the senses of workmen in factories are often dulled by the noise, repetition, confusion, fatigue and preoccupation with work, and that, in such circumstances, it would be unreasonable to expect them to take scrupulous care for their own safety.<sup>26</sup>

The approach to contributory negligence in cases of breach of the employer's duty of care at common law and breach of statutory duty is illustrated by *Bailey v Gore Bros Ltd* and *Pitters v Spotless Dry Cleaners and Laundry* respectively.

### **Bailey v Gore Bros Ltd (1963) 6 WIR 23, Court of Appeal, Jamaica**

The plaintiff/appellant was employed by the defendants/respondents in the operation of a stone-crushing machine. The machine was defective, in that, while it was working, a bolt frequently slipped, causing the rollers to become choked and to stop. The operator would then climb up on to the machine and clear the stones from the rollers before the machine was started up again. One day, the appellant, having cleared the choke in this way, was climbing down to the ground while the rollers were working, when he slipped and fell. His right hand was caught between the rollers, which were not protected by any guard, and he was severely injured. He brought an action against the respondents, alleging that they were in breach of their common law duty to provide a safe system of work and effective supervision of the stone-crushing operation. The respondents pleaded contributory negligence on the part of the appellant.

*Held*, the respondents were liable to the appellant in negligence, but the damages were to be reduced by 10% (as found by the jury in the lower court) on account of the appellant's contributory negligence. On the issue of contributory negligence, Lewis JA said:

Where contributory negligence is set up as a defence, it is only necessary to establish to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed, by this want of care, to his own injury; for where contributory negligence is set up as a shield against the obligation to satisfy the whole of the plaintiff's claim, the principle involved is that where a man is part author of his own injury he cannot call on the other party to compensate him in full: *per* Lord Simon in *Nance v British Columbia Electric Rly Co.*<sup>[27]</sup> I accept completely the proposition that, in cases of injuries to workmen due to the employer's breach of a statutory regulation, one ought not to hold as contributory negligence against a workman operating under the conditions of noise and bustle, confusion and repetition associated with a factory, every risky thing he may do through familiarity with the dangers incidental to his work, or every act or omission due to inadvertence or lack of concentration. I recognise that it may be proper, as counsel for the appellant contended, to apply the same principle, to a limited extent, to cases arising from a

25 *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB 132, p 140, *per* Lawrence J.

26 *Ibid.* See also Fagelson, I (1979) 42 MLR 646.

27 [1951] 2 All ER 448, p 450.

breach of the common law duty to provide a safe system of work. These propositions find support in the cases of *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd*<sup>[28]</sup> and *Caswell v Powell Duffryn Associated Collieries Ltd*.<sup>[29]</sup>

It must nevertheless be borne in mind that the question of contributory negligence was essentially one for the jury, who had before them all the evidence, in a very short case, relating to the conditions in which the plaintiff worked and the circumstances in which he sustained his injuries. That it was the established practice for the workmen to have the rollers started so as to ensure that the choke had been cleared before they came down was clearly proved, and the fact that, on this occasion, the appellant followed that practice is not, on the authorities, evidence of contributory negligence. Having successfully cleared the choke, it was undoubtedly most imprudent of the appellant to climb down while the rollers were working, but this, too, it seems, was established practice. The respondents, equally with the appellant, were aware of the danger involved in this procedure but never warned the appellant that he ought not to do it. Having regard especially to his youth and inexperience, I am of opinion that this act ought not to be attributed to him as contributory negligence. Considering the small percentage of blame which the jury apportioned to him, I am inclined to the view that they could not have held this against him.

The appellant stated in evidence that the cause of his fall was his slipping on ground stones and grease which were on the machine. He had to climb up and down the machine several times daily and knew that the machine 'has always ground stones and grease from time to time', the grease being used in connection with its operation. He knew that it was necessary to exercise care in going up and down the machine. In going up, he said, he did not look to see if there were stones and grease. In coming down, he did not see the grease and stones before he slipped. He came down 'backwards and at a normal rate', as he usually comes down.

It may be remarked in passing that, in the particulars supplied by the appellant's solicitors of a safe and proper system of work and the various respects in which the respondents failed to take proper precautions for the safety of the appellant, no mention is made of the condition of the surface of the machine. However, in his evidence, John Rodgers, the respondents' personnel officer, stated that he agreed that the machine had grease and oil which would make it very slippery and could contribute to an accident to persons climbing up and down.

Counsel for the appellant submitted that on the foregoing evidence, no jury could reasonably come to the conclusion that the appellant had failed to take reasonable precautions for his own safety. It was improper, he said, to draw from the appellant's statement that he did not see the stones and grease the inference that he did not look to see where he was going. In climbing down 'backwards', he could not be expected to see the stones and grease. Further, he contended, even if his slipping and falling can be attributed to his negligence, it was not this negligence that was the proximate cause of the injury to his hand: the fall may have caused other injuries but it was the absence of a guard around the rollers which alone caused this type of injury.

The test which the jury had to apply was this—ought the appellant reasonably to have foreseen the likelihood of injury to himself if he fell while the rollers were working, and if so, did he take reasonable care to avoid falling?

The plaintiff stated that he knew that he ought to take care in climbing up and down the machine. In my judgment, there can be no doubt that he ought to have foreseen the likelihood of danger to himself from the working rollers if he fell. He may not

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28 [1936] AC 206.

29 [1939] 3 All ER 722.

have foreseen the extent of the damage he in fact suffered, but this in my view is immaterial, for it does not differ in kind from that which he ought to have foreseen (see *Hughes v Lord Advocate*).<sup>[30]</sup> If the jury found, as they must have done, that the plaintiff fell because he failed to look where he was going in conditions which admittedly called for the exercise of care, that this amounted to culpable failure to take care for his own safety, and that by this lack of care he contributed to his own injury, I cannot say that this is a verdict which is unreasonable and such as to show that the jury have failed to perform their duty.

**Pitters v Spotless Dry Cleaners and Laundry (1978) Supreme Court,  
Jamaica, No CL P-016 of 1975 (unreported)**

The plaintiff was a laundry-woman employed by the defendant. While she was operating a mangle (a machine used for pressing flat items), a tablecloth which was being fed into the machine became folded over. In order to straighten the tablecloth, the plaintiff reached over the machine's trip guard (a device designed to stop the machine when pressed) and her hand became caught under the hot rollers of the mangle. She was severely burnt, and eventually had to have four fingers amputated.

Carey J held that the machine was dangerous and, since it was unfenced, the defendant was in breach of its statutory duty under reg 3(1) of the Factories Regulations 1961. He declined to find the plaintiff guilty of contributory negligence. He said:

Mr Scharschmidt, on behalf of the defendant, contended that as the plaintiff, an experienced worker, well knew that part of the machinery was hot, she was guilty of an act of extravagant folly in placing her hand where she did. He was relying on the case of *FE Callow (Engineers) Ltd v Johnson*,<sup>[31]</sup> where the plaintiff was held one-third liable. In the instant case, so the argument ran, the plaintiff was largely to blame.

Mr Muirhead, for his part, urged that for the court to find contributory negligence, it had to be shown that the plaintiff had by some act of perverted and deliberate ingenuity, forced or circumvented the safeguards provided.<sup>[32]</sup>

To constitute contributory negligence, there had to be a high degree of negligence. He also referred to *Walker v Clarke*.<sup>[33]</sup> Even if the court were persuaded in favour of a finding of contributory negligence, the percentage should be small, the effect of which would amount to a punishment against a zealous employee intent on advancing the defendant's business.

The approach of the courts on this issue of contributory negligence can be discerned in the words of Lawrence J in *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd*:<sup>[34]</sup>

I think, of course, that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory and that it is not for very risky thing which a workman in a factory may do in his familiarity with the machine that a plaintiff ought to be held guilty of contributory negligence.

One starts with the basic assumption that the plaintiff has done a 'risky thing', and then goes on to enquire into the nature and quality of the riskiness, for if it amounts

30 [1963] AC 837 (see above, p 107).

31 [1970] 3 All ER 639.

32 *Can v Mercantile Produce Co Ltd* [1949] 2 All ER 531, p 537, *per* Stable J.

33 (1959) 1 WIR 143 (see above, p 153).

34 [1934] 2 KB 132, p 140.

to extravagant folly, or if the safeguards are circumvented by perverted or deliberate ingenuity, then contributory negligence may be found.

To qualify as contributory negligence, the behaviour of the plaintiff is also a very relevant consideration. In *Smith v Chesterfield and District Co-operative Society Ltd*,<sup>[35]</sup> the court held the plaintiff 40% to blame because she had done a deliberate act against which she had been warned. If the 'risky thing' is in disobedience of orders, the court will apportion the degree of responsibility. Lord Wright in *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd*,<sup>[36]</sup> said that contributory negligence in connection with breach of statutory duty meant misconduct, viz, disobedience of orders. Goddard LJ in *Hutchinson v London and North Eastern Rly*<sup>[37]</sup> expressed himself in these words:

I always directed myself to be exceedingly chary of finding contributory negligence where the contributory negligence alleged was the very thing which the statutory duty of the employer was designed to prevent.

I take all these matters into consideration.

The facts in this case show the plaintiff did deliberately place her hand where it became caught. It was a risky thing. It is a risk which the defendant was required, however, to guard against. A measure of criticism can forcibly be suggested against the plaintiff's conduct. Mr Scharschmidt did so. I have nevertheless come to the conclusion that any deficiencies on Miss Pitters' part fall short of the negligent conduct required in the case of a workman where breach of statutory duty is concerned. She should be absolved from any responsibility. I so hold. It was the failure to fence securely which was the cause of the accident and not the plaintiff's misguided, albeit risky act of placing her right hand in the position she did.

## Road accidents

An example of a successful plea of contributory negligence is the Trinidadian case of *Kunwarsingh v Ramkelawan*.<sup>38</sup> There, BD was driving the plaintiff's car at night when he collided with the defendant's van, which was parked on the road without lights. The car was damaged. BD's evidence was that he was driving at 25 mph and did not see the unlighted van until he was almost eight feet behind it. Rees J held<sup>39</sup> that there is a presumption of negligence where a vehicle is parked on a road at night without lights; therefore, the defendant was liable in negligence, but BD was contributorily negligent (with 25% apportionment), in that:

...there is a principle in cases of this kind to the effect that if a driver of a vehicle proceeds at such a speed that he is unable to pull up within the limits of his vision, he is in the wrong. If the driver is unable to see where he is going, he must stop. Applying this principle, if [BD] did not see the van until he was eight feet away, with the beam of his light presumably showing much more than eight feet, he was not keeping a proper lookout. If he saw the van before he was a distance of eight feet from it and did not stop before striking it, then he was travelling at a speed at which he could not stop within the limits of his vision. In either event he was guilty of [contributory] negligence.

Similarly, in *Dhoray v Dabiesaran*,<sup>40</sup> the plaintiff was driving his car along a main road when he saw a truck reversing on to the road about 80 ft in front of him. The truck

35 [1953] 1 All ER 447.

36 [1936] AC 206.

37 [1942] 1 KB 781, p 788.

38 (1972) 20 WIR 441 (High Court, Trinidad and Tobago).

39 *Ibid*, p 444.

40 (1975) High Court, Trinidad and Tobago, No 476 of 1972 (unreported).

stopped momentarily but, as the plaintiff was about to pass, it suddenly reversed again and struck the plaintiff's vehicle. The plaintiff's claim in negligence against the owner of the truck was successful, but Roopnarine J also found the plaintiff contributorily negligent (with 50% apportionment), in that he:

...had seen the truck reversing on to the roadway about 80 ft away and yet he did not stop to permit the driver of the truck to reverse, nor did he slow down and blow his horn to make sure whether it was safe for him to go through or not, but just drove on and thereby his want of care contributed to his own injury.

Another example of a successful plea of contributory negligence in a road accident case is *Khan v Bhairoo*.

### **Khan v Bhairoo (1970) 17 WIR 192, Court of Appeal, Guyana**

B's truck collided with K's car due to the negligent driving of B's servant, C. K lost an arm in the accident. In an action brought by K, the trial judge found that, by driving his car with his right hand resting on the outside of the car at the time of the collision, K was guilty of contributory negligence, which he assessed at 10%.

*Held*, on appeal, the trial judge's finding as to contributory negligence was correct. Bollers C (Ag) said:

[Counsel for the appellant] submits that in this case there could be no contributory negligence in the appellant because there was no such fault in the driving of the appellant's car and, further, assuming the appellant was negligent in having his right hand outside the vehicle, the second named respondent, the driver of the lorry, could not take advantage of that circumstance to excuse himself because, notwithstanding the appellant's negligence, he (the second named respondent), by the exercise of reasonable care could have avoided the accident. His submission in that regard is that the fact of the appellant's hand being outside of the vehicle when the vehicle was passing the lorry had nothing whatever to do with the accident. His submission went even further, and that was that, for the appellant to be found liable for contributory negligence, there must be negligence in the driving of the vehicle in which he was travelling, and the learned judge had not found that there was negligence in the driving of the car. On an examination of the authorities, I regret that I cannot accept this submission.

In *Davies v Swan Motor Co Ltd*,<sup>[41]</sup> a collision took place between an omnibus and a dust cart, owing to the negligence of the drivers of both vehicles, in which the plaintiff's husband was killed. He had been standing on the steps of the dust cart, where he was forbidden to be, and was crushed in the collision which was in no way caused or contributed to by his presence there. It was nevertheless held that his death was contributed to by his negligence in riding in a forbidden position and the damages payable to his widow were reduced by one-fifth. The apportionment of the damages was made under s 1(1) of the Law Reform (Contributory Negligence) Act 1915 [UK], the provisions of which are identical with ss 9 and 10 of the Law Reform (Miscellaneous Provisions) Ordinance, Cap 4 (Laws of Guyana), so that the English decisions on the apportionment of damages after 1945 are directly in point in the consideration of cases in this country. In *Davies v Swan Motor Co Ltd*,<sup>[42]</sup> it was made clear that contributory negligence does not mean breach of duty by the plaintiff, and, in order to make a plaintiff guilty of contributory negligence, a defendant does not have to show any breach of duty to him. What it means is that there has been an act or omission

41 [1949] 1 All ER 620.

42 *Ibid*.

on the part of the plaintiff which has materially contributed to the damage, the act or omission being of such a nature that it may properly be described as negligence, although negligence is not given its usual meaning. I digress here to state that in *Nance v British Columbia Electric Rly Co*, Lord Simon said:<sup>[43]</sup>

It is perhaps unfortunate that the phrase 'contributory negligence' uses the word negligence in a sense somewhat different from that which the latter word would bear when negligence is the cause of action.

Bucknill LJ, in *Davies' case*,<sup>[44]</sup> after stating this proposition of law, cited the speech of Lord Atkin in *Caswell v Powell Duffryn Associated Collieries Ltd*, as follows:<sup>[45]</sup>

The injury may, however, be the result of two causes operating at the same time, a breach of duty by the defendant and the omission on the part of the plaintiff to use the ordinary care for the protection of himself or his property that is used by the ordinary reasonable man in those circumstances. In that case, the plaintiff cannot recover because the injury is partly caused by what is imputed to him as his own default. On the other hand, if the plaintiff were negligent, but his negligence was not a cause operating to produce the damage, there would be no defence.

While, therefore, it is true that in order to establish the defence of contributory negligence the defendant must prove, first, that the plaintiff failed to take ordinary care of himself or, in other words, such care as a reasonable man would take for his safety, and, secondly, that his failure to take care was a contributory cause of the accident, there may also be cases in which the plaintiff is guilty of contributory negligence because in the circumstances he owes to the defendant a duty to act carefully.

In *Davies v Swan Motor Co Ltd*, Bucknill LJ found that the plaintiff did owe such a duty to the defendant, when he stated:<sup>[46]</sup>

In the first place, I am prepared to hold that, in standing where he did on the lorry, the deceased committed a breach of duty to the omnibus driver because in so doing he made the driver's task in passing the lorry more difficult than it would otherwise have been and, to that extent, increased the risk of a collision.

Thus, in the *Davies* case, on both grounds, that is, breach of duty and failure to take reasonable steps for his own safety, the plaintiff, by riding on the steps attached to the offside of the dust lorry, was held guilty of contributory negligence and he was so guilty, although his mere standing in that position contributed in no way to the accident. It is my assessment of the authorities, therefore, that the expressions 'contribution to the accident' and 'contribution to the damage suffered by the plaintiff' are used interchangeably by the judges.<sup>[47]</sup>

In the *Davies* case, while it is true that both the driver of the omnibus and the driver of the vehicle in which the plaintiff was a passenger were found liable in negligence, nevertheless it was pointed out that on the alternative ground the plaintiff's conduct showed a lack of reasonable care for his safety, and on that ground he was also found guilty of contributory negligence...

If any doubt existed, on the authority of *Davies v Swan Motor Co Ltd*, as to whether, in order to find a plaintiff guilty of contributory negligence, one would have to find the driver of the vehicle in which he was travelling liable for negligence, that doubt must be immediately dispelled by the case of *Jones v Livox Quarries Ltd*.<sup>[48]</sup> In that case, the

43 [1951] 2 All ER 448, p 451.

44 [1949] 1 All ER 620, p 624.

45 [1939] 3 All ER 722, p 730.

46 [1949] 1 All ER 620, p 622.

47 *Ibid*, p 620.

plaintiff, employed by the defendants, was, contrary to orders, riding on the back of a traxcavator, which was run into from behind by a dumper negligently driven by another employee of the defendants. The plaintiff was found guilty of contributory negligence on the ground that he unreasonably and improperly exposed himself to this particular risk, even though his conduct was not a cause operating to produce this particular accident...

Singleton LJ, in the course of his judgment, in answer to the submission that the plaintiff was standing upon the traxcavator and was not in any sense a cause which operated on the accident which befell him, but the real cause of the accident to the plaintiff was the negligent driving of the driver of the dumper, adopted the test applied by Bucknill LJ in *Davies v Swan Motor Co Ltd*,<sup>[49]</sup> which was the test of ordinary plain commonsense of this business, and arrived at the conclusion that the plaintiff, in riding on the traxcavator, was disobeying the orders of his employers and, in so doing, he was exposing himself to danger. He had put himself in a dangerous position which, in fact, exposed him to the particular danger which came upon him, and he ought not to have been there. The learned judge then stated:<sup>[50]</sup>

The fact that he was in that particular position meant that he exposed himself, or some part of his body, to another risk, the risk that some driver following might not be able to pull up in time—it may be because that driver was certainly at fault. That is the view which the trial judge took of this case, and I do not see that that is a wrong view. It is not so much a question of ‘was the plaintiff’s conduct the cause of the accident?’ as ‘did it contribute to the accident?’, on the assumption that it was something of a kind which a reasonably careful man so placed would not have done. If he unreasonably, or improperly, exposed himself to this particular risk, I do not think that he ought to be allowed to say that it was not a cause operating to produce the damage.

In *Jones v Livox Quarries Ltd*, Denning LJ made it clear that, although contributory negligence did not depend upon a duty of care, it did depend upon foreseeability. He continued:<sup>[51]</sup>

Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless...

I think myself that the circumstances of the present appeal fall within this principle, and it might be transposed in the terms of this case to say that, even though the appellant may not have foreseen the possibility of his arm being removed by the passing vehicle driven by the second named respondent, nevertheless, on a commonsense view, the injury suffered by the appellant was due in part to the fact that he chose to drive his car with his hand outside when there was no need for that, and he would not have suffered this injury had he kept it inside, which is clearly demonstrated by the fact that the rest of his body was unhurt and intact. In the words of Denning LJ, then, ‘The man’s (appellant’s) negligence here was so mixed up with his injury that it cannot be dismissed as mere history’.<sup>[52]</sup> The dangerous position of his hand outside the vehicle was one of the causes of his damage, just as the dangerous position of the plaintiff was in *Davies v Swan Motor Co Ltd* and *Jones v Livox Quarries Ltd*...

48 [1952] 2 QB 608.

49 [1949] 1 All ER 620.

50 [1952] 2 QB 608, p 614.

51 *Ibid*, p 615.

52 *Ibid*, p 616.

[Section 10 of the Law Reform (Miscellaneous Provisions) Ordinance, Cap 4, provided:

10(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.]

If, in s 10(1), the words 'personal injury' are substituted for the word 'damage' and the word 'negligence' is substituted for the word 'fault' in construing s 10, it will be clearly seen that, where any person suffers an injury as the result partly of his own negligence and partly of the negligence of another, his claim in respect of that injury is not to be defeated by reason of his negligence whereby he suffers the injury, but the damages recoverable shall be reduced to the extent as the court thinks just and equitable, having regard to his share in the responsibility for the injury, and it is here that Denning LJ, in the two cases discussed, states that whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction involves a consideration not only of the causative potency, but also of its blameworthiness. In my view, then, the appellant in this case was partly to be blamed for the damage which he suffered, and the learned judge was correct in finding that he was at fault [and in assessing the extent of his negligence at 10%].

Similarly, in *Premasagar v Rajkumar*,<sup>53</sup> the plaintiff was driving his car with his right hand resting on the outside of the door when the defendant negligently collided with the car, causing injuries to the plaintiff's arm. Bernard J found the plaintiff contributorily negligent and reduced his damages by 15%. He said:

A driver ought to have both hands on the steering wheel at all times. No part of his hand should be on the door. At least for his own personal safety, it should be inside, except where he is in the process of overtaking and is giving the appropriate signal, which was not the case here. Besides, if both hands are not holding the steering wheel fully, a driver's control over a moving vehicle and his ability to adjust to situations quickly, particularly dangerous ones, or to take immediate evasive action, would obviously be lessened. Had the plaintiff's hand not been in that position, he may very well not have suffered those unfortunate injuries to his elbow. He is guilty, in my view, of contributory negligence in the circumstances.

## Apportionment

The rule at common law was that if the harm to the plaintiff was due partly to the plaintiff's own fault, he could recover nothing from the defendant. In other words, contributory negligence was a complete defence. Now, statutory provisions in most jurisdictions provide that where a defendant is found to be negligent and the plaintiff is guilty of contributory negligence, the court may *apportion* the damage: The damages recoverable...shall be reduced to such extent as the court thinks just and equitable having regard to the share of the [plaintiff] in the responsibility for the damage.<sup>54</sup> Examples are s 28 of the Supreme Court of Judicature Act, Ch 4:01

<sup>53</sup> (1978) High Court, Trinidad and Tobago, No 244 of 1974 (unreported).

(Trinidad and Tobago); s 3 of the Contributory Negligence Act, Ch 65 (The Bahamas); s 3 of the Contributory Negligence Act, Cap 195 (Barbados); s 3 of the Law Reform (Contributory Negligence) Act (Jamaica); and s 9 of the Law Reform (Miscellaneous Provisions) Act, Cap 6:02 (Guyana).

According to Lord Reid:<sup>55</sup>

...a court must deal broadly with the problem of apportionment, and, in considering what is just and equitable, must have regard to the blameworthiness of each party. But the claimant's share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of his acts in causing the damage, apart from his blameworthiness.

### VOLENTI NON FIT INJURIA

*Volenti non fit injuria* is synonymous with 'consent'. No person can enforce a right which he has voluntarily waived or abandoned. As we have seen,<sup>56</sup> consent is a good defence to intentional torts, such as assault, battery and false imprisonment.

*Volenti non fit injuria* may also be pleaded in negligence actions, as well as in most other torts. In negligence, the courts speak of 'Voluntary assumption of risk' rather than 'consent'. If a defendant is successful in his plea of *volenti*,<sup>57</sup> he will have a complete defence and the plaintiff will be unable to recover any damages. It is mainly for this reason that *volenti* has declined in importance as a defence to negligence actions, and it rarely succeeds today: for, since the introduction of apportionment of loss in contributory negligence cases, the courts have tended to encourage reliance on contributory negligence and to discourage reliance on *volenti*, on the ground that, in most cases, the fairer solution is that the plaintiff should have his damages reduced, rather than being able to recover nothing at all.

This reluctance to allow the *volenti* defence is exemplified by *Mowser v De Nobriga*,<sup>58</sup> where the plaintiff, a spectator at a race meeting, was injured when she was struck by a riderless horse which had escaped from the race track through a gap in the fence.<sup>59</sup> Rees J held that *volenti non fit injuria* did not apply. He said:<sup>60</sup>

Counsel for the defendants argued that the doctrine *volenti non fit injuria* is applicable and, on that basis, he said that, notwithstanding the defendants may be negligent, they are entitled to succeed. He submitted that the plaintiff was a spectator who attended the races and therefore took upon herself such elements of risk as exist in the sporting activity of horse racing. That she freely and voluntarily, with full knowledge of the nature of the risk she ran, impliedly agreed to incur it. I think that if a person makes an agreement with another, either expressly or by implication, to run the risk of injury caused by that other, he cannot recover for damage caused to

54 It was held in *White v Gaskin* (1990) High Court, Barbados, No 256 of 1988 (unreported) *per* King J (Ag), that the defence of contributory negligence must be pleaded, and, in the absence of such pleading, the judge has no jurisdiction to make a finding of such negligence. see *Fookes v Slaytor* [1979] 1 ALL ER 137.

55 *Stapley v Gypsum Mines Ltd* [1953] AC 663, p 682.

56 See above, pp 15, 16.

57 *Nettleship v Weston* [1971] 3 All ER 581, p 588, *per* Lord Denning MR.

58 (1969) 15 WIR 147 (High Court, Trinidad and Tobago).

59 See above, pp 70–74.

60 *Mowser v De Nobriga* (1969) 15 WIR 147 (High Court, Trinidad and Tobago), p 155.

him by any of the risks he agreed to run. As the plaintiff/wife was a non-paying spectator who was injured on land adjoining the premises occupied by the defendants, no question of express contract arises—if anything, this alleged agreement must arise by implication, I have already made it abundantly clear that in my view the defendants were negligent because there was a breach of duty which caused damage to the plaintiff/wife and this breach of duty was based solely on proximity or ‘neighbourship’ in the Atkinian sense. Although it was at one time thought that spectators who were injured by a competitor who was engaged in performing the very activity which the spectators came to watch would be denied a remedy because, although the defendant was negligent, there was a valid defence of *volenti non fit injuria*, there has been a relatively new attitude to the defence of *volenti* in the actionable tort of negligence. In *Wooldridge v Sumner*,<sup>[61]</sup> Diplock LJ went as far as saying that the defence of *volenti* has no application to any case of negligence *simpliciter*...

In my judgment, having regard to the authorities, I do not think in the present case that the defendants can avail themselves of the doctrine *volenti non fit injuria*. It has not escaped me that the injury to the plaintiff/wife was caused by her attempt to rescue her infant son, but even so it brings the matter no further because the act of the plaintiff/wife was the natural and foreseeable result of the negligence of the defendants. The view expressed by Greer LJ in *Haynes v Harwood*,<sup>[62]</sup> where he quoted a passage from an article by Professor Goodhart, is as follows:

The American rule is that the doctrine of the assumption of risk does not apply where the plaintiff has, under an exigency caused by the defendant’s wrongful conduct, consciously and deliberately faced a risk, even of death, to rescue another from imminent danger of personal injury or death, whether the person endangered is one to whom he owes a duty of protection, as a member of his family, or is a mere stranger to whom he owes no special duty.

Greer LJ added:<sup>[63]</sup>

In my judgment, that passage not only represents the law of the US but also the law of England.

Sufficient has been said to dispose of the defence of *volenti non fit injuria* in the present case.

### Essentials of *volenti* in negligence cases

The defendant must show not merely that the plaintiff consented to *physical* risk (that is, the risk of actual damage), but also that he consented to the *legal* risk (that is, the risk of actual damage for which there will be no redress in law).<sup>64</sup> Consent here means, in effect, the agreement of the plaintiff, express or implied, to exempt the defendant from the duty of care which he would otherwise have owed.<sup>65</sup>

*Volenti* can be established in any one of three ways:

- (a) by proof of an express *contract*, whereby the plaintiff agreed to exempt the defendant from legal responsibility; for example, a person who leaves his car

61 [1962] 2 All ER 978.

62 [1934] All ER Rep 103, p 108.

63 *Ibid.*

64 Williams, *Joint Torts and Contributory Negligence*, 1951, London: Sweet & Maxwell, p 308.

65 *Buckpitt v Oates* [1968] 1 All ER 1145, p 1148.

at a car park on the contractual terms that all vehicles are left at their owners' risk, and the proprietor of the park is not to be liable for any loss or damage, howsoever caused, will be deemed to have consented to run the risk of loss for which there will be no legal redress;

- (b) by proof that, even though there was no express contract, there was an express *consent* to run the risk; an example is where a person accepts a free lift in a vehicle in which a notice is displayed exempting the driver from liability for injury caused by any negligence on his part;<sup>66</sup>
- (c) where there is no express contract and no express consent, by showing that it must be *inferred* or *implied* from the facts that the plaintiff consented to run the risk; for example, one who accepts a lift from a driver whom he knows to be so intoxicated as to be incapable of driving safely will be deemed to have been *volens* to any negligence on the driver's part.<sup>67</sup>

### *Volenti and scienti*

One important limit to the doctrine is that mere *knowledge* of the existence of a danger or risk does not amount to consent to run the risk. The maxim is *volenti, not scienti, non fit injuria*. Thus, for instance, an employee who is aware of a dangerous state of affairs at his workplace, but nevertheless continues to work there, will not be held to have been *volens* since knowledge of a risk does not amount to consent to it, especially where the employee has complained to his employer about the danger. Furthermore, the law recognises that an employee in such a situation may have to put up with the danger, as his only alternative will be to give up the job.<sup>68</sup>

This principle is also illustrated by the Vincentian case of *Gooding v Jacobs*.<sup>69</sup> Here, the plaintiff was standing on a log (the trunk of a coconut tree) on her mother's land, when the defendant drove up in a jeep with two other men and started pushing the log away. The plaintiff remonstrated with the defendant about his trespassing on the land, whereupon he got into the jeep, reversed it, and drove forward, hitting the log and throwing the plaintiff to the ground, injuring her. The defendant pleaded *volenti non fit injuria*, arguing that the plaintiff, with full knowledge of the nature of the risk, remained on the log as the defendant drove towards it.

66 See *Birch v Thomas* [1972] 1 WLR 294; *Buckpitt v Oates* [1968] 1 All ER 1145.

67 *Ashton v Turner* [1980] 3 All ER 870; *Miller v Decker* [1957] SCR 624; *Pitts v Hunt* [1990] 3 All ER 344. But it is uncertain whether the passenger will be *volens* where the degree of intoxication is merely such as to impair the driver's judgment. See *Dann v Hamilton* [1939] 1 KB 509, where the defence failed; cf *Insurance Comr v Joyce* (1948) CLR 39, where it succeeded. See also Gordon, DM (1966) 82 LQR 62. In such circumstances, the passenger may be held to have been contributorily negligent: *Owens v Brimmell* [1976] 3 All ER 765; *Ashton v Turner* [1980] 3 All ER 870; *Gunness v Ramdeo* (2001) High Court, Trinidad and Tobago, No S 1606 of 1995 (unreported) (p 356, above). In *Morris v Murray* [1991] 2 WLR 195, the plaintiff was a passenger in a plane which crashed because the pilot was drunk. It was held that *Dann v Hamilton* (where the *volens* defence failed) was distinguishable because, in *Morris*, the pilot's drunkenness was extreme and the journey was fraught with danger from the beginning; (which was not the case in *Dann*, where the driver became drunk later during a social outing); furthermore, piloting a plane was a much more risky operation than driving a car.

68 *Smith v Baker* [1891] AC 325; *Forbes v Burns House Ltd* (2000) Supreme Court, The Bahamas, No 432 of 1995 (unreported).

69 (1973) High Court, St Vincent and The Grenadines, No 5 of 1971 (unreported).

Berridge J held that *volenti non fit injuria* was not applicable. Mere knowledge of a risk does not amount to assent to harm or the risk of it. He said:

The maxim *volenti non fit injuria* is of respectable antiquity and the idea underlying it has been traced as far back as Aristotle. Indeed, it was recognised in the works of the classical Roman jurists and in the Canon Law as well.

The maxim is not *scienti non fit injuria*, and the difference between *volens* and *sciens* is illustrated by the case of *Dann v Hamilton*,<sup>[70]</sup> where it was held that a passenger in the car of a friend who was driving it and who, to the knowledge of the passenger, was under the influence of drink could nevertheless recover damages against the friend for injuries sustained from an accident caused by the friend's negligent driving; but perhaps not if the friend's intoxication was so extreme and glaring as to make the passenger's acceptance of a lift in the car an obviously dangerous operation.

It does not follow that a person assents to a risk merely because he knows of it. Conspicuous illustrations of this occur from time to time in harm sustained by workers in the course of their occupations, and, as far back as *Thomas v Quartermaine*,<sup>[71]</sup> the courts have declined to identify, as a matter of course, knowledge of a risk with acceptance thereof.

I do not share the view that the plaintiff consented or assented to the risk of the harm which befell her, and I find that the maxim *volenti non fit injuria* is not applicable.

## Rescuers

The doctrine of *volens* does not apply where the plaintiff incurs a risk in order to rescue a third party from a perilous situation in which he has been placed by the defendant's negligence, for a rescuer acts under the impulse of duty, whether legal, moral or social, and does not, therefore, exercise that freedom of choice which is essential to the success of the defence. In *Haynes v Harwood*,<sup>72</sup> the plaintiff, who was a policeman on duty, was injured when he attempted to prevent some horses, which had bolted, from injuring bystanders. The plaintiff sued the defendant, the owner of the horses, who had carelessly left them unattended. It was held that the defendant could not rely on *volenti* because the policeman was a rescuer who had acted under a duty to prevent injury to the public. Similarly, in *Mowser v De Nobriga*,<sup>73</sup> the act of the plaintiff in attempting to rescue her infant son from being trampled by a runaway horse fell within this principle.

## *Volenti* and workmen

Another limitation is that consent must be freely given. Thus, in the employer/employee relationship, the courts have gone far to protect workmen from any

70 [1939] 1 KB 509.

71 (1887) 18 QBD 683.

72 [1934] All ER Rep 103. On the other hand, where the plaintiff was injured in an attempt to stop runaway horses and a milk cart in a meadow, where there was no danger to any person, he was held to have been *volens* to the injury: *Cutler v United Dairies* [1933] 2 KB 297.

73 See above, pp 70–74 and 368. See also *Baker v TE Hopkins and Sons Ltd* [1959] 3 All ER 225; *Grant v Robin Hood Enterprises Ltd* (1995) Court of Appeal, Bermuda, Civ App No 25 of 1994 (unreported) (rescuer not guilty of contributory negligence in descending into gas filled cesspit in order to rescue a colleague).

misuse by their employers of their superior economic power, and are very ready to hold that a workman who continues to expose himself to some risky operation or dangerous situation at his place of work cannot have freely consented to run the risk of injury, since it is most probable that he will have been faced with the choice of putting up with the danger or giving up his job. In *Rhyna v Transport and Harbours Department*,<sup>74</sup> Ganpatsingh J said:

The respondents further contended that the appellant was the sole architect of the consequences which befell him and the maxim *volenti non fit injuria* applied to defeat his claim. In this regard, they relied on the case of *Imperial Chemical Industries Ltd v Shatwell*.<sup>[75]</sup> In that case, two fellow servants combined to disobey an order deliberately, though they knew of the risk of injury involved. The employer was not at fault. In an action by one of them against the employer for injuries suffered, based on the employer's vicarious responsibility for the conduct of the other, it was held that the doctrine *volenti non fit injuria* was a complete defence.

I must say that I fail to see the relevance of the facts of that case to the one under consideration. Here, it cannot be said that the appellant acted in disobedience to an order of his employer. There was no such evidence. What he did, or rather attempted to do, was the very thing he was instructed to do; and that was to catch the line. There was no evidence to contradict that coming from the respondents. How, then, can it be said that he was *volens*? In *Smith v Baker*,<sup>[76]</sup> the maxim *volenti non fit injuria* was held not to apply in a situation in which the danger was created or enhanced by the negligence of the employer, albeit that the employee undertook and continued in his task with full knowledge and understanding of the danger. I am afraid that whether one approaches the facts from the point of view of the maxim *volenti non fit injuria* or contributory negligence, I cannot say that the appellant was in any way blameworthy for the injury he suffered. If this rope was pelted towards him, as he said it was, and which was not denied, then he had really no choice but to attempt to catch it.

On the other hand, in *Hinkson v COX Ltd*,<sup>77</sup> it was held that the defence of *volenti* was established. Here, the plaintiff, who was a foreman in the defendants' workshop, and M, a fellow employee, were changing a broken track link on a tractor. Neither of them was wearing goggles at the time, though the defendants had made goggles available. The metal had been heated, the plaintiff was holding a hammer on the pin, and M was trying to knock out the pin with a sledgehammer. A piece of metal flew into the plaintiff's eye and caused severe injury. It was clear that both the plaintiff and M were well aware of the danger of rust and splinters flying from metal when it was heated and struck. Williams J pointed out that:

...the plaintiff was the foreman and in authority of Marshall. He was an experienced mechanic. He admitted that the decision to knock the pin out in the way they did was his, and it was he who instructed Marshall to heat the metal and use the sledgehammer. He argued that for your own safety and protection you should wear goggles when hammering metal; but he did not make use of the goggles provided... It is my view that the plaintiff instructed the execution of the operation with full knowledge and appreciation of the danger, and must be regarded as *volens* in the fullest sense.

74 (1985) Court of Appeal, Guyana, Civ App No 56 of 1982 (unreported); see above, pp 74,75.

75 [1965] AC 656.

76 [1891] AC 325.

77 (1985) High Court, Barbados, No 451 of 1984 (unreported).

## CHAPTER 14

# DAMAGES FOR PERSONAL INJURIES AND DEATH

### PERSONAL INJURIES

When tort liability has been established, the court's next task is to assess the amount (the 'quantum') of damages which the defendant must pay to the plaintiff by way of compensation. In the Caribbean, most personal injury claims are in negligence, and the vast majority of such injuries occur in road accidents. Damages in personal injury actions are classified as general or special. General damages are awarded for those items which cannot be precisely quantified in money terms, such as pain and suffering and loss of amenities, whilst special damages can be precisely calculated.

The distinction between special and general damages was explained by Haynes C in the leading case of *Heeralall v Hack Bros (Construction) Co Ltd*:<sup>1</sup>

Damages are special and general. Special damages must be specially pleaded and proved, and are awarded in respect of out-of-pocket expenses and loss of earnings actually incurred down to the date of the trial itself. They are generally capable of substantially exact calculation, or at least of being estimated with a close approximation to accuracy. The familiar examples are medical and surgical fees paid or payable, hospital expenses (if any) and loss of income. If the plaintiff has been employed at a fixed salary or wage, such loss of income can commonly be calculated precisely; but where he is self-employed, it must be estimated by reference to his past earnings. The basic principle, as far as these losses are concerned, is that the injured person should be placed, as far as money can do so, in the same financial position as he would have been in at the date of trial if no accident had happened. General damage, on the other hand, need not be pleaded specially, as the law implies it. It usually falls under these heads: (a) loss of future earnings or income; (b) pain and suffering; and (c) loss of 'amenities' or enjoyment of life. Admittedly, other items may be included in particular cases, such as future expenditure (for example, the cost of an artificial limb). By the very nature of the three usual heads, they are incapable of precise mathematical calculation, because the trial judge has to assess (a) with reference to an indefinite future, subject to vicissitudes and contingencies, and, as regards (b) and (c), make an award in money for the injury itself, the pain and suffering from it and the overall effect on the plaintiff's enjoyment of life, which do not really have equivalent money values.

### Special damages

Examples of special damage include not only medical expenses and loss of earnings, but such smaller items as damage to clothing and taxi fares to and from hospital. Under medical and nursing expenses, the plaintiff is entitled to claim the cost of treatment and care which he reasonably incurs as a result of his injuries. This would include payment of hospital bills and doctors' fees. Also, where the victim is nursed by a member of his family or a friend, he is entitled to the reasonable cost of such nursing services (both for the past and for the future), even though he may not be under any legal or moral obligation to pay the person who gives the

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1 (1977) 25 WIR 117 (Court of Appeal, Guyana), p 124.

services. In *Tudor v Cox*,<sup>2</sup> an 18 year old youth received serious head injuries as a result of the defendant's negligence. After the plaintiff's discharge from hospital, his mother looked after him at home. Husbands J held that an award must be made for those services. He said:

On the authority of *Cunningham v Harrison*,<sup>[3]</sup> some award must be made for the extra domestic attendance his injuries have necessitated, and for which there will be a continuing need. Since his discharge from hospital, the plaintiff's mother has waited on him and rendered him domestic service. He should recover compensation for the value of her service. As was said by my brother Williams J in the Barbados Court of Appeal in *Sandiford v Prescod*:<sup>[4]</sup>

The task of a mother in bringing her offspring to maturity can be thankless enough as it is, without her being expected to spend her more advanced years in looking after her grown child. If she is to do so, compensation should be provided. If a handicapped person is committed to her care, she is unlikely to be able to do paid work elsewhere. In any case, she is under no obligation to relieve a defendant of the consequences of his negligent act. There is no question of a plaintiff being required to mitigate damages.

Similarly, in the Trinidadian case of *Grey v John*,<sup>5</sup> where the plaintiff had been seriously injured in a road accident and his daughter had given up her employment for five months in order to look after him, Ramlogan J held that, on the authority of *Donnelly v Joyce*,<sup>6</sup> the plaintiff was entitled to the proper and reasonable cost of supplying nursing services: 'It is because there is a need for services that there is a loss, and, once that loss results from the wrongdoing of the defendant, then the plaintiff is entitled to an amount which would compensate him.' Accordingly, the plaintiff was entitled to an amount equivalent to the wages his daughter had lost during the five month period.

### General damages

In Commonwealth Caribbean jurisdictions, general damages are usually assessed according to the guidelines laid down by Wooding CJ in *Cornilliac v St Louis*,<sup>7</sup> where his Lordship stated that the court should take into account:

- (a) the nature and extent of the injuries sustained;
- (b) the nature and gravity of the resulting physical disability;
- (c) the pain and suffering which had to be endured;
- (d) the loss of amenities suffered; and
- (e) the extent to which, consequentially, the plaintiff's pecuniary prospects have been materially affected.

2 (1979) High Court, Barbados, No 128 of 1978 (unreported).

3 [1973] 3 All ER 463. See also *Donnelly v Joyce* [1973] 3 All ER 475; *Hunt v Severs* [1994] 2 All ER 385; *Coleman v McDonald* (1979) 16 JLR 490 (Court of Appeal, Jamaica) (below, pp 383–87).

4 (1977) 12 Barb LR 55, p 63.

5 (1993) High Court, Trinidad and Tobago, No 1332 of 1985 (unreported). See also *Christopher v Rampersad* (2001) High Court, Trinidad and Tobago, No SC 1063 of 1996 (unreported).

6 [1973] 3 All ER 475.

7 (1965) 7 WIR 491, Court of Appeal, Trinidad and Tobago, p 492.

As Haynes C pointed out in *Heeralall v Hack Bros (Construction) Co Ltd*:<sup>8</sup>

...put together, these considerations in *Cornilliac v St Louis* include the orthodox three heads of damage customarily dictated in the English judgments [pain and suffering, loss of amenities and loss of future earnings], together with the injury itself as a separate element or ingredient of damage.<sup>9</sup>

### **Cornilliac v St Louis (1965) 7 WIR 491, Court of Appeal, Trinidad and Tobago**

The appellant was seriously injured as a result of the respondent's negligent driving of a vehicle. After pointing out that, in order to succeed in his appeal against the trial judge's assessment of damages, 'the appellant must show that the amount awarded was so inordinately low as to be a wholly erroneous estimate of the damage sustained', Wooding CJ considered the relevant facts under each of the following heads of damage:

#### *The nature and extent of the injuries sustained*

The appellant was occasioned a compound, comminuted, complicated fracture of the humerus in the middle of the shaft and a fracture of the upper end of the radius and the ulna at the elbow joint. By 'complicated' is meant that the fracture involved the elbow and the radial nerve and artery. He also suffered from shock and haemorrhage. The injuries were so extensive that, at first, it was feared that his right arm would have to be amputated, but this was avoided, happily, by the skilful administrations of his surgeon.

#### *The nature and gravity of the resulting physical disability*

The fractures have healed but with a residuum of deformity. There is considerable limitation of movement of the joint which, in the course of time, worsened because of new bone formation from the healing of the fracture. Its present range of movement is no more than about 20%, so that the appellant is unable to touch his face, and therefore to shave or feed himself or discharge any ordinary function involving a range of movements with his right hand; and, in addition, the hand has lost some of its grip. Arthritis, too, has resulted: it already is major and is likely to become worse.

#### *The pain and suffering endured*

The appellant experienced intense pain throughout his stay in a nursing home for the 12 days immediately following the accident. It was so intense that he had to be given sedatives. At one time, the plaster cast in which the arm was placed after the bones had been set had to be opened up because the pain in the limb had become intolerable. During the whole of the period until the nerves healed, which the surgeon reckoned to be anything between nine and 18 months, he was subjected to a great deal of pain—diminishing in intensity, it is true, but nevertheless always perceptibly there.

#### *The loss of amenities suffered*

The appellant had been an active, physically fit, outgoing man who was 48 years old at the time of the accident. He used to enjoy playing music, mainly jazz and calypso,

8 (1977) 25 WIR 117, p 125.

9 Though in *Associated Industries Ltd v Ragnauth* (1982) 32 WIR 249, p 253, Luckhoo JA in the Court of Appeal of Guyana noted that an award for pain and suffering and loss of amenities would normally incorporate such factors as an injured person's disfigurement and physical injuries, and there was no need to tabulate those as separate items and have them assessed separately: 'The practice in our courts as well as in the courts of the Caribbean and of England is to give effect to such matters in an award under the heading of damages for pain and suffering and loss of amenities.'

on both the saxophone and the piano, and was full of the zest of a more than ordinarily successful life. He can no longer play. And his outdoor activities must necessarily now be limited. For him, therefore, much of the fun and sparkle has gone from living.

*The effect on pecuniary prospects*

At the time of the accident, the appellant was assistant to the superintendent in charge of the cementing operations of Halliburton Tucker Ltd, and was paid a salary of \$865 per month. He was also given a bonus, probably (as is customary in this country) at the end of each year. He was being groomed to take over the superintendency when the contract of its expatriate holder came to an end, and it is practically certain that, but for the disabilities which he has been occasioned, he would now have been filling that berth. This is confirmed by the fact that a junior whom he had assisted in training was promoted to be superintendent when the contract of the expatriate ended in 1962. As the normal age of retirement was 60 years, it seems clear that the appellant lost the prospect of being for eight years in that post, which carries a salary of \$1,250 per month with the perquisites of a company-supplied home and car. Instead, his employers, who appear to esteem him greatly, have put him in charge of their bulk cement plant and pay him an all-in total of \$1,050 per month. In my estimation, the difference between the emoluments of the two posts exceeds \$500 per month. But that is not all.

As the learned judge rightly said, the appellant's loss is long term as well. His pension entitlements under his employers' contributory pension scheme will now be less than if he had been promoted to the superintendency to which he had so confidently looked forward. No particulars were given in evidence whereby any reasonable estimate can be made of this prospective loss. Also worth mentioning, although its calculable value may be negligible, is the fact that, through the generosity of his employers, he is being paid more than his present job is worth, so that the chances of an increase in pay for the remaining period of his service must be rated lower than if he had not been disabled and had secured the expected promotion.

Having recapitulated the several matters which the learned judge had to (and, it should be added, which he did) take into consideration, I find myself involuntarily echoing Denning LJ's exclamation, 'Good gracious me, as low as (\$7,500) for these injuries!'—see *Taylor v Southampton Corp*, reported in *Kemp and Kemp on Damages*, 2nd edn, Vol I, p 640. It certainly seems to me that that sum is a wholly unrealistic estimate of the damage sustained.

## **Heads of general damage**

### *Pain and suffering*

This includes both past and future pain and suffering arising from the injuries themselves and from any surgical operations or treatment. It also includes nervous shock and any mental suffering brought about by the plaintiff's realisation that his life has been shortened (if, indeed, it has been). However, no damages are awarded under this head if the plaintiff was unconscious throughout the period and thus did not actually suffer any physical or mental pain.<sup>10</sup>

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10 *West and Son Ltd v Shephard* [1964] AC 326.

### *Loss of amenities*

Loss of amenity means loss of the enjoyment of life. Thus, if, for example, the plaintiff's injuries have deprived him of the capacity to play music or sports, or to read, or to enjoy a normal social life, he will be awarded substantial damages under this head.

### *Loss of expectation of life*

A conventional sum may be awarded to the plaintiff under this head if there is proof that his life expectancy has been reduced. Thus, for example, it has been held that, in the year 2002, the conventional sum in Trinidad and Tobago stood at \$15,000.<sup>11</sup>

### *Loss of future earnings*

Earnings lost up to the date of the judgment can be precisely calculated, and so are classed as special damages. But future earnings cannot be so quantified, since no one can foretell what will happen as regards the plaintiff's health, his job prospects and other circumstances.<sup>12</sup> Assessment of future earnings is thus largely guesswork. The formula used is that of the multiplier and the multiplicand, which involves the court's making a final, lump sum award 'having assessed the amount notionally required to be laid out in the purchase of an annuity which will provide the annual amount needed for the whole period of loss'.<sup>13</sup> The court first calculates the multiplicand, that is, the plaintiff's annual loss of earnings as at the present date, based upon his known average earnings and the average earnings for a person in the same type of employment, and taking into account any likely promotions or pay increases. All earnings are calculated net, that is, after deduction of income tax and national insurance contributions.<sup>14</sup> The figure arrived at is then multiplied by the multiplier, that is, the number of 'years' purchase' chosen by the court. The multiplier chosen will depend on various factors, such as the plaintiff's age and the security and regularity of his employment. The maximum is normally 18, and the most usual figure is between 10 and 15.

In *Heeralall v Hack Bros (Construction) Co Ltd*,<sup>15</sup> Haynes C explained the methods of assessment of damages for pain and suffering, loss of amenities and loss of future earnings thus:

The next head of general damages—pain and suffering—can be an element of considerable substance in some cases, relating as it does to both physical and mental pain and suffering, past as well as present and prospective (if any). It is difficult for judges to assess this. As the Earl of Halsbury observed in *The Mediana*:<sup>16</sup>

11 *Samuel v Surajh* (2002) High Court, Trinidad and Tobago, No 2656 of 1998 (unreported).

12 *Alphonso v Ramnath* (1997) 56 WIR 183 (Court of Appeal, Eastern Caribbean States); *Auguste v Neptune* (1997) 56 WIR 229 (Court of Appeal, Eastern Caribbean States).

13 *Allen v Ebanks* [1998] CILR 190, p 195, *per* Harre CJ (Grand Court, Cayman Islands).

14 *Johnson v Browne* (1972) 19 WIR 382 (High Court, Barbados), p 388, following *British Transport Commission v Gourley* [1955] 3 All ER 796.

15 (1977) 25 WIR 117.

16 [1900] AC 113, p 116.

How is anybody to measure pain and suffering in moneys counted? Nobody can suggest that you can by any arithmetical calculation establish what is the exact sum of money which would represent such a thing as the pain and suffering which a person has undergone by reason of an accident... But nevertheless the law recognises that as a topic upon which damages may be given.

All we can do is to bring to bear our general knowledge and experience as men of the world on the matter, essentially here one of judgment, good sense and proportion. The award for this, taken in isolation, has come to be a 'conventional' sum, in the sense that it is an attempt to equate money with something with which money is not commensurable; and, as Scarman LJ said in *Wagner v Mitchell* (see *Kemp and Kemp*, 4th edn, Vol 2, p 9106): '...in a proper case, a substantial sum should be awarded for this element.' In that same case, the same judge said also (again at p 9106): '...it is often said that money can be no compensation for pain and suffering. The proposition is too broad. There are cases in which money can be a very real compensation...it provides the opportunity of distraction and diversion.'

Be that as it may, the law can help in no other way.

And so it is also with 'loss of amenities'—the ability to enjoy life in the way that he formerly could, whatever life should offer. This head of general damages embraces everything which reduces the plaintiff's enjoyment of life, considered apart from pain and suffering and apart from any material loss which may be attendant upon the plaintiff's injuries. Birkett LJ in *Manley v Rugby Portland Cement Co Ltd* (1951) (see *Kemp and Kemp*, 2nd edn, 1961, p 624) illustrated what is meant when he said:

There is a head of damage which is sometimes called loss of amenities; the man made blind by the accident will no longer be able to see the familiar things he has seen all his life; the man who has had both legs removed will never again go upon his walking excursions—things of that kind.

Money cannot buy this. But it may enable the loser to enjoy other things instead and be some solace or consolation to the plaintiff. So it is that in every case the trial judge has to determine what sum it is fair for the defendant to pay to compensate the plaintiff in this way for his suffering and deprivations. And again he could get general guidance from awards made by his brothers in comparable cases. He has to perform difficult and artificial tasks of converting into monetary damages the physical injury and deprivation and pain, and to give judgment for what he considers to be a reasonable sum. As Lord Denning MR put it in the recent case of *Smith v Central Asbestos Co Ltd*:<sup>17</sup>

It is impossible to know what is a proper sum for loss of the amenities of life.

The judges are being asked to calculate the incalculable. The figure is bound to be for the most part a conventional sum. All that the judges can do is to work out a pattern...

And this pattern should be such as the ordinary man would not instinctively regard as either mean or extravagant but would consider to be sensible and fair...

In cases of severe personal injury, the damages awarded in respect of *prospective loss of earnings* will often be the most important head of general damages. In this regard, the English courts in more modern times evolved a method of assessment to calculate a capital sum as the present (date of award) value of the plaintiff's loss of expected future earnings. In Australia, in Canada and in New Zealand, to help this calculation, use is made frequently, if not regularly, of actuarial evidence. But this type of proof has met with disfavour in England, and is not usually, if ever, put forward in this region. So I shall say no more about it now.

17 [1972] 1 QB 244, p 262.

The method referred to involves calculations necessarily made on certain assumptions, and its value must depend upon how far those assumptions are accepted as valid. They are twofold. One is as to the period of time for which the plaintiff would, if he had not been injured, have earned or been capable of earning—that is to say the duration of working life affected by the accident. In a case of total incapacity, that is often taken to be until the age of 60 or 65. The other assumption is as to the rate of remuneration that, if he had not been injured, the plaintiff would for the assumed period have enjoyed. In most cases, neither assumption necessarily fits the facts. Some allowances and qualifications are called for by what are now commonly referred to in this connection as the contingencies of the future or the vicissitudes of life. What should be the extent and manner of that must depend upon the circumstances of the particular case, upon the judge's estimate, necessarily imprecise, of what, had he not been injured, would have been the lot of the plaintiff in future years. Is it likely he would have continued to earn or been able uninterruptedly to earn throughout the assumed period? Might his earning capacity have been cut short within the period, or might it on the other hand have endured beyond it? Interruptions of the assumed earnings period by sickness, unemployment or other causes must also be allowed for to the extent that seems reasonable in the particular case.

The assumed rate of wages or remuneration is usually that which the plaintiff was earning before he was injured. In some cases, it may be reasonable to assume that it would have remained constant throughout the assumed period. In other cases, the probability may be that he would have prospered or been promoted and earned at a higher rate. On the other hand, the probability may be that, because of his age or other circumstances, his rate of remuneration would have declined. A judge cannot predict such contingencies and evaluate their effect with any precision or by reference to any formula. When it is said that in assessing damages regard must be had to the contingencies and vicissitudes of life, what is meant is not some idea of the chances of the future in the abstract or of the lot of mankind in general. It is the case of the particular plaintiff that has to be considered, having regard to what it was likely that the future would have had in store for him.

Based on these assumptions, the method of assessment evolved under this head is described in *Mayne and McGregor on Damages*, 12th edn, p 767, thus:

Method evolved by the courts—the courts have evolved a particular method for calculating this head of damage. The basis is the amount that the plaintiff would have earned in the future and has been prevented from earning by the injury. The amount is calculated by taking the figure of the plaintiff's annual earnings at the time of the injury less the amount, if any, which he can now earn annually, and multiplying this by the number of years during which the loss of earning power will last, which, if the injury is for the plaintiff's life, will require a calculation of the period of his expectation of working life. The resulting amount must then be scaled down by reason of two considerations, first that a lump sum is being given instead of the various sums over the years, and second that contingencies might have arisen to cut off the earnings before the period of disability would otherwise come to its end. The method adopted by the courts to scale down the basic figure is to take the figure intact of present annual earnings and reduce only the multiplier. And if the present annual earnings are liable to increase or decrease in the future, then the practice of the courts is still to allow for this not by changing the figure of present annual earnings but by altering, up or down, the multiplier.

In practice, this method has been applied in one or the other of two ways. In *Jamaica Omnibus Services Ltd v Caldarella*<sup>18</sup> and *Khan v Bhairoo*,<sup>19</sup> in each case the trial judge

18 (1966) 10 WIR 117.

19 (1970) 17 WIR 192 (see above, pp 364–67).

used the full estimated remaining working life as multiplier, then ‘scaled down’ by reducing the resulting sum by one-third, and awarded the remaining two-thirds as compensation under this head—this is one way. The other approach was used by George J in the local case of *Sarju v Walker*.<sup>[20]</sup> His Honour there ‘scaled down’ for ‘imponderables’ by taking a reduced multiplier of 15 instead of the full estimated working life of the plaintiff of 23 plus. In my judgment, once the proper considerations are allowed for, it should be open to a trial judge to choose either way of proceeding to an award of fair compensation.

### *Loss of earning capacity*

Cases in which the court may make an award in respect of loss of earning capacity are:

- (a) where the plaintiff’s injuries have affected his ability to earn, but he suffers no loss of earnings because his employer continues to employ him at the same rate of pay. In such cases, the plaintiff may recover damages for his loss of earning capacity if there is a real risk that he could lose his existing employment at some time in the future and may then, as a result of his injury, be at a disadvantage in finding an equivalent employment or an equally well paid job;<sup>21</sup>
- (b) where the plaintiff is a young child who has never been employed, so that there is no actual loss of earnings.<sup>22</sup>

The explanation of the basis for an award for loss of earning capacity which has been cited in several Caribbean cases<sup>23</sup> is that of Brown LJ in *Moeliker v Reyrolle and Co*:<sup>24</sup>

In deciding this question, all sorts of factors will have to be taken into account, varying almost infinitely with the facts of the particular cases. For example, the nature and prospects of the employer’s business; the plaintiff’s age and qualifications; his length of service; his remaining length of working life; the nature of his disabilities; and any undertaking or statement of intention by his employers as to his future employment. If the court comes to the conclusion that there is no ‘substantial’ or ‘real’ risk of the plaintiff losing his present job during the rest of his working life, no damages will be recoverable under this head.

But if the court decides that there is a risk which is ‘substantial’ or ‘real’, the court somehow has to assess this risk and quantify it in damages...

The consideration of this head of damages should be made in two stages: (1) Is there a ‘substantial’ or ‘real’ risk that the plaintiff will lose his present job at some time before the estimated end of his working life? (2) If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and

20 (1973) 21 WIR 86.

21 *Moeliker v Reyrolle and Co Ltd* [1977] 1 WLR 132; *Alphonso v Rammath* (1997) 56 WIR 183, p 194 (Court of Appeal, Eastern Caribbean States).

22 *S v Distillers Co (Biochemicals) Ltd* [1970] 1 WLR 114.

23 Eg, *Pelter v University of the West Indies* (1994) 30 Barb LR 169 (Court of Appeal, Barbados); *Fun and Games Ltd v Smith* (1994) High Court, Barbados, No 403 of 1992 (unreported); *Crockwell v Haley* (1993) Court of Appeal, Bermuda, Civ App No 3 of 1992 (unreported); *Gravesandy v Moore* (1986) 23 JLR 17 (Court of Appeal, Jamaica); *Pogas Distributors Ltd v McKitty* (1995) Court of Appeal, Jamaica, Civ App No 13 of 1994 (unreported); *Edwards v Pommels* (1991) Court of Appeal, Jamaica, Civ App No 38 of 1990 (unreported); *Francis v Baker* (1992) 29 JLR 424 (Court of Appeal, Jamaica).

24 [1977] 1 WLR 132, p 140.

unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.

There is no fixed approach to the computation of damages for loss of earning capacity. The court may use the multiplier/multiplicand method;<sup>25</sup> or it may award 'a fixed and relatively moderate sum'; or the loss 'may be subsumed in the general damages awarded'.<sup>26</sup>

### *Inflation*

It is well established that, in assessing general damages, the possible effects of inflation are not to be taken into account by increasing the multiplier.<sup>27</sup> It has been argued that it would be unrealistic to ignore inflation altogether, especially in times of financial instability.<sup>28</sup> However, the conventional view is that the successful plaintiff receives a lump sum payment which should be invested, and protection from the effects of future inflation should be left to sound investment policy.<sup>29</sup> On the other hand, in *Shamina v Dyal*,<sup>30</sup> Georges C, in the Court of Appeal of Guyana, pointed out that:

...aside from the fact that the money market and other investment opportunities that are available to the investor in the UK are all but non-existent here, the rate of inflation has been so rampant as to be described as 'hyper'. I believe that, until greater stability returns to the monetary system of [Guyana], in its assessment of future pecuniary loss, the court ought not to 'turn Nelson's eye' to the issue of inflation. But it cannot act without cogent and relevant evidence. Perhaps evidence of past trends and of future prospects may be of assistance.

In the instant case, the defendant had not furnished any such evidence, and the court accordingly was not in a position to take the impact of inflation into account in the assessment of damages.

### **Deductions**

We have already seen<sup>31</sup> that, in calculating damages for loss of earnings, the plaintiff's liability to income tax on the earnings for the loss of which he claims compensation must be taken into account and deducted from the damages payable by the defendant. This principle was established by the House of Lords in *British Transport Commission v Gourley*<sup>32</sup> and has been applied in many Commonwealth Caribbean cases. The rationale for making such a deduction is that the aim of damages in the law of torts is *restitutio in integrum*, that is, to restore the plaintiff to the position he would have been in had the tort not been committed; and if the

25 As in *Christopher v Rampersad* (2001) High Court, Trinidad and Tobago, No SC 1063 of 1996 (unreported).

26 *Joyce v Yeomans* [1981] 2 All ER 21; *Kiskimo Ltd v Salmon* (1991) Court of Appeal, Jamaica, Civ App No 13 of 1994 (unreported); *Campbell v Charley* (1999) Court of Appeal, Jamaica, Civ App No 68 of 1997 (unreported).

27 *Taylor v O'Connor* [1970] 1 All ER 365, pp 372, 373.

28 *Ibid*, p 368.

29 *Ibid*, p 378.

30 (1993) 50 WIR 239, p 257.

31 See above, p 377.

32 [1955] 3 All ER 796.

deduction were not made, the plaintiff would be over-compensated. For the same reason, certain 'collateral benefits' received by the plaintiff in compensation for the injury must be deducted from the damages. This is subject to two important limitations:

- (a) it was established in *Parry v Cleaver*<sup>33</sup> that a benefit is to be deducted only where the receipt of the benefit truly reduces the loss suffered by the plaintiff; and
- (b) on policy grounds, certain benefits are not deductible.

The position as to collateral benefits may be summarised as follows:

- (a) *Wages or sick pay*. Wages or sick pay paid by the plaintiff's employer as a matter of *contractual obligation* are deductible in full, because they reduce the plaintiff's loss;<sup>34</sup> but it seems that *ex gratia* payments made by an employer are not deductible.<sup>35</sup>
- (b) *Occupational pensions*. In *Parry v Cleaver*,<sup>36</sup> it was held that a disability pension, whether or not discretionary and whether or not contributory, should not be deducted in assessing a plaintiff's lost earnings. This is so even where the tortfeasor is the plaintiff's employer and, therefore, the 'provider' of the pension scheme, because the pension is the fruit of the employee's work and is not a replacement for his loss of earnings.<sup>37</sup>
- (c) *Unemployment benefit*. Any unemployment benefit received from a State fund is deductible in full, as it reduces the plaintiff's loss.<sup>38</sup> But it has been held that a State retirement pension is not deductible.<sup>39</sup>
- (d) *Charitable donations*. Payments received from charitable organisations are not deductible, for two policy reasons:
  - because otherwise there would be 'a risk that the springs of charity would dry up';<sup>40</sup> and
  - because it would be unjust if the only person who benefited from the receipt of charitable donations were the tortfeasor, because his obligation to the plaintiff would thereby be reduced.<sup>41</sup>
- (e) *Loss insurance*. Benefits received under a contract of insurance are not deductible from damages for personal injury, for, on policy grounds, it would be unfair to penalise the plaintiff for his own foresight and thrift in taking out the policy and paying the premiums.<sup>42</sup>

The question of deductions in personal injury claims was fully discussed by Carberry JA in the Jamaican Court of Appeal in *Coleman v McDonald*.

33 [1969] 1 All ER 555.

34 *Metropolitan Police Receiver v Croydon Corp* [1957] 2 QB 154.

35 *Dennis v London Passenger Transport Board* [1948] 1 All ER 779.

36 [1969] 1 All ER 555.

37 *Smoker v London Fire and Civil Defence Authority* [1991] 2 All ER 449.

38 *Nabi v British Leyland Ltd* [1980] 1 All ER 667.

39 *Hewson v Downs* [1970] 1 QB 73.

40 Winfield and Jolowicz, *Tort*, 15th edn, 1998, London: Sweet & Maxwell, p 776.

41 *Parry v Cleaver* [1969] 1 All ER 555.

42 McGregor, *Damages*, 15th edn, 1988, London: Sweet & Maxwell, para 1133; *Parry v Cleaver* [1969] 1 All ER 555.

### Coleman v McDonald (1979) 16 JLR 490, Court of Appeal, Jamaica

The plaintiff/respondent was injured in a road accident caused by the negligence of the defendant/appellant. The plaintiff was insured with the Ontario Health Insurance Plan, one-third of the premiums being paid by the plaintiff and two-thirds by her employers. The plaintiff's entire medical and hospital bills were paid by the insurers, but, under the terms of the insurance, the plaintiff was obliged to reimburse the cost of the medical and hospital expenses from any damages awarded to her in the action. The Chief Justice of the Cayman Islands, from whose judgment the defendant appealed, awarded the plaintiff the amount of the medical and hospital expenses as special damages.

*Held*, the Chief Justice was correct in allowing the claim, in view of the facts that: (a) the plaintiff paid the premiums of the policy, though in part only; and (b) the plaintiff was obliged to reimburse the insurers. Carberry JA said:

The problem here stands at the edge of a much larger controversy that has been raging for some time in all the countries using the English common law. The damages awarded to a plaintiff in an action for negligence are compensatory, not punitive; they are intended to provide restitution for the plaintiff, not to visit retribution on the defendant (see *per* Diplock LJ in *Browning v The War Office*).<sup>[43]</sup> From this basis springs the problem: granted that a plaintiff has been injured by the defendant, so that he has been unable to work and earn wages, and has incurred expenses for medical treatment and the like, what is to happen if some third person, from motives of benevolence or otherwise, pays to the plaintiff sums of money intended to compensate or provide for his salary, or meet his expenses; does this receipt by the plaintiff mean that the plaintiff is to be debarred in whole or in part from making his claim for lost salary or for the expenses incurred from the defendant? Is it to be said that the plaintiff has, by reason of the receipt of this extraneous money, not suffered the loss that has been inflicted on him; that there is no longer any further need, *pro tanto*, for restitution from the defendant, and that to demand it of him is to extract retribution rather than extract restitution? Another way of asking this question is to ask whether in this situation the defendant is to reap the charity or benefit intended for the plaintiff, or to benefit perhaps from the provision that the plaintiff has made by way of insurance or other use.

The defendant's approach to the matter is to say that the particular loss, no thanks to me, it is true, has not been experienced due to the payment made by the provider, so why should I have to meet it? The plaintiff's approach is to say: the defendant has injured me and should pay for those losses; the fact that some third person has provided me with money is no concern of the defendant. It was not meant to help him, or to relieve him from liability. It was meant to help me, and his liability remains. Why should not the defendant pay what he was due to pay? Why should I not retain with thanks the benefits that a compassionate provider moved by pity has given to me? There are various other in-between or complicating factors. The third person or provider may be the plaintiff's own employer: where he provides sick pay or leave, then the truth of the matter is that it is he who has lost: he is paying wages or salary and getting no equivalent in services in return because the defendant's negligence has deprived him *pro tempore* (sometimes permanently) of the plaintiff's services, yet, as the matter now stands, the employer cannot sue to recover those lost wages: *AG for New South Wales v Perpetual Trustee Co*<sup>[44]</sup> and *IRC v Hambrook*,<sup>[45]</sup> overruling *AG v*

43 [1963] 1 QB 750, p 764.

44 [1955] AC 457.

45 [1956] 1 All ER 578.

*Valle Jones*.<sup>[46]</sup> Nor can the plaintiff sue to recover them, for, if they were paid to him as of right, that is, under the terms of his service contract, then it is said the plaintiff has not lost them and so cannot recover. See, for example, *Graham v Baker*<sup>[47]</sup> and *Browning v The War Office*.<sup>[48]</sup> However, if the employer pays them as purely voluntary payments, or perhaps has the prudence to pay them on terms that he will get them back if the plaintiff recovers them from the defendant, then the plaintiff may recover them, though he will do so on trust to repay the employer: see, for example, *Dennis v London Passenger Transport Board*,<sup>[49]</sup> *Ayers and Guelph v Hoffman*.<sup>[50]</sup>

Nevertheless, disability pensions, in contrast to sick pay, are never to be deducted or reckoned in the defendant's favour: see *Payne v Rly Executive*<sup>[51]</sup> and *Parry v Cleaver*.<sup>[52]</sup>

The techniques involved in the several common law courts in attempting to resolve the problem are fascinating. Sometimes, resort is had to the doctrine of 'causation': can it be said that the provision made by the provider was 'caused' by the accident that befell the plaintiff? If it was not so 'caused' but was due to 'extraneous' facts, then the provision will not assist the defendant: see, for example, *Hay v Hughes*<sup>[53]</sup> (grandfather taking on orphaned grandchildren). At other times, resort is had to the doctrine of 'remoteness' and it is said that the provision by the provider was too remote and, therefore, not deductible. At other times, resort is made to the concept of whether it is 'just and equitable' that the plaintiff should get the benefit of the provision without having to account, or whether the defendant should in effect get the benefit of the provision in having it deducted from the damages he is required to pay: see, for example, Lord Denning MR in *Browning v The War Office*.<sup>[54]</sup> The canons of what is just and equitable are apt to be elusive, as that judgment was overruled in *Parry v Cleaver*.<sup>[55]</sup> In the Australian cases, both Dixon CJ and Windeyer J have been apt to discard 'causation' and to direct attention to the 'forgotten man', the actual 'provider', and to ask whether the provider meant the plaintiff to have the provision, regardless of whether he recovered from the defendant or not (see *National Insurance Co of New Zealand v Espagne*).<sup>[56]</sup> In the case of charitable or public fund subscriptions for victims of natural or other disasters, it is usually easy to see that the provider meant the plaintiff to enjoy the provision regardless of the defendant's liability, and in such a case the provision is not deductible in favour of the defendant: see *Redpath v Belfast and County Down Rly*.<sup>[57]</sup> The problem, unfortunately, is likely not only to remain with us, but to increase, because, with the growth of the 'Welfare State' and public provisions for citizens who suffer from some form of disablement or the other, there enters on the scene a new 'provider' whose intention will not be gleaned from its utterances but must be deciphered from the statutory instruments or laws setting it up.

In all this welter of authority there are at least two classes of case which provide a clear and unambiguous answer to the problem presently before us.

46 [1935] 2 KB 209.

47 (1961) 106 CLR 340.

48 [1963] 1 QB 750.

49 [1948] 1 All ER 779, *per* Denning J.

50 (1956) 1 DLR (2d) 272 (Ontario High Court).

51 [1951] 2 All ER 910.

52 [1969] 1 All ER 555.

53 [1975] 1 All ER 257.

54 [1963] 1 QB 750.

55 [1969] 1 All ER 555.

56 (1961) 105 CLR 569.

57 [1947] NI 167.

There are first the insurance cases. It is convenient to set out in full the relevant paragraphs taken from *McGregor on Damages*, 13th edn, 1972, para 116(a), dealing with deductions in calculating loss of future earnings:

*Insurance moneys*

As early as 1874 it was decided in *Bradburn v Great Western Rly*<sup>58]</sup> that, where the plaintiff had taken out accident insurance, the moneys received by him under the insurance policy were not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys. This decision has withstood all the recent changes of judicial heart over the issue of collateral benefits and is solidly endorsed by *Parry v Cleaver*<sup>59]</sup> not only by the majority who relied upon it by analogy, but also by the minority who sought to distinguish it. The argument in favour of non-deduction is that even if in the result the plaintiff may be compensated beyond his loss, he has paid for the accident insurance with his own moneys, and the fruits of this thrift and foresight should in fairness enure to his and not to the defendant's advantage.

At p 765, para 1133, *McGregor on Damages* again deals with insurance moneys, this time with reference as to their deducibility in respect of claims for medical expenses. The passage reads thus:

*Insurance moneys*

Whether a plaintiff whose medical expenses have been paid for him under a private medical insurance scheme to which he subscribes, such as that run by BUPA, is entitled nevertheless to claim the expenses as part of his damages is a question which does not appear to have been explicitly passed upon by the courts. It would seem likely that the analogy of the non-deductibility of insurance moneys in relation to loss of earnings—a rule unanimously supported by their Lordships in *Parry v Cleaver*—would prevail since the argument in favour of non-deduction, viz, that the plaintiff has paid for the insurance with his own moneys and should not be deprived of the fruits of his thrift and foresight to the defendant's advantage, applies as much in this context as in the other. Indeed the plaintiff may have an accident insurance policy, the moneys from which he can deploy as he cares between the payment of his medical expenses and the replenishment of his lost earnings, or which indeed he may spend in any other way he chooses. Nor should it make any difference that, as may frequently be the case here, the insurance moneys, instead of being paid directly to the plaintiff, are applied directly by the insurer in payment of the medical expenses.

We are of the view that, the opportunity having now occurred for this court to deal 'explicitly' with the problem so far as it relates to the recovery of medical expenses, we ought to hold and do hold that the payment of the medical expenses by accident insurance taken out by the plaintiff, whether solely or by way of a contribution with her employer, does not in any way prevent their recovery from the defendant and that the principle enunciated in *Bradburn v Great Western Rly*<sup>60]</sup> applies. As was said by Pigott B:<sup>61]</sup>

He (the plaintiff) pays the premiums upon a contract which, if he meets with an accident, entitles him to receive a sum of money. It is not because he meets with the accident, but because he made a contract with, and paid premiums to, the insurance company for that express purpose that he gets the money from them. It is true that there must be the element of accident in order to entitle him to the money; but it is under and by reason of his contract with the insurance

58 [1874–80] All ER Rep 195.

59 [1969] 1 All ER 555.

60 [1874–80] All ER Rep 195.

61 *Ibid*, p 197.

company that he gets the amount; and I think that it ought not, upon any principle of justice, to be deducted from the amount of damages.

While it is true that the plaintiff in this case contributed one-third only of the premium, the argument that only one third of the medical expenses should therefore be paid by the defendant is but an ingenious attempt to reap where the defendant has not sown. It fails. But it should be added that, if it were the case that the defendant was an employer who had contributed the other two-thirds of the premium, then the defendant should be entitled to two-thirds of the benefit of the insurance coverage.<sup>[62]</sup>

See, further, *Jones v Gleeson*,<sup>[63]</sup> a decision of the High Court of Australia (approved by the House of Lords in *Parry v Cleaver*), where that court refused to permit the deduction of a contributory pension from the damages (awarded for future loss of income), though the plaintiff contributed only in part to the pension fund, the other part being furnished by the plaintiff's employers.

In *Parry v Cleaver*,<sup>[64]</sup> Lord Reid said as regards 'benevolent' contributions to the plaintiff and benefits of insurance policies:

It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large, and that the only gainer would be the wrongdoer...

As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor. Here, again, I think that the explanation that this is too remote is artificial and unreal. Why should the plaintiff be left worse off than if he had never insured? In that case he would have got the benefit of the premium money; if he had not spent it he would have had it in his possession at the time of the accident grossed up at compound interest...

Apart from the fact that these expenses were paid by the proceeds of an accident insurance policy, they were also recoverable on other grounds, both in principle and on authority.

There is no question but that they were expenses rendered necessary by the defendant's conduct and that the charges made therefor were reasonable. There is nothing punitive in calling on a defendant to pay for the expenses which have been incurred by or on behalf of the plaintiff as a result of the injury that he has caused to the plaintiff.

Had the plaintiff borrowed money from the bank to pay these expenses, clearly they would be recoverable. Nor does it make any difference that a third person has advanced them on behalf of the plaintiff: see *Allen v Wates*,<sup>[65]</sup> *Liffen v Watson*.<sup>[66]</sup>

We would respectfully agree with the judgment of the English Court of Appeal in *Donnelly v Joyce*,<sup>[67]</sup> [which is] fairly summed up in the headnote to the report in the All England Reports, which reads:

In an action for damages for personal injuries incurred in an accident, a plaintiff was entitled to claim damages in respect of services provided by a third party which were reasonably required by the plaintiff because of his physical needs

62 *Parsons v BNM Laboratories* [1963] 2 All ER 658; *Turner v Ministry of Defence* (1969) 113 SJ 585.

63 (1965) 39 ALJR 258.

64 [1969] 1 All ER 555.

65 [1935] 1 KB 200.

66 [1940] 1 KB 556.

67 [1973] 3 All ER 475.

directly attributable to the accident; the question whether the plaintiff was under a moral or contractual obligation to pay the third party for the services provided was irrelevant; the plaintiff's loss was the need for those services, the value of which, for the purpose of ascertaining the amount of his loss, was the proper and reasonable cost of supplying the plaintiff's need. It followed, therefore, that the defendant was liable to the plaintiff for the cost of the mother's services, that is, her loss of wages, necessitated by the defendant's wrongdoing.

In the result, therefore, it appears to us that the learned Chief Justice was correct in holding that this plaintiff was entitled to recover from the defendant 'the special damages claimed on the understanding and conditions that they are paid to the Ontario Ministry of Health in satisfaction of that Ministry's subrogated rights'. Indeed, it is our view that she would have been so entitled even if she was under no legal obligation to pay same over to the Ontario Ministry of Health.

The plaintiff was entitled to recover this sum from the defendant, not only under the principles laid down in *Bradburn v Great Western Rly*,<sup>[68]</sup> as to accident insurance policies, but also under the wider principles indicated in *Donnelly v Joyce*.<sup>[69]</sup>

If, as is alleged, the plaintiff is under a legal obligation to refund this sum to the Ontario Ministry of Health, then, even on the narrowest view advanced in the cases that we have been referred to and have mentioned above, the defendant is liable to reimburse this sum to the plaintiff so that the legal obligation may be discharged.

### Duty to mitigate

A plaintiff who has suffered injuries as a result of the defendant's tort is required to act reasonably so as to mitigate, that is minimise, his loss. Thus, for instance, if he has lost his job because of his injuries, he will be expected to accept alternative employment. Another important aspect of the duty to mitigate is that the plaintiff may be expected to undergo reasonable medical treatment necessitated by his injuries, if such treatment is likely to improve his chances of employment or to decrease his loss, though he will not be expected to submit to a surgical operation which involves a substantial risk. If a plaintiff refuses surgery, the court will decide, in the light of the circumstances of the particular case, whether such refusal was reasonable.

The leading case on this topic in the Caribbean is *Selvanayagam v University of the West Indies*.<sup>70</sup> The plaintiff in this case, a Professor of Civil Engineering at the University's St Augustine Campus, fell into an unguarded trench on the campus and sustained severe injuries to his neck, in addition to other injuries. The University admitted liability, and one of the main questions before the Privy Council was whether the plaintiff had acted reasonably in refusing an operation on his neck. The consultant neuro-surgeon who examined the plaintiff had recommended surgery. In his opinion, the operation would be 'not very risky' and the chances of success would be 'quite good', with movement in the neck increasing after about six months to 80% of normal, after which the plaintiff would be fit to resume his professional work. However, the plaintiff was a diabetic, and there was a risk of infection. The surgeon accordingly was of the view that, in the light of the diabetes

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68 [1874–80] All ER Rep 195.

69 [1973] 3 All ER 475.

70 [1983] 1 All ER 824.

complication, the decision whether to operate or not was best left to the patient. The Privy Council concluded on the evidence and in the circumstances that the trial judge had correctly held that the plaintiff had discharged the onus of showing that his refusal of surgery was reasonable. As Lord Scarman explained:<sup>71</sup>

Their Lordships do not doubt that the burden of proving reasonableness was on the [plaintiff]. It always is, in a case in which it is suggested that, had a plaintiff made a different decision, his loss would have been less than it actually was. The point was succinctly made in an admiralty case of collision at sea by Lord Merriman P: *The Guildford, SS Temple Bar (owners) v MV Guildford (owners)*.<sup>[72]</sup> Their Lordships would add a further comment on the law, well established though it is. The rule that a plaintiff who rejects a medical recommendation in favour of surgery must show that he acted reasonably is based on the principle that a plaintiff is under a duty to act reasonably so as to mitigate his damage. Their Lordships respectfully agree with the opinion expressed on the point by the High Court of Australia in *Fazlic v Milingimbi Community Inc*,<sup>[73]</sup> to which they were helpfully referred by counsel for the appellant. The question is one of fact and, as already mentioned, the burden of proof is on the plaintiff. In *Richardson v Redpath Brown and Co Ltd*<sup>[74]</sup> Viscount Simon LC said that the material question is 'whether the workman [ie the plaintiff] who refuses to be operated upon is acting reasonably in view of the advice he has received.' Their Lordships would, with respect, put the question in more general terms. Though the advice received will almost always be a major factor for consideration, the true question is whether in all the circumstances, including particularly the medical advice received, the plaintiff acted reasonably in refusing surgery. Their Lordships note that in *Fazlic's case*<sup>[75]</sup> the High Court of Australia took the same view.

For these reasons, their Lordships are of the opinion that the Court of Appeal was wrong to reverse the judge. He was right to treat the question as one of fact and to put the burden of proof on the [plaintiff]. And there was evidence on which he could properly conclude that the [plaintiff] had discharged it.

The principles in *Selvanayagam* were applied by the Eastern Caribbean Court of Appeal in a St Lucian case, *Lansiquot v Geest plc*,<sup>76</sup> where the plaintiff, an employee of the defendant, had been injured by falling on a defective stairway in one of the defendant's ships. The plaintiff suffered a 'slipped disc' and consequent sciatica, which caused severe and continuing pain. She refused surgery. On the question as to whether the refusal was reasonable, the evidence was that a specialist in rheumatology had outlined to the plaintiff the 'pros' and 'cons' of surgical intervention, but considered that the decision whether to submit to surgery was better left to the plaintiff herself, bearing in mind that there was no guarantee that it would cure her back pain. Satrohan Singh JA, delivering the judgment of the court, concluded that the plaintiff's refusal of surgery was not unreasonable in the circumstances. He said:

The Court must approach the evidence on the issue objectively. The burden of proving that the decision not to have an operation was reasonable, was on the [plaintiff]. Though the medical advice received will almost always be a major factor for consideration, the true question is whether, in all the circumstances, including

71 *Ibid*, p 827.

72 [1956] 2 All ER 915, p 919.

73 (1981) 38 ALR 424, p 430.

74 [1944] 1 All ER 110, p 112.

75 (1981) 38 ALR 424, p 428.

76 (2000) Court of Appeal, Eastern Caribbean States, No 1 of 1999 (unreported).

particularly the medical advice received, the [plaintiff] acted reasonably in refusing surgery. The evidence on this issue did not show medical advice that surgery would certainly have cured the [plaintiff] of her back pains and her sciatica. ... The acceptance of surgery is a serious decision for anyone to make. There is always a grave risk involved when the human body is invaded.

Assessing the evidence objectively, it did not show surgery as being more certain than not as a relief or a cure for the back pain. It also did not tell the [plaintiff] of the risks involved, in order to allow the [plaintiff] to make an informed decision, as was done in *Selvanayagam*. At best, it showed that the doctors, in all good faith, were seeking to cure the [plaintiff] by trial and error...

From the above observations, it is reasonable to conclude that the [plaintiff] was left in a state of total uncertainty as to whether or not she could, with more certainty than not, have been cured by surgery.

The decision of the Court of Appeal in *Lansiquot* has subsequently been upheld by the Privy Council;<sup>77</sup> however, the most significant aspect of the Privy Council's ruling was the strong support given to the criticisms of the *Selvanayagam* rule, that the onus lies on a plaintiff, who has refused medical treatment, to prove that his refusal was reasonable. Lord Bingham pointed out that textbook writers and commentators had almost universally preferred those decisions which had put the onus on the *defendant* to show that the plaintiff's refusal of medical treatment was unreasonable;<sup>78</sup> and although the trial judge and the Court of Appeal in this case had rightly considered the *Selvanayagam* rule to be binding on them,<sup>79</sup> the opposite view of the onus was 'soundly based'. On the facts of the instant case, however, the result would be the same whether the onus lay on the defendant or on the plaintiff.<sup>80</sup>

## DEATH

The assessment of damages in respect of the death of a victim of negligence is governed by the fatal accidents legislation of the particular jurisdiction (see below, Appendix 2). The purpose of such legislation is to ensure that the dependants<sup>81</sup> or near relations of the deceased receive adequate compensation for the material loss they have suffered as a result of the death. In Lord Wright's words, this is 'a hard matter of pounds, shillings and pence'.<sup>82</sup> As in the assessment of loss of future earnings in personal injuries cases, the courts in fatal accident cases use the multiplier/multiplicand approach; but there is a difference, in that whereas in personal injuries claims the multiplicand is an estimate of the plaintiff's annual loss of earnings, in fatal accident claims it is an estimate of the *annual value of the dependency*,<sup>83</sup> that is, of the amount which the deceased would have spent on his

77 [2002] UKPC 48 (PC Appeal No 27 of 2001) *sub now. Geest plc v Lansiquot*.

78 Eg, *Richardson v Redpath* [1944] 1 All ER 110.

79 See also *Maharaj v Bishop* (1985) High Court, Trinidad and Tobago, No 4546 of 1982 (unreported), where Deyalsingh J considered himself to be bound by the ruling in *Selvanayagam* putting the onus of proof on the plaintiff. On the facts of *Maharaj*, which also featured a diabetic plaintiff, the refusal of surgery was held to be reasonable, as the medical opinions were conflicting.

80 One suspects that this would be so in most cases.

81 It has been held that a 'common law wife' was not a dependant within the Compensation for Injuries Act, Ch 8:05 (Trinidad and Tobago). See *Samuel v Surajit* (2002) High Court, Trinidad and Tobago, No 2156 of 1998 (unreported).

82 *Davies v Powell Duffryn Associated Collieries Ltd* [1942] 1 All ER 657, p 665.

83 *Khan v Khan* [1974] LRG 287, Court of Appeal, Guyana, p 291.

family. Thus, the multiplicand in fatal accident claims will usually be lower than in personal injuries actions, because it is necessary to deduct a percentage from the net income to represent what the deceased would have spent exclusively on himself.<sup>84</sup> The multiplier will also normally be lower in fatal accident claims, since the court must take into account not only the age, health and future prospects of the deceased before his death, but also those of the dependants themselves.<sup>85</sup>

A comparison of the various fatal accidents statutes in the Commonwealth Caribbean shows a considerable divergence between the detailed provisions of each (see below, Appendix 2). For instance, whereas the Compensation for Injuries Act (Trinidad and Tobago) and the Accident Compensation (Reform) Act (Barbados) provide a cause of action for the benefit of 'dependants' of the deceased,<sup>86</sup> the Fatal Accidents Act (Jamaica) gives a cause of action for the benefit of the deceased's 'near relations'. Again, whereas the limitation period for fatal accident claims is three years from the date of the death under the Bahamian Act and three years from the time that the cause of action arose under the Barbadian Act, it is four years from the date of the death under the Trinidadian statute. Further, the Barbadian statute differs from the others, in that:

- (a) it includes a provision for an award of compensation for loss of guidance, care and companionship; and
- b) ( it gives a cause of action to dependants in respect of *injury or death*.<sup>87</sup>

Of the many Commonwealth Caribbean cases in which fatal accident damages have been assessed, the following (*Maraj v Samlal* and *McCarthy v Barbados Light and Power Co Ltd*) are illustrations of some of the judicial techniques employed.

**Maraj v Samlal (1982) High Court, Trinidad and Tobago,  
No 1058 of 1973 (unreported)**

Narine J said:

On the night of 16 December, 1972, there was a collision on Lady Hailes Avenue, San Fernando, between motor car PN 7142 and motor car PF 5962. As a result of that collision, Boysie Maraj, the driver of PN 7142, died on that very night. At the time of his death he was 32 years of age, married and the father of the infant plaintiffs.

This action was brought under the Compensation for Injuries Ordinance, Ch 5, No 5 (now Laws of the Republic of Trinidad and Tobago, Ch 8:05) by the wife on her own behalf and on behalf of the four infant plaintiffs, as their mother and next friend.

Sometime after this action was filed, the original defendant, Ramdeo Samlal, also died. George Jagan Badoo was appointed administrator *ad litem* by order of Ibrahim

84 *Harris v Empress Motors Ltd* [1983] 3 All ER 561, followed in *Pilgrim v Transport Board* (1990) High Court, Barbados, No 1110 of 1983 (unreported).

85 In *Mallet v McMonagle* [1969] 2 All ER 178, Lord Diplock referred to a multiplier of 16 as one rarely exceeded.

86 See *Cumberbatch, J* (1988) 17 Anglo-Am LR 316.

87 See s 3. In *Toppin v Jordan* (1991) 51 WIR 16, p 18, King J (Ag) pointed out that it had been customary to use the Barbados Act purely in circumstances where a person died as a result of an accident. *Toppin* appears to be the only case in which an action under the Act was entertained in favour of the dependants of a *living*, injured person

J, made on 11 February 1981 for the purpose of representing the estate of Ramdeo Samlal in these proceedings.

[Narine J found the defendant wholly liable in negligence for the accident, and continued:]

Prior to his death, the deceased was 32 years of age and employed with the Trinidad and Tobago Electricity Commission as a senior mechanical assistant in the maintenance department. Mr Sebastian, a senior engineer with T & TEC in the year 1969, said that the deceased worked with him and he described the position held by the deceased as a supervisory one. Before coming to T & TEC, the deceased worked with and received training at Texaco Trinidad Inc. He received an 'A' grade certificate from the Technical Institute, San Fernando, in July 1955, and that certificate shows that he was a first prize winner for general proficiency. He was the recipient of a certificate of merit from Texaco dated 15 December 1967. In 1960, he received a certificate from the Board of Industrial Training, Trinidad and Tobago, showing that he was successful, and he obtained a second class certificate in the third year special examination in Mechanical Engineering of the City and Guilds of London Institute in 1959. Sebastian described his training, both academic and practical, as covering a period of seven years. He described the deceased as 'A' class. He said that, when he left T & TEC, the deceased was the only one in that 'slot'—meaning that promotion to the position of mechanical supervisor was almost inevitable. Mr Hajaresingh supports this opinion. He said that he got the job which the deceased held, and that he was promoted to the position of mechanical supervisor in or about 1978. Hajaresingh went on to say that the next position open to him is that of an assistant mechanical engineer. Also of importance in Hajaresingh's evidence is the fact that the academic qualifications of the deceased and his own were more or less the same. We know that, at the time of death, the deceased held a higher position than Hajaresingh and of the latter's promotion from time to time. Therefore, in my opinion, it would be safe to conclude that the progress of the deceased and that of Hajaresingh would have followed a similar pattern.

Both Hajaresingh and Sebastian gave evidence of the ability on the part of a person qualified as the deceased was to make 'extra' money by doing private work, Sebastian saying that he in fact employed the deceased on one occasion.

And finally on the question of prospects, I again refer to the evidence of Sebastian. He said that the deceased had the capacity to achieve the same as himself, that is, to become a fully qualified mechanical engineer, and indeed even at the time of death the deceased without any further qualification could have obtained employment in the open market as a junior engineer, with a salary of about \$4,000 per month with certain perquisites; that there was, and, indeed, is, a demand for persons with the ability and qualifications which the deceased possessed.

When the evidence of these two witnesses just referred to is taken in conjunction with the evidence issuing from the Trinidad and Tobago Electricity Commission, one can form a fair opinion of the prospects of the deceased, at least if he continued to work with T & TEC. That ultimately he would have become an assistant maintenance engineer seems a real possibility, if not in the year 1981, then within a few years of it.

He was undoubtedly an ambitious young man, living a well organised life, a thrifty man with a thrifty wife. I have no evidence as to when he would have been required to retire; the evidence is that he was wholly dependent on his personal earnings, and therefore what matters is not so much his full expectation of life as his expectation of working life. From the evidence it seems to me that he was a fit and healthy man, participating in various forms of sporting activities, and, in my opinion, his working life as a skilled workman could easily have extended to 65 years. I have taken 16 years as the number of years' purchase, and I have done so principally because of the age of the deceased at the date of his death, and because of his prospects for promotion as well as the likelihood of a continuing predominantly happy and progressive life. I also consider 16 years a suitable multiplier which would reduce the total loss to its

present value. In fixing 16 years, I have considered the uncertainties which may arise at different states of the life of the deceased; death earlier than the normal expectancy; sickness or accident; and some of the other matters dealt with by Lord Diplock in *Mallet v McMonagle*.<sup>[88]</sup> In this case, the head of the household was killed; his wife and children were solely dependent upon him. I have tried to arrive at the net contribution to the household after making certain deductions which I consider legitimate, especially income tax, and such sums as may have been required from time to time to meet the needs of the deceased himself.

Because of the length of time which elapsed between the date of death and the date of trial—almost 10 years—I have deviated somewhat from the guidelines prescribed in *Cookson v Knowles*.<sup>[89]</sup> As is well known in cases of this kind, so much depends on conjecture. However, for the period between death and trial in this case there are some hard facts and figures which are available and which in my opinion reduce, though they cannot eliminate, reliance on conjecture.

In addition to income from salary, I have had to consider other benefits to which the deceased would have become entitled had he continued in employment.

These consist of:

- (a) a housing benefit;
- (b) a stand-by allowance;
- (c) income via overtime;
- (d) a cost of living allowance;
- (e) air fare to UK for himself and wife and two children.

I think in the method I have employed I have been able to maintain the spirit of the guidelines in *Cookson v Knowles*,<sup>[90]</sup> in arriving at the pre-trial loss on the one hand and the post-trial or future loss on the other.

In order to arrive at the net loss sustained by the dependants, which sum constitutes the measure of damages, I have tried as best I could to follow the method ordinarily employed and which is to be found in the judgment of Lord Wright in the case of *Davies v Powell Duffryn Associated Collieries Ltd*, wherein he said:<sup>[91]</sup>

There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities.

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a *datum* or basic figure, which will generally be turned into a lump sum by taking a certain number of years' purchase. That sum, however, has to be taxed down by having due regard to uncertainties—for instance, the widow might have again married and thus ceased to be dependent—and other like matters of speculation and doubt.

Perhaps I should deal at once with the question of re-marriage of the widow. She is in her 30s; 10 years have passed and she has not yet re-married. Indeed, I do not consider her chances of re-marriage as ready. One cannot shut one's eyes to the fact that she is, as it were, encumbered with four young children.

88 [1969] 2 All ER 178.

89 [1978] 2 All ER 604.

90 *Ibid.*

91 [1942] 1 All ER 657, p 665.

There is also the question of a continuing income by way of pension after retirement, had the deceased lived and worked to the qualifying age. The exhibit 'C' (salary statement) shows that the deceased was a contributor to a pension plan; the monthly deduction of \$33.25 from his gross salary is shown in that statement. What his pension would have amounted to at any given time I am unable to tell. This too would be an income in the future to be considered in arriving at a reasonable number of years' purchase. It would be seen, therefore, of necessity, that a number of assumptions and approximations would have to be made and introduced in order to facilitate the computation of the damages to be awarded. The cases decided both here and in England support such an approach and I do not think it necessary for me here to make any detailed reference to them, save perhaps to refer to a case which deals with this question broadly: *Austin v London Transport Executive*.<sup>192</sup>

Some of the matters the learned judge is asked to take into account seem beyond the wit or wisdom of man to take into account in any sure or certain way... Whatever wisdom he may have, he cannot lift the veil of the future and see among the seeds of time which will grow and which will not. He cannot do that. He can only do the best he can (*per* Birkett LJ).

And this is what I have set out to do. Because of the length of time between death and trial, I have divided the period of 10 years into two periods, the first is of six years, that is, 1973 to 1978 inclusive, a period during which the deceased would have remained a senior mechanical assistant. Between 1978 and 1979, it would seem that, had he lived, he would have become a mechanical supervisor in 1978. And it will be remembered that Sebastian said that the deceased was the only one 'in that slot'. So that it seems reasonable to assume that the deceased would have been promoted by 1978–79.

For the year 1978, therefore, I have used the average of the salary as mechanical assistant, namely, \$1,470 per month, and as mechanical supervisor, \$1,745 per month, the mean being the sum of \$1,608 per month.

The next period is a period of four years, which takes me to the year 1982. And the third period is a period of six years, that is, from 1983 to 1988 inclusive. The last years represent the period of the future loss.

(a) The first period covers six years: 1973–78	
Dependency upon income from salary	\$52,698
(b) The second period covers four years: 1979–82	
Dependency upon income from salary	\$71,650
(c) The third period covers six years: 1983–88	
Dependency upon income from salary	\$104,490
(d) Benefit from housing—for a period of 10 years	\$39,750
(e) Benefit from stand-by allowance for a period of 10 years	\$9,600
(f) Income from over-time for a period of 10 years	\$27,840
(g) Income from COLA for period of 16 years	\$16,896
(h) Air fares to UK for himself, wife and two children	\$25,000
	\$347,924

The total damage, therefore, amounts to \$347,924. I accordingly award this sum together with interest on items (a) and (b) above (pre-trial loss) at the rate of 5% per annum, which rate represents half the normal rate of interest obtainable on short term investments. The period for which I have awarded interest is nine years, that is, roughly from the date of death to the date of trial. Items (a) and (b) amount to \$124,348, and the interest thereon amounts to \$59,066.

92 (1951) Court of Appeal, England and Wales, No 293 (unreported).

In the result there will be judgment for the plaintiffs in the sum of \$347,924, with interest in the sum of \$59,066.

I have apportioned the sums recoverable as stated hereunder:

(a) for the benefit of the widow, the sum of	\$286,990
(b) for the benefit of the child Veeda Maraj, the sum of	\$30,000
(c) for the benefit of the child Lindon Maraj, the sum of	\$30,000
(d) for the benefit of the child Hydeen Maraj, the sum of	\$30,000
(e) for the benefit of the child Stanley Maraj, the sum of	\$30,000
	\$406,990

The sums awarded for the benefit of the children at (b), (c), (d) and (e) above are to be paid into court to abide such order as may be made upon application.

I should add that this is a typical case of apportionment between widow and children, and I have followed the practice of awarding the greater part of the total damages to the widow on the reasonable assumption that she has cared for and that she will continue to care for and maintain the children so long as they are dependent upon her, and that she will not shirk from that responsibility.

**McCarthy v Barbados Light and Power Co Ltd (1988)**  
**High Court, Barbados, No 127 of 1988 (unreported)**

Husbands CJ (Ag) said:

On 21 February 1985, the motor van MH 429, owned by the first defendant and driven by its servant and agent, the second defendant, was travelling south to north on the Spring Garden Highway, St Michael. The third defendant, Margaret O'Neal, was driving her car MB 14 in the opposite direction. Eammon Michael McCarthy was in the front passenger seat of her car. The vehicles collided at the Brighton junction. Eammon McCarthy was killed. The plaintiff, the widow of Eammon McCarthy and the administratrix of his estate, claims in this action that the collision was caused by the negligence of the defendants, and, more particularly, by the negligent driving of the defendants Williams and O'Neal.

[Husbands CJ (Ag) found all three defendants liable in negligence. He continued:]

At the time of his death in February 1985, Eammon McCarthy, the deceased, was resident in Texas, USA, with his wife and children. He was 48 years of age. He had been married to the plaintiff, now aged 42, since August 1966, and was the father of three children—Sean, 19 years old, Kimberley, 18 years old, and Kara, 17 years old. His parents, James and Enid, now 76 and 70 years old respectively, were residing in Trinidad. The deceased was described as a good family man, and indeed the evidence suggests that he and the plaintiff were a good family couple. He was the breadwinner and she the housewife. They each enjoyed the company and companionship of the other and they both had the interests of their children as their paramount concern. He maintained a close relationship with his parents, although they lived on the Island of Trinidad. He was a good provider. He was employed by International Business Machines Corporation in 1966 and remained in their employ ever since. At the time of his death, he was in their permanent and pensionable establishment as a product control planning administrator. He earned a gross annual salary of US\$38,882 and received US\$29,994.42 after deduction of taxes. In addition, he received annual medical, surgical, dental and vacation benefits valued at \$13,694. He was well thought of by his employers and had received from them letters of commendation for his dedication

and industry. His promotional prospects were good. He was in good health. His age of retirement was 65 years.

The plaintiff's claim is on behalf of the dependants of the deceased and for the benefit of his estate. Under s 2 of the Accident Compensation (Reform) Act, Cap 193A, 'dependant' includes the wife, children and parents of the deceased. This Act entitles the dependants to recover as damages their pecuniary loss resulting from the death of the deceased, as well as an amount to compensate for the loss of guidance, care and companionship that the dependants might reasonably have expected to receive from the deceased. The principles to be adopted in the calculation of damages in these cases is adumbrated in the celebrated passage in *Davies v Powell Duffryn Associated Collieries Ltd*,<sup>[93]</sup> where Lord Wright said:

There is no question here of what may be called sentimental damages, bereavement or pain and suffering. It is a hard matter of pounds, shillings and pence, subject to the element of reasonable future probabilities.

The starting point is the amount of wages which the deceased was earning, the ascertainment of which to some extent may depend on the regularity of his employment. Then, there is an estimate of how much was required or expended for his own personal and living expenses. The balance will give a *datum* or basic figure which will generally be turned into a lump sum by taking a certain number of years' purchase.

The starting point here is readily ascertained. The deceased was on the permanent establishment of IBM, which has produced figures of his net earnings which have not been questioned. Following the guidelines in *Cookson v Knowles*,<sup>[94]</sup> I propose to adopt a multiplier as at the date of death of the deceased and then assess the award having regard to the pre-trial and post-trial losses. Mindful of the age, good health and promotional prospects of the deceased, as well as the ages and general well being of the dependants, I am of the view that 12 is an appropriate multiplier in this case.

In determining pre-trial loss, that is to say, the loss between death and the date of trial, I have been greatly assisted by the figures [of the deceased's net earnings] to which I have just referred. Death took place in February 1985; the trial in October 1988; a period of three years. The projected net income of the deceased for this period is set out in Exhibit 32(a) as follows:

Year	Net pay US\$	
1985	29,994.42	
1986	33,645.00	
1987	37,298.30	
1988	39,574.50	(two-thirds of which is relevant for those purposes)
	26,383.00	

making a total of \$127,320.72. To this must be added the average annual benefit (for medicals, surgical, dental and holidays) of \$13,694, which was estimated to increase an average of \$1,036 per year. For three years, those benefits would be \$55,390. Added to this also must be the sum for the gratuitous services rendered by the deceased as handyman in the home; services for which the widow now has had to pay. She estimates the cost at US\$1,200 per annum or \$4,400 for the relevant period. These sums, \$127,320.72+\$55,390+\$4,400, amount to \$187,110.72. From this must be deducted an amount estimated as required or expended by the deceased for his own personal

93 [1942] 1 All ER 657, p 665.

94 [1978] 2 All ER 604.

and living expenses. In the circumstances of his case, I would deduct 25%, leaving a balance of \$140,333.04 as pre-trial loss.

For post-trial loss, the multiplicand is assessed as at the date of trial and is based on the income which the deceased would have received. According to Exhibit 32(a), his net annual salary would then have been \$39,574.50, which figure has to be adjusted upwards to allow for the possibility of future increases due to promotion. I would adopt \$41,000 as the multiplicand.

Having regard to the ages of the children, I would deduct 30% for personal and living expenses of the deceased. The remainder, \$28,700, I would multiply by eight and one-third, to make a post-trial dependency of \$239,166.66. The total pre-trial and post-trial dependency would be \$140,333.04+\$239,166.66 or \$379,499.70.

Having regard to the multiplier adopted and the adjustment of the multiplicand, I make no further provision in respect of the deceased's pension rights.

#### *Apportionment*

The current procedure is to award the greater part of the total award to the widow on the assumption that she will maintain the dependent children, and the remainder to the children, the younger being preferred to the older because the period of dependency is anticipated to be greater. The children, Sean, Kimberley and Kara, are now aged 20, 19 and 18 years old respectively. The plan is for them all to have university education. I award them each \$12,000 and the remainder of \$343,499.70 to the widow.

#### *Loss of guidance, care and companionship*

Section 8 of the Accident Compensation (Reform) Act, Cap 193A, reads in part:

8 Damages recoverable under this Act may include...

- (e) an amount to compensate for the loss of guidance, care and companionship that the dependants might reasonably have expected to receive from the injured person if the injury had not occurred.

I must now attempt to assess in financial terms the loss under this head.

The deceased was a good family man. He spent much of his leisure time with his wife and children, who, at the time of his death, were in High School. He helped and encouraged the children with their school work and was also their sports coach. They went on vacations together. This was the first occasion on which he had been on a vacation without them. He was extremely useful around the house, effecting the necessary maintenance repairs. He is sadly missed by his widow, who says that his sudden passing left her with a feeling of incompleteness. She is adjusting slowly to her new situation and feels that she must complete the job they both started with the children. The widow speaks of the close relationship which also existed between the deceased and his parents, who lived in Trinidad. They visited them in Texas about once in every two years; his mother, because she was not employed, was the more regular visitor.

Plans were afoot for them to leave Trinidad and take up residence with the plaintiff and the deceased in Texas. Exhibit 24 is an 'affidavit in support', signed by the deceased, dated 17 January 1985 and addressed to the American Embassy in Trinidad. In this, the deceased deposed that he would be responsible for his father's welfare upon his arrival in America and that he would not become a public charge.

The cases indicate the many difficulties encountered on placing an appropriate monetary value on a loss of this nature. In *Zdasiuk v Lucas*,<sup>[95]</sup> Thomson JA said:

It is no doubt desirable that there should be some degree of consistency in the awards that are made by our courts under s 60(2)(d) [of the Family Law Reform Act, RSO 1980, c 152] as compensation for the loss of guidance, care and

95 (1987) 58 OR (2d) 443, p 445.

companionship which a claimant might reasonably have expected to receive from the person injured or killed if the injury or death had not occurred. It does not follow, however, that this consistency should be achieved by means of a 'conventional award' that is arrived at without regard to the presence of circumstances which may make 'unconventional' or exceptional the particular case in which the award is being made.

In this case, in addition to the close relationship between the parties, consideration has to be given to the effect of the loss on the surviving dependants. There may be cases where, in a closely knit family, the sudden and tragic death of the breadwinner, on whom the wife and children relied heavily for guidance and companionship, could be a shattering blow; where the widow is unable to cope on her own with the burden of this new responsibility; where the children, without the accustomed guidance and companionship of their father, feel rudderless and lost. The peculiar circumstances of each case have to be closely examined. I do not think there is room under this head for anything like a conventional award.

The widow in this case appears to be a woman of strong character and, although still deeply affected by the trauma of her loss, has made a determination to carry on. I award her \$20,000 under this head. To each of the three children I award \$5,000. Some award to his parents must also be made. The evidence is that they were about to uproot themselves from Trinidad and had planned to live with the deceased and his family in Texas. In his affidavit (Exhibit 24), the deceased gave the US authorities in Trinidad the undertaking that he would be responsible for his father's welfare on his arrival in America. Needless to say, the deceased would have been of great assistance in advising his parents about their move to the USA. Suddenly he is gone and they will of necessity have to reconsider their plans. But his advice and guidance are no longer available to them. This of itself is a grievous loss. I award each of them \$2,500.

### Survival of actions

The general rule at common law was that personal actions died with the individual who could bring them (or against whom they could be brought). Thus, an action for damages for personal injuries did not survive the death of the victim, and the latter's estate had no claim against the wrongdoer. In England and Wales, s 1(1) of the Law Reform (Miscellaneous Provisions) Act 1934 altered this rule by providing that all causes of action (with the exception of defamation) survived the death of the plaintiff or the defendant. Thus, an action for damages for personal injuries can now be brought by the estate of the deceased victim. Similar provisions have been enacted in most Commonwealth Caribbean jurisdictions.<sup>96</sup> A conventional sum as damages for loss of expectation of life is recoverable, even where death is instantaneous.<sup>97</sup>

An action brought by the estate of a deceased plaintiff is dealt with on the same basis as if the plaintiff were alive. Thus, the measure of damages is generally the same as for a living plaintiff. The estate can recover for any expenses incurred or

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96 See, eg, Law Reform (Miscellaneous Provisions) Act, Cap 205, s 2 (Barbados); Law Reform (Miscellaneous Provisions) Act, Cap 6:02, s 12 (Guyana); Causes of Action (Survival) Act, Cap 10, s 2(1) (BVI); Law Reform (Miscellaneous Provisions) Act, s 2 (Jamaica); Survival of Actions Act, 1992, s 2 (The Bahamas).

97 *Benham v Gambling* [1941] 1 All ER 7; *Grant v Samuel* (1998) High Court, British Virgin Islands, No 72 of 1996 (unreported), where Benjamin J emphasised that the courts should exercise moderation in making awards for loss of expectation of life where the victim has died.

loss of earnings attributable to the tort up to the date of death. Similarly, damages for pain and suffering and loss of amenities up to the date of the death are recoverable.

In order to prevent double recovery, where the beneficiaries of the estate and the dependants of the deceased are the same persons, any damages received by them under the Law Reform (Miscellaneous Provisions) Act 1934 claim in respect of pain and suffering, loss of amenities, loss of expectation of life and loss of future earnings (but not loss of past earnings or other special damage) must be deducted from their Fatal Accidents Act damages.<sup>98</sup>

It was held in *Gammell v Wilson*<sup>99</sup> that a claim for loss of earnings in the 'lost years', that is, those years during which, but for the accident, the plaintiff would probably have lived, survived for the benefit of the estate under the Law Reform (Miscellaneous Provisions) Act 1934 claim. This principle has been applied in Jamaica,<sup>100</sup> Trinidad and Tobago<sup>101</sup> and the British Virgin Islands.<sup>102</sup> In England and Wales, s 4(2) of the Administration of Justice Act 1982 now provides that damages for the 'lost years' are no longer recoverable by the estate, and similar provisions have been enacted in Barbados<sup>103</sup> and Guyana.<sup>104</sup>

In *Dixon v Harris*,<sup>105</sup> Harrison J (Ag) outlined the approach which the Jamaican courts should take in computing loss under the Fatal Accidents and Law Reform (Miscellaneous Provisions) Acts.

### Dixon v Harris (1993) 30 JLR 67, Supreme Court, Jamaica

The deceased was a pilot who had been killed when his plane crashed into a mountain as a result of the negligence of an air traffic controller. The plaintiff was the deceased's widow and administratrix of his estate.

Harrison J said:

The deceased was 27 years old at the time of his death. Surviving him are his wife and three children. He died intestate. The children are Christina Alicia Dixon, born 6 December 1979, Jennifer Anne Dixon, born 29 July 1982 and Christopher Lake Dixon, born 8 March 1985. It will be observed that Christopher was born after the deceased had died.

By s 4(4) of the Fatal Accidents Act, the court is empowered to 'award such damages to each of the near relations as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased'. In computing this loss, the court should approach the matter thus:

- (1) find the multiplier;
- (2) find the probable net earnings over the period between death and trial;
- (3) for the future years, assess a multiplicand, that is, the net salary, and apply to it the balance of multiplier;

98 *Kandalla v British Airways Board* [1980] 1 All ER 341; *Administrator General v Shipping Association of Jamaica* (1983) Supreme Court, Jamaica, No CL 1979/A-018 (unreported); *Greaves v Corbin* (1987) High Court, Barbados, No 972 of 1982 (unreported); *Khan v Khan* [1974] LRG 287 (Court of Appeal, Guyana).

99 [1981] 1 All ER 578.

100 *Jamaica Public Service Co Ltd v Morgan* (1986) 44 WIR 310.

101 *Samuel v Surajh* (2002) High Court, Trinidad and Tobago, No 2656 of 1998 (unreported).

102 See *Grant v Samuel* (1998) High Court, British Virgin Islands, No 72 of 1996 (unreported).

103 Law Reform (Miscellaneous Provisions) Act, Cap 205, s 2(4)(b) (Barbados).

104 Law Reform (Miscellaneous Amendments) Act 1988, Cap 205, s 4(1)(a) (Guyana).

105 See also *fuller v AG* (1995) Supreme Court, Jamaica, No F 152 of 1993 (unreported).

- (4) calculate the level of dependency of the near relations;
- (5) add interest to the amount the near relations would have lost between death and the date of judgment.

So far as the Law Reform (Miscellaneous Provisions) Act is concerned, the award is usually made for the loss of expectation of life, funeral expenses, other special damages and the 'lost years'. The multiplier used under the Fatal Accidents Act is the same for the purpose of the Law Reform (Miscellaneous Provisions) Act.

The evidence revealed that the deceased was a pilot earning a gross monthly salary of \$3503.20 at death. His other income amounted to \$600 monthly. The annual net income for the deceased totalled \$45,711.60. The combined net annual income of the deceased and the plaintiff was \$67,311.60.

At this stage, I propose to look at and determine the level of dependency of the near relations. The total annual expenditure at death amounted to \$46,500, which included expenses for rent, motor car, school fees, clothing, doctors' bills, dentist, electricity, water, telephone and food. It is quite obvious that the deceased's salary alone could not meet these expenses and was therefore supplemented by his wife. Of the \$46,500, I shall deduct \$5,200, as expenditure exclusively on the deceased. The total dependency at the time of death is therefore \$41,300 per year. This amount represents the amount spent exclusively on the dependants and on shared services, which would be 90.3% of the deceased's net earnings or 61.35% of the joint earnings. The difference in the percentages would be 28.68%. Reduce this percentage by 14.34%. Therefore, the dependency as a percentage of the deceased's net earnings at death would be 75.69% or \$34,599.11.

My next task is to fix a multiplier. Learned counsel for the plaintiff submitted that a multiplier of 14 or 16 should be used. Counsel for the defence, on the other hand, submitted that one of 10 would be appropriate.

The deceased was only 27 years old at death and in apparently good health. He held a good job, though risky. One could reasonably assume that he would have retired at age 60 years. In *Jamaica Public Service Company Ltd v Morgan*,<sup>[106]</sup> the plaintiff was 25 years old at the time of death. He was in excellent health. The Court of Appeal approved a multiplier of 14 years. I therefore accept the submission of counsel for the plaintiff that 14 would be an appropriate multiplier.

My next task is to calculate the net earnings over the period 1984 to the present. It is quite possible that the deceased could have looked forward to an increase in earnings. He could also have been faced with increasing expenditure as the children grew older. On the other hand, I have considered the possibility of a reduced income and also that of a fairly constant income. In the particular circumstances before me, evidence of the career path of the deceased was projected. I am inclined to accept the submissions of learned counsel for the defence that the court would be wrong to conclude that the deceased would have naturally progressed to have been employed by Air Jamaica. The witness, Mr Foster, a pay-roll officer at Air Jamaica, was not in a position to state categorically the employment policy of the institution. No other witness was called by the plaintiff to indicate whether or not there was a policy whereby the deceased would have moved on to join Air Jamaica.

There is evidence, however, from Mr Reid of Airways International, the company which had employed the deceased, that the deceased was not only interested in flying but had an interest in management. No evidence was led, however, as to the salary of persons at that level with Airways International. He did say, however, that, if the deceased were still employed by the company, he would be receiving between \$300,000 to \$425,000 annually. I hold, therefore, that, in due course, had the deceased continued his career path with the company, he would in my view have been at least a senior

pilot. I therefore estimate that the earnings of the deceased during this period would have been \$425,000 less tax, resulting in a balance of \$284,000. I have resolved, therefore, that this figure should be \$284,000. Therefore, 75.69% (that is, the level of dependency) of \$284,000 equals \$214,959.60. The median dependency in the years between death and trial would therefore be  $\$34,599.11 + \$214,959.60 \div 2 = \$124,779.35$ . This figure would represent the pre-trial multiplicand.

*Pre-trial*

The dependency for eight pre-trial years would therefore be \$998,234.90.

*Post-trial*

The length of post-trial years would be six because of the multiplier of 14 years. The post-trial loss would be \$1,289,757.60.

Under the Law Reform (Miscellaneous Provisions) Act, damages would comprise loss of expectation of life and loss of earnings to the estate of the deceased.

In *Dyer v Stone*,<sup>[107]</sup> Campbell JA sets out in clear language the steps which must be followed in ascertaining the loss of future earnings for the 'lost years'. These steps are:

- (1) ascertain from credible evidence the net income of the deceased at the date of death;
- (2) where a relatively long period has elapsed between the date of death and trial of the action, the deceased's net income at the date of trial must be restricted by reference to the net income being earned at the date of trial by persons in corresponding positions to that held by the deceased at the time of his death or by persons in a position to which the deceased might reasonably have attained. The average of the net income at 1 and 2 is considered to be the average annual net income of the deceased for the pre-trial period;
- (3)
  - (a) total of expenditures at the time of death which are exclusively incurred by the deceased to maintain himself reasonably consistent with his status in life;
  - (b) add to (a) a portion of the joint living expenses like rent and electricity which, under the Fatal Accidents Act, would have been treated as wholly for the benefit of the dependants;
  - (c) calculate the total of (a) and (b) as a percentage of the net income at the date of death;
- (4) reduce the average net income for each of the pre-trial years by the percentage at (c). The remaining balances constitute lost earnings for these years;
- (5) the exercise is repeated for the post-trial years but, instead of deducting the living expenses, which were computed as a percentage of the net income at the date of death from the average net income, they are deducted from the actual estimated income at the date of trial.

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107 (1990) Court of Appeal, Jamaica, Civ App No 7 of 1988 (unreported).

*Calculations**Pre-trial:*

Net annual income at the date of death	\$45,711.60
Net annual income at the date of trial	\$284,000.00
Total	\$329,711.60
Average annual net income for pre-trial period $\$329,711.60 \div 2$	\$164,855.80
Total expenditure	\$46,500.00
Expenditure as a % of net income at time of death $\$45,711.60 \div 11,000.00 = 24\%$ 24% of $\$164,855.80 = \$39,565.00$	
Lost earnings for pre-trial years $\$164,855.80 - 39,565 \times 8$	\$1,002,326.40

*Post-trial:*

Lost earnings for post-trial years $= \$164,855.80 - 46,500 \times 6$	\$710,130.00
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In the light of the above calculations, I am expected at this stage to finally decide under which of the two Acts, that is, the Fatal Accidents and Law Reform (Miscellaneous Provisions) Acts, the beneficiaries would be entitled to their award. The principle established from the cases seems to suggest that a beneficiary who benefits under the Law Reform (Miscellaneous Provisions) Act cannot benefit under the Fatal Accidents Act except to the extent that his/her dependency under the latter exceeds this amount. Of course, where the award under the Law Reform (Miscellaneous Provisions) Act is greater than the award under the Fatal Accidents Act, the award under the latter is completely extinguished.

In this case, the results which have been achieved from the various computations above indicate quite clearly that the beneficiaries would benefit entirely from the award under the Fatal Accidents Act.

Counsel for the plaintiff has requested the court to apportion the award among the dependants. This apportionment is as follows:

Christina: 14%	=\$320,318.93
Jennifer: 16%	=\$366,078.78
Christopher: 20%	=\$457,598.48
Widow: 50%	=\$1,143,996.20

I would make the following awards:

- (1) Under the Fatal Accidents Act the sum of \$2,287,992.40, being the award to the widow and the children.
- (2) Under the Law Reform (Miscellaneous Provisions) Act, as follows:
  - (a) Funeral expenses \$5,000
  - (b) Loss of expectation of life \$10,000

Final judgment will therefore be for \$2,302,992.40 with interest at 3% on the sum of \$998,234.90, being the pre-trial portion of the award under the Fatal Accidents Act from 26 November 1984 to 25 February 1993. Interest at 3% is also awarded on the funeral expenses of \$5,000 from the date of service of the writ.



## APPENDIX 1

### DIGEST OF ADDITIONAL COMMONWEALTH CARIBBEAN CASES

#### ASSAULT, FALSE IMPRISONMENT AND MALICIOUS PROSECUTION

**Ali v AG (1982) High Court, Trinidad and Tobago, No 1993 of 1978**

Arrest and prosecution for using obscene language and resisting police officer—whether claim barred by Public Authorities Protection Ord, Ch 9, No 4, s 2—whether arrest justified under Summary Courts Ord, Ch 3, No 4, s 104 and Police Service Act, Ch 15:01, ss 35,36—malice established—award of exemplary damages.

**AG v Charlton (1985) Court of Appeal, Jamaica, Civ App No 85/83**

Arrest—plaintiff detained at airport—accused of taking foreign currency out of country—no reasonable cause for arrest.

**AG v Francis (1999) Court of Appeal, Jamaica, Civ App No 13 of 1995**

Assault and battery—constable shot and wounded plaintiff—exemplary damages awarded.

**Bennett v Bernard (1963) 8 JLR 227 (Court of Appeal, Jamaica)**

Malicious prosecution—no evidence that defendant instituted criminal proceedings against plaintiff.

**Burroughs v AG (1990) High Court, Trinidad and Tobago, No 4702 of 1986**

Malicious prosecution—Commissioner of Police charged with unlawful killing and drug offences—whether reasonable and probable cause for prosecution—prosecutor acting on advice of special counsel as well as DPP and Attorney General—no absence of reasonable cause.

**Bushell v Port Authority of Trinidad and Tobago (1998) 56 WIR 460 (Court of Appeal, Trinidad and Tobago)**

Estate constable—detention of suspects—not classed as police officer—whether employer, not State, vicariously liable.

**Carrington v Karamath (1985) 38 WIR 306 (Court of Appeal, Trinidad and Tobago)**

Arrest without warrant—plaintiff not told reason for arrest—aggravated and exemplary damages.

**Charles v AG (1973) High Court, St Vincent, No 138 of 1972**

Arrest—plaintiff detained at airport by immigration officer—prosecution for attempting to leave country without tax exit certificate—reasonable cause to suspect commission of offence.

**Deen v McDonald [1950] LRBG 72 (West Indian Court of Appeal)**

Malicious prosecution—charge of perjury dismissed—no genuine belief in guilt of plaintiff—onus of proof of lack of reasonable and probable cause.

**Harripaul v AG (1985) High Court, Trinidad and Tobago, No 1722 of 1978**

Arrest and prosecution for theft and possession of marijuana—powers of arrest under Police Service Act, Ch 15:01, s 36(1), Larceny Act, Ch 11:12, Narcotic Control Ord, Ch 27 of 1961,

Summary Offences Act, Ch 11:02—plaintiffs wrongfully arrested—police concocted story implicating plaintiffs—no reasonable cause for arrest or prosecution—malice established—damages awarded for indignity and humiliation of facing charges.

**Hills v AG (1980) High Court, Trinidad and Tobago, No 1009 of 1974**

Arrest and charge—plaintiff arrested without being made aware of charges against him—malicious prosecution—no reasonable and probable cause.

**Irish v Barry (1965) 8 WIR 177 (Court of Appeal, Trinidad and Tobago)**

Arrest without warrant—whether reasonable cause for believing plaintiff guilty of theft of \$5 note—relevance of respectability and standing of plaintiff in community.

**Lopez v Orange Grove National Co Ltd (1975) High Court, Trinidad and Tobago, No 370 of 1974**

Arrest without warrant—charge of larceny—power of arrest for estate sergeant under Supplemental Police Ord, Ch 11, No 2, s 14—reasonable cause to suspect plaintiff.

**Mackey v Thompson (1994) Supreme Court, The Bahamas, No 977 of 1990**

Malicious prosecution—charge of disorderly behaviour and obstruction of police officers—whether reasonable and probable cause.

**Marshall v Thompson (1979) Supreme Court, Jamaica, No CL M-101 of 1976**

False imprisonment—plaintiff arrested under Suppression of Crime (Special Provisions) Act, s 4(1)(c)—whether reasonable suspicion of plaintiff's guilt—question of fact—reasonable suspicion not to be equated with *prima facie* proof—detention justified.

**Marston v Wallace [1963] GLR 277 (Court of Appeal, Jamaica)**

Arrest in pursuance of search warrant—whether reasonable cause for arrest—defence under Constabulary Force Law, Cap 72, s 39.

**Narayan v Kellar [1958] LRBG 45 (Supreme Court, British Guiana)**

Arrest without warrant—Police Ord, Ch 77, s 25—meaning of 'found committing'—*Cummings v Demas* (1950) 10 Trin LR 43 followed.

**Navarro v Vialva (1981) High Court, Trinidad and Tobago, No 3749 of 1979**

Malicious prosecution—whether investigating officer had reasonable and probable cause for prosecuting—not necessary for officer to have first hand knowledge—reasonable to rely on statement by patient in psychiatric hospital.

**Palmer v Morrison [1963] GLR 150 (Court of Appeal, Jamaica)**

Arrest by constable—whether reasonable and probable cause—failure to give reasons for arrest—rule in *Christie v Leachinsky*.

**Rajkumar v Babooram (1990) High Court, Trinidad and Tobago, No 818 of 1979**

Malicious prosecution—family feud—reasonable cause for prosecution.

**Ramkissoon v Sorias (1970) High Court, Trinidad and Tobago, No 2170 of 1968**

Arrest without warrant—plaintiff playing cards, arrested for gambling—Police Service Act, No 30 of 1965, s 36(1)—no reasonable cause for arrest or prosecution.

**Rhymer v James (1999) Court of Appeal, British Virgin Islands, Civ App No 13 of 1997**  
Arrest for alleged disorderly conduct on private property—constable liable for false imprisonment.

**Robinson v AG (1981) High Court, Trinidad and Tobago, No 941 of 1976**

Political meeting—arrest and prosecution of party leader after dispersal of meeting—whether arrest justified under Police Service Act 1965, s 35 or Summary Courts Ord, Ch 3, No 4, s 104—whether reasonable suspicion of commission of offence—police sergeant acting on orders of superiors—absence of reasonable and probable cause.

**St Bernard v AG (1996) High Court, Grenada, No 306 of 1995**

Attorney-at-law wrongfully arrested and humiliated by constable in a public place—award of aggravated damages.

**Sakal v Attorney General (2000) High Court, Trinidad and Tobago, No 1377 of 1993**

Malicious prosecution—whether reasonable and probable cause—information from eye witnesses—issue of arrest warrant rather than summons not evidence of malice.

**Small v Trinidad Tesoro Petroleum Co Ltd (1978) High Court, Trinidad and Tobago, No 540 of 1972**

Arrest and charge under Summary Offences Ord, Ch 4, No 17, s 36—whether reasonable cause for arrest—plaintiff aware of reason for arrest—no evidence of malice—action for false imprisonment and malicious prosecution failed.

**Tookai v Gordon (1994) High Court, Trinidad and Tobago, No 1542 of 1984**

Assault and arrest—plaintiff knocked off motorcycle by constable—no reasonable or probable cause for arrest on suspicion of murder—award of aggravated damages.

**Tynes v Barr (1994) 45 WIR 7 (Supreme Court, The Bahamas)**

Assault, battery and false imprisonment—attorney-at-law unlawfully arrested by constables in humiliating circumstances—award of aggravated damages.

**Wills v Voisin (1963) 6 WIR 50 (Court of Appeal, Trinidad and Tobago)**

Malicious prosecution—no proof of lack of honest belief in guilt of plaintiff-defendant acting under authority of search warrants.

## NEGLIGENCE

**Alfred v Mahabir (1987) High Court, Trinidad and Tobago, No 158 of 1980**

Dilemma principle—rule in *Jones v Boyce*—plaintiff cyclist not guilty of contributory negligence in failing to ride off road to avoid collision.

**Bartlett v Cain (1983) High Court, Barbados, No 234 of 1983**

*Res ipsa loquitur*—car mounting pavement and striking pedestrian—car skidding on wet road when taking curve—excessive speed—presumption of negligence not rebutted.

**Boyce v Forde (1993) High Court, Barbados, No 151 of 1981**

Pedestrian crossing road—duty of car driver to slow down or sound horn—driver not entitled to assume care by pedestrian.

**Brathwaite v Harris (1973) 8 Barb LR 59 (Divisional Court, Barbados)**

*Res ipsa loquitur*—double collision—negligence of two drivers combined to damage plaintiff's car—presumption of negligence not rebutted.

**Charran v Singh (1981) 30 WIR 148 (Court of Appeal, Guyana)**

Road accident—vehicles colliding in middle of road—plaintiff driver contributorily negligent—20% apportionment.

**Coelho v Agard (1975) High Court, Trinidad and Tobago, No 2394 of 1973**

Road accident—*res ipsa loquitur*—collision with stationary vehicle on highway in daylight is *prima facie* evidence of negligence.

**Crossbourne v Jamaica Rly Corp (1981) Supreme Court, Jamaica, No CL C-019 of 1978**

Railway crossing—collision between train and van—train sounded diesel horn on approaching crossing—no negligence on part of train driver.

**Ellis v Jamaica Rly Corp (1992) Court of Appeal, Jamaica, Civ App No 92 of 1989**

Occupiers' liability—duty of common humanity—plaintiff fell on railway track and run over by train—no recklessness on part of train driver.

**Ghanesh v Alvarez (2001) High Court, Trinidad and Tobago, No 1455 of 1998**

Collision at intersection—burden on driver of vehicle on minor road to disprove negligence on his part—no duty on driver on major road to slow down when approaching intersection.

**Harrison (CF) and Co Ltd v Barbados Light and Power Co Ltd (1970) 6 Barb LR 39 (High Court, Barbados)**

Foreseeability of damage—neither precise extent nor manner of infliction of damage need be foreseeable—damages—apportionment between several tortfeasors based upon blameworthiness, not on causation.

**Honeyghan v Guardsman Ltd (1973) 30 JLR 437 (Supreme Court, Jamaica)**

Road accident—driver alleging owner of vehicle negligent as vehicle defective—whether *res ipsa loquitur* applies where particulars of prior knowledge are pleaded.

**Jamaica Omnibus Co Ltd v Byndloss (1965) 9 WIR 34 (Court of Appeal, Jamaica)**

Bus driver braking suddenly to avoid collision with child—passenger injured—no negligence on part of driver.

**Leacock v Hinds Transport Services Ltd (1987) High Court, Barbados, No 888 of 1984**

Trailer parked on highway without lights—car colliding with trailer—negligence of car driver sole cause of accident.

**Mangaria v Pasram (1960) 3 WIR 151 (Federal Supreme Court, Civil Appellate Jurisdiction, British Guiana)**

Road accident—car driven in centre of road at night without right side head lamp—motor cyclist riding at high speed colliding with car—both parties negligent.

**McDonald v Williams (1985) Supreme Court, Jamaica, No CL M-127 of 1977**

Attorney—settlement with insurers—entry of consent judgment—breach of duty of care.

**Mitchell v Mason (1962) 8 JLR 5 (Supreme Court, Jamaica)**

Petrol tanker overturning on highway—van driver stopped near tanker—passenger in van injured—whether *novus actus interveniens*.

**Palmer v Manchester PC [1965] GLR 196 (Court of Appeal, Jamaica)**

Damage to vehicle—open manhole in road left by council workmen—no warning notices—council liable in negligence.

**Ramkissoon v Griffith (1979) High Court, Trinidad and Tobago, No 1180 of 1974**

Pedestrian crossing road—duty of car driver to apply brakes and sound horn—driver not entitled to assume pedestrian keeping lookout.

**Ramsey v West Indies Oil Co Ltd (1997) High Court, Antigua and Barbuda, No 247 of 1989**

Employee driver delivering liquid propane gas—failure of employer to provide adequate supervision.

**Reid v Forest Industries Development Co Ltd (1998) Court of Appeal, Jamaica, Civ App No 57 of 1996**

Road accident—whether *res ipsa loquitur* applicable—effect of evidence of expert on accident reconstruction.

**Rolle v Resorts International (Bahamas) Ltd (1994) Supreme Court, The Bahamas, No 499 of 1991**

Duty to provide safe equipment—garbage collector injured by defective pan at private premises—whether employer liable.

**Rose Hall Development Ltd v Robinson (1984) Court of Appeal, Jamaica, Civ App Nos 6 and 8 of 1982**

Occupiers' liability—independent contractor engaged to do electric wiring—negligence of contractor—occupier not liable.

**Shamrock Trading Co Ltd v AG (1978) 31 WIR 60 (High Court, Barbados)**

Duty of care—breach of duty—defendant's pallets contaminated with weedkiller—plaintiff's rice cargo contaminated.

**Shrikishun v Drainage and Irrigation Board (1972) High Court, Guyana, No 13 of 1969**

Canal controlled by defendant becoming clogged—plaintiff's land flooded—defendant under statutory duty to maintain canal—breach of duty by defendant—defendant liable in negligence.

**Sibbles v Jamaica Omnibus Services Ltd (1965) 9 WIR 56 (Court of Appeal, Jamaica)**

Bus colliding with parked car—*res ipsa loquitur*—presumption of negligence not rebutted.

**Sobers v Clarke (1980) 15 Barb LR 44 (High Court, Barbados)**

Injury to finger—medical treatment—whether doctor negligent—whether *novus actus interveniens*.

**Tugwell v Campbell [1965] GLR 191 (Court of Appeal, Jamaica)**

Car skidding and overturning—driver applying brakes when confronted with patch of water—*res ipsa loquitur*—presumption of negligence not rebutted.

**West Indian Hosiery Manufacturing Co Ltd v Pitt (1978) 13 Barb LR 88 (High Court, Barbados)**

Carrier—plaintiff's machine damaged in transit—onus on carrier to disprove negligence.

**Williams v Wilkins (1974) 12 JLR 1477 (Court of Appeal, Jamaica)**

Motor vehicle—bus running backwards down hill—failure of brakes—passenger injured—*res ipsa loquitur* applicable—inevitable accident not proved.

EMPLOYERS' LIABILITY

**Austin v CW Jordan Furniture Ltd (1994) High Court, Barbados, No 855 of 1989**

Apprentice joiner injured by power saw—employer's failure to provide adequate training and instructions—liability in negligence and under Factories Act, Cap 34.

**Ellis v Industrial Chemical Co (Jamaica) Ltd (1985) Court of Appeal, Jamaica, Civ App No 6 of 1984**

Negligence—failure to provide protective clothing for employee in acid plant—Z employer liable for acid burns to employee.

**Johnson v Sterling Products Ltd (1979) High Court, Guyana, No 2952 of 1976**

Factory employee's hand injured by machine—plaintiff's chair slipped off box, resulting in hand being caught—machine uncovered and unguarded—employer negligent and in breach of statutory duty.

**Marshall v Swan Laundry Ltd (1977) High Court, Guyana, No 2441 of 1975**

Negligence—laundry worker's hand injured by steam pressing machine—machine defective—unsafe system of work—*res ipsa loquitur* not applicable.

**Paramount Dry Cleaners Ltd v Bennett (1974) 22 WIR 419 (Court of Appeal, Jamaica)**

Negligence—laundry worker's hand injured by steam-pressing machine—no evidence of failure to provide safe system of work.

**Reece v West End Concrete Products Ltd (1978) High Court, Trinidad and Tobago, No 1169 of 1977**

Statutory duty—Factories Ord, Ch 30, No 2, s 15—injury from unfenced cement mixer—negligence in permitting dangerous condition to continue.

**Skeete v Electroplaters Ltd (1976) 27 WIR 266 (High Court, Trinidad and Tobago)**

Factory—dangerous machinery—whether failure to fence rotating wheel amounted to negligence or breach of statutory duty—Factories Ord, Ch 30, No 2, s 15—contributory negligence—whether disobedience to express orders amounted to contributory negligence.

**Sturup v Resorts International (Bahamas) Ltd (1991) Supreme Court, The Bahamas, No 83 of 1985**

Hotel employee—fall on kitchen mat—no breach of duty by employer.

**Thomas v BRC Jamaica Ltd (1990) Supreme Court, Jamaica, No T 004 of 1988**

Factory labourer injured when crane handle flew off rolling machine—failing to provide safe system of work—breach of statutory duty.

**Thompson v Revere Jamaica Ltd (1985) Court of Appeal, Jamaica, Civ App No 7 of 1979**  
Statutory duty to provide safe premises—appellant employee falling in bathroom provided by employers—Factories Regulations 1961, requiring provision of suitable washing facilities for employees—employer in breach of duty

**Young v Stone and Webster Engineering Ltd (1964) 7 WIR 316 (Court of Appeal, Jamaica)**  
Factory—machine being examined by appellant and respondents' servant—machine negligently switched on by respondents' servant—appellant's hand injured—appellant guilty of contributory negligence.

#### NUISANCE AND *RYLANDS V FLETCHER*

**Bookers Central Properties Ltd v Toolsie Persaud Ltd [1966] LRBG 18 (Supreme Court, British Guiana)**

Smoke emitted from defendants' sawmill incinerator—eyes of workman at plaintiffs' neighbouring premises affected—no defence that defendants used all possible care.

**Chattergoon v Payne (2000) High Court, Trinidad and Tobago, No SCV 923 of 1981**

Withdrawal of support from land—whether unreasonable user of land—whether easement of support acquired.

**Clarke v Caribbean Pest Control Ltd (1981) 16 Barb LR 214 (High Court, Barbados)**

Smells from pest control company's premises—evidence of injury to health not necessary—substantial interference with enjoyment of land.

**Danclar v James (1985) High Court, Trinidad and Tobago, No 1910 of 1981**

Interference with easement—privy erected on access road—plaintiff's user of road interfered with—liability in nuisance.

**Gonsalves v Young [1928] LRBG 54 (Supreme Court, British Guiana)**

Smoke from defendant's chimney—unreasonable interference with neighbour's enjoyment of land—chimney not built in conformity with bylaws—no damage—injunction granted.

**Longden v Simon (1988) High Court, Trinidad and Tobago, No 275 of 1985**

Damage to building from vibrations—fact that building is old does not justify damage—cost of repairs recoverable.

**Manboard v Salabie (1969) 15 WIR 132 (Court of Appeal, Jamaica)**

Escape of fire—no proof that defendant started fire on his land—no evidence of negligence—*Rylands v Fletcher* not applicable.

**McKoy v Burke (1981) Supreme Court, Jamaica, No M 200 of 1975**

Interference with right of support—negligent excavation by builder—non-delegable duty under *Dalton v Angus*.

**Neblett v Worrell (1981) 16 Barb LR 260 (High Court, Barbados)**

Smells from animal husbandry—interference with plaintiff's enjoyment of land not substantial—no liability in nuisance.

**Piper v Seepersad (1987) High Court, Trinidad and Tobago, No 793 of 1980**

Wrongful diversion of watercourse—flooding of plaintiff's premises—liability in negligence and nuisance.

**St James Coast Estates Ltd v Sunset Crest Rentals Ltd (1977) 29 WIR 18 (High Court, Barbados)**

Pleading—interference with enjoyment of land—owner of land affected must plead and prove his occupation of the land.

**Samaroo v Woo Sam [1931] LRBG 1 (Supreme Court, British Guiana)**

Escape of sparks from chimney of rice mill—damage to thatched house—*Rylands v Fletcher* applicable—statutory authority defence—defendant failed to prove he carried out operations without negligence—defendant liable.

**Scott v Syndicated Developers Ltd (1999) Supreme Court, Jamaica, No J 264 of 1993**

Seepage of water from apartment above—award for annoyance and discomfort—proper measure of damages.

**Sides v Barbados Light and Power Co Ltd (1985) High Court, Barbados, No 691 of 1983**

Fire—escape of electricity from power lines—isolated event can amount to nuisance—defendant liable for damage to house.

## DEFAMATION

**Astaphan v Beach (2000) High Court, St Christopher and Nevis, No 22 of 1993 (unreported)**

Libel—newspaper report that plaintiff not a qualified barrister—plaintiff's name omitted in error from Admission Roll—defendant liable.

**Caven v The Gleaner Co Ltd (1983) Court of Appeal, Jamaica, Civ App No 8 of 1980**

Libel—defamatory speech at union meeting reported in newspaper—Defamation Act, s 9—qualified privilege—malice—belief in truth or falsity of defamatory allegations not decisive of question of malice—duty to publish in public interest.

**Collymore v The Argosy Co Ltd [1956] LRBG 183 (Supreme Court, British Guiana)**

Libel—judicial proceedings—inaccurate report in newspaper of statement made by prisoner from dock during trial—malice inferred.

**The Gleaner Co Ltd v Abrahams (2000) Court of Appeal, Jamaica, Civ App No 70 of 1996**

Libel—Public official accused of corruption—aggravated damages awarded.

**Gonsalves v The Argosy Co Ltd [1953] LRBG 61 (Supreme Court, British Guiana)**

Libel—'rolled up' plea is plea of fair comment only—newspaper article imputing dishonourable motives to member of Legislative Council—defence of fair comment failed.

**Hill v Tull (1991) High Court, Barbados, No 1057 of 1986**

Slander—allegation at public meeting during election campaign that store owner corruptly distributed contaminated rice to constituents.

**Hylton v Maitland (1996) Supreme Court, Grenada, No 166 of 1991**

Libel—imputation of ‘sinister fanaticism’ on part of DPP in seeking convictions—not fair comment.

**Jacks v First National City Bank (1979) Supreme Court, Jamaica, No CL J-016/75**

Information given to radio reporter—statement that plaintiff ‘disciplined’ by his employers—words defamatory—privileged occasion—mere proof of falsity of statement not evidence of malice.

**Miller v Seymour [1985] CILR 402 (Grand Court, Cayman Islands)**

Slander—election candidate called a ‘thief’—repetition of slander and refusal to apologise—aggravated damages.

**The Montserrat Reporter Ltd v Howe (1993) Court of Appeal, Montserrat, Civ App No 2 of 1991**

Libel—allegation that Government minister was ‘puppet’ of Prime Minister—no basis for reversing trial judge’s findings of fact.

**Nabarro v Powell (1994) Court of Appeal, British Virgin Islands, Civ App No 8 of 1994**

Libel—imputation in statutory declaration to Registrar of International Business Corporations—whether defamatory

**Persaud v Parsley [1948] LRBG 91 (High Court, British Guiana)**

Libel—defamatory letter sent by district engineer to employee in reply to letter accusing overseer of accepting bribes—privileged occasion—excessive statement remained within privilege, and material only as evidence of malice.

**Singh v The Evening Post (1976) High Court, Guyana, No 2754 of 1973**

Libel—allegation in newspaper that magistrate racially biased—defence of fair comment—comment not based on true facts—failure to check facts is evidence of malice.

**Sultan-Khan v Trinidad Publishing Co Ltd (1987) High Court, Trinidad and Tobago, No 5293 of 1986**

Libel—pleading—fair comment—whether defendant should plead that publication made without malice—status of ‘rolled up’ plea—not necessary to expressly plead truth of facts on which comments were based.

**Sykes v Guardian Insurance Brokers Ltd (1999) Supreme Court, Jamaica, No S 115 of 1991**

Libel—letter from insurance broker alleging dishonesty and inefficiency on part of general manager of insurance company—qualified privilege—evidence of malice.

**Taylor v The Advocate Co Ltd (1965) 9 WIR 139 (High Court, Barbados)**

Libel—report of disciplinary proceedings against municipal officer—not matter of public interest.

**Tudor v The Advocate Co Ltd (1997) High Court, Barbados, No 1316 of 1992**

Libel—imputation that politician ‘could not make up his mind’—not defamatory.

**Williams v Best (1997) High Court, Barbados, No 1414 of 1992**

Libel—imputation in a newspaper of bias on the part of Chief Justice—whether permissible under right of freedom of expression

## VICARIOUS LIABILITY

**Administrator General v Tate (1988) 27 WIR 172 (Supreme Court, Jamaica)**

Motor vehicle—employee killed whilst being given lift in employer's vehicle—driver not acting outside course of employment—employer liable.

**Alphonso v Ramnath (1997) Court of Appeal, British Virgin Islands, Civ App No 1 of 1996**

Motor vehicle driver carelessly knocked down cyclist—presumption that driver was vehicle owner's agent.

**Barrow v Melville [1933] JLR 13 (Full Court, Jamaica)**

Motor vehicle—servant allowed 11 year old boy to drive van—collision caused by boy's negligence—employer vicariously liable.

**Brown v Stamp (1968) 13 WIR 146 (Court of Appeal, Jamaica)**

Motor vehicle—rule in *Barnard v Sully*—driver presumed to be agent of owner—presumption not rebutted.

**Bushell v Chefette Restaurants Ltd (1978) 13 Barb LR 110 (High Court Barbados)**

Motor vehicle—lift given to company's employee—company liable for driver's negligence.

**Carew v United British Oilfields of Trinidad Ltd (1950) Trin LR 28 (High Court, Trinidad and Tobago)**

Independent contractor—tree felling operation—plaintiff invitee injured—non-delegable duty of employer.

**Clinton v Russell (1975) High Court, Trinidad and Tobago, No 790 of 1973**

Motorcycle borrowed without owner's consent—rider's negligence causing accident—presumption of agency rebutted—owner not vicariously liable.

**Douglas v Kingston and St Andrew Corp (1985) Court of Appeal, Jamaica, Civ App No 60 of 1981**

Motor vehicle—truck left unattended by employee/driver—truck driven away by sideman—plaintiff's house damaged through sideman's negligence—employer not liable, as damage unforeseeable.

**Duff v Gafoor (1975) High Court, Guyana, No 4272 of 1973**

Motor vehicle—rule in *Barnard v Sully*—whether use of vehicle *ultra vires* company owning it—presumption of service or agency not rebutted—company liable for negligence.

**Mason v Martins Tours Ltd (1984) Supreme Court, Jamaica, No CL M 100/79**

Motor vehicle—collision between minibus and hired car—death of both drivers—contract of hire contained clause governing vicarious liability—insurance cover for car rental firm.

**Parejo v Koo (1966–69) 19 Trin LR 272 (High Court, Trinidad and Tobago)**

Motor vehicle—driver delivering car to owner deviated from route to drop passengers—driver using car partly for his own and partly for owner's purposes—owner liable for driver's negligence.

**Ramsay v Brown (1980) Supreme Court, Jamaica, No CL 1977/R-153**

Motor vehicle—rule in *Barnard v Sully*—vehicle not used for owner's purposes—owner not liable for driver's negligence.

**Roberts v Omar (1985) High Court, Trinidad and Tobago, No 310 of 1079**

Motor vehicle—rule in *Barnard v Sully*—owner having sufficient interest or concern in purposes of driver—owner liable for driver's negligence.

**Seunath v Ramdeo (1984) High Court, Trinidad and Tobago, No 1128 of 1980**

Motor vehicle—presumption of agency—driver borrowed car from owner—presumption rebutted.

**Teixeira v Spence (1975) High Court, Guyana, No 3653 of 1972**

Motor vehicle—rule in *Barnard v Sully*—car driven by mechanic without consent of owner—owner not liable for driver's negligence.

**Texaco Trinidad Inc v Halliburton Tucker Inc (1975) Court of Appeal, Trinidad and Tobago, No 80 of 1970**

Borrowed servant—whether servant under control of special employer—operator and special employer jointly liable.

## PERSONAL INJURIES

**Aziz Ahamad Ltd v Raghubar (1967) WIR 352 (Court of Appeal, Trinidad and Tobago)**

General damages—uniformity of awards desirable—courts should follow local trends.

**Bayo v Holiday Foods Ltd (1979) High Court, Trinidad and Tobago, No 1008 of 1978**

Special damage—loss of earnings before trial—standard of proof.

**Central Soya of Jamaica Ltd v Freeman (1985) Court of Appeal, Jamaica, Civ App No 18/84**

Non-pecuniary loss—effect of inflation on awards—effect of depreciation of dollar—rate of interest—rule in *Jefford v Gee*.

**Crockwell v Haley (1993) Court of Appeal, Bermuda, No 23 of 1992**

Applicability of principle in *British Transport Commission v Gourley* in Bermuda, with respect to foreign plaintiff—whether relevant that no income tax payable in Bermuda.

**Dietrich v Chen (1984) Supreme Court, Jamaica, No CL D-1983**

Road accident—victim suffering from reactive depression—medical expenses.

**Gittens v AG (1983) High Court, Barbados, No 180 of 1981**

Road accident—negligence—action for personal injuries—principles in *Cornilliac v St Louis* applied.

**Gravesandy v Moore (1986) 23 JLR 17 (Court of Appeal, Jamaica)**

Loss of earning capacity and loss of prospective earnings distinguished—plaintiff's leg disfigured—general damages—judicial notice taken of fall in value of dollar.

**Mapp v Dowding Estates and Trading Co Ltd (1978) 32 WIR 99 (High Court, Barbados)**

Successive injuries—rule in *Baker v Willoughby* applied.

**Rose v Smith (1985) Court of Appeal, Jamaica, Civ App No 32/84**

Infant suffering brain damage—award for pain and suffering and loss of amenities—no evidence on which to base award for loss of earnings.

**Sainchand v Deonarine (1985) Court of Appeal, Guyana, Civ App No 61 of 1983**

Judgment—date of trial means date judgment delivered—duty to mitigate loss—partial loss of hearing.

**Samaroo v Montano (1988) High Court, Trinidad and Tobago, No 153 of 1983**

Injury to leg—duty to mitigate loss by seeking other suitable employment—33 year old plaintiff—multiplier of eight—depreciation of value of dollar taken into account.

**Sarju v Walker (No 1) (1973) 21 WIR 86 (Court of Appeal, Guyana)**

Assessment of damages—principles to be applied—method of fixing multiplier and multiplicand—whether itemisation of damages necessary—principles on which appeal court can interfere with judge's assessment.

**Singh v Mohammed (1979) High Court, Trinidad and Tobago, No 1363 of 1978**

Severe disablement—19 year old plaintiff—loss of future earnings taxed down by one-third—*Prescod v Sandiford* formula applied.

**Sohan v Hackett (1984) High Court, Trinidad and Tobago, No 513 of 1978**

Injury affecting plaintiff's sex life—loss of future earnings—multiplier of 12 for 35 year old plaintiff.

**Stewart v Ragbir (1984) High Court, Trinidad and Tobago, No 663 of 1982**

General and special damages—fall in value of dollar taken into account—interest payable under *Jefford v Gee*.

**Valdez v Samlal (1976) High Court, Trinidad and Tobago, No 810 of 1972**

Special and general damages—multiplier of 14 for 30 year old plaintiff—interest awarded on *Jefford v Gee* principles.

**Wardle v Holder (1979) High Court, Barbados, No 321 of 1977**

Expenses—medical expenses in Canada paid for under Ontario Health Insurance Programme recoverable—*Parry v Cleaver* applied—allowance for future medical treatment in Canada.

**Warren v Tuzo (1980) Court of Appeal, Bermuda, Civ App No 27 of 1979**

Special damages—loss of earnings before trial—failure to plead special damages.

## FATAL ACCIDENTS

**Administrator General v Dacres (1981) Supreme Court, Jamaica, No CL 19799/A-001**

Assessment of dependency.

**Carter v Dawson [1998] CILR 204 (Grand Court, Cayman Islands)**

Proper plaintiffs—step-grandchildren not 'dependants'—future loss to be calculated by conventional method without use of actuarial tables—multiplier of 7.8 years for 62 year old.

**Cunningham v Swaby (1990) Supreme Court, The Bahamas, No 364 of 1985**

Damage must be related to loss of support suffered immediately as a result of death—deprivation of prospect of being supported in future not assessable.

**Gorgichuk v Barbados Transport Co-operative Society Ltd (1984) Court of Appeal, Barbados, Civ App No 4 of 1983**

Fringe benefits to be included in calculating dependency—promotional prospects to be taken into account.

**Greaves v Corbin (1987) High Court, Barbados, No 972 of 1982**

Value of dependency—multiplier of 16—loss of guidance, care and companionship—principles to be derived from Canadian cases—benefits received under Law Reform (Misc Provisions) Act, Cap 205 taken into account.

**Grenier v Chin (1980) Supreme Court, Jamaica, No CL G-004/1974**

Remarriage of widow—whether proceeds of life insurance policy deductible.

**Hosein v Philbert (1972) 22 WIR 495 (Court of Appeal, Trinidad and Tobago)**

Compensation for Injuries Ord, Ch 5, No 5, s 6—failure to give notice of injury to defendant—reasonable excuse for failure.

**Knowles v Syntex Corp (1982) Court of Appeal, The Bahamas, No 16 of 1981**

*Cookson v Knowles* approach followed—absence of income tax in Bahamas justifies lower multiplier.

**Lorde v Transport Board (1999) 58 WIR 51 (Court of Appeal, Barbados)**

Competence of dependants to bring action—cause of action accruing on death, not on grant of letters of administration—action statute-barred.

**Mitchell v Nandlall (1979) High Court, Trinidad and Tobago, No 533 of 1973**

Multiplier of 14—death of 30 year old teacher—assessment of net loss to dependants.

**Rampersadsingh v Richards (1979) High Court, Trinidad and Tobago, No 703 of 1973**

Multiplier of 26 taxed down by one-third to allow for contingencies.

**Salick v Caroni Ltd (1979) High Court, Trinidad and Tobago, No 380 of 1975**

Assessment of dependency—deceased 52 year old.

**Springer v Lalla (1964) 7 WIR (Court of Appeal, Trinidad and Tobago)**

Compensation for Injuries Ord, Ch 5, No 5, s 6—failure to give notice of injury to defendant—reasonable excuse for failure.



## APPENDIX 2

### EXTRACTS FROM FATAL ACCIDENTS LEGISLATION IN THE BAHAMAS, BARBADOS, JAMAICA, TRINIDAD AND TOBAGO AND GUYANA

#### FATAL ACCIDENTS ACT, CH 61 (THE BAHAMAS)

- 2 (1) In this Act, unless the context otherwise requires— ‘  
adopted’ means adopted in pursuance of an adoption order made under the Adoption of Children Act or in pursuance of an order of a court in any country which the Supreme Court is satisfied has jurisdiction to make an order making similar provision with similar effect to an order made in pursuance of that Act;  
‘child’ includes grandchild;  
‘person entitled’ means a person for whose benefit an action may be brought under this Act;  
‘parent’ includes grandparent.
- (2) In construing any relationship for the purposes of this Act—  
(a) an adopted person shall be treated as a child of the person or persons by whom he was adopted and not as the child of any other person; and subject thereto;  
(b) any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood and the stepchild of any person as his child; and  
(c) an illegitimate person shall be treated as the legitimate child of his mother or reputed father.
- 3 (1) Where the death of any person is caused by the wrongful act, neglect or default of any other person and such act, neglect or default would but for his death have entitled the person injured to maintain an action for damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.
- (2) Notwithstanding any rule to the contrary, no action for damages under sub-s (1) shall be stayed on the ground that criminal proceedings are pending or have not been taken.

#### *Persons for whose benefit action may be brought*

- 4 (1) An action under this Act shall be brought for the benefit of any person who is the wife, husband, parent or child of the deceased or who is, or is the issue of, a brother, sister, uncle or aunt of the deceased person.
- (2) An action under this Act shall be brought in the name of—  
(a) the executor or administrator of the deceased on behalf of any or all persons entitled; or  
(b) where there is no executor or administrator of the deceased or where the executor or administrator of the deceased fails to institute an action within six months after the date of death of the deceased, any person or persons entitled, on behalf of all persons entitled.

### *Damages*

- 5 (1) In any action under this Act, the court may award such damages as it may think proportioned to the injury resulting from the death to the persons entitled respectively; and shall, after deducting costs not recovered from the defendant, divide such damages among such parties in such shares as the court may direct.
- (2) Damages may be awarded in respect of the reasonable funeral expenses of the deceased person if such expenses have been incurred by a person entitled.
- (3) In assessing damages in any action under this Act, there shall not be taken into account any insurance money, benefit, pension or gratuity which has been, or will or may be, paid as a result of the death.
- (4) In sub-s (3) of this section—
- ‘benefit’ means benefit under the National Insurance Act, and any payment by a friendly society or trade union for the relief or maintenance of a member’s dependants;
- ‘gratuity’ includes a gratuity payable upon the death of a public officer or police officer under the Pensions Act or the Police Act;
- ‘insurance money’ includes a return of premiums; and
- ‘pension’ includes a return of contributions and payment of a lump sum in respect of a person’s employment.
- 6 In assessing damages payable under this Act—
- (1) to a widower in respect of the death of his wife or to a widow in respect of the death of her husband, there shall not be taken into account the remarriage of the widower or widow or his or her prospects of remarriage as the case may be; or
- (2) to a child in respect of the death of his father, there shall not be taken into account the remarriage or prospects of remarriage of the surviving mother.

### *Payment into court*

- 7 A defendant in any action under this Act may pay into court one sum in compensation of all persons entitled without specifying the shares into which it is to be divided.

### *Limitation of action*

- 8 (1) Not more than one action shall lie in respect of the same subject matter of complaint under this Act.
- (2) Every action under this Act shall be commenced within three years of the date of the death of the deceased.

### *Plaintiff to deliver particulars of person for whom damages claimed*

- 9 In any action under this Act, the plaintiff shall deliver to the defendant together with his statement of claim full particulars of the person or persons for whom or on whose behalf the action is brought and of the nature of the claim in respect of which damages are sought to be recovered.

## ACCIDENT COMPENSATION (REFORM) ACT, CAP 193A (BARBADOS)

- 2 (1) In this Act—  
 ‘action’ means an action under s 3;  
 ‘dependant’ means:
- (a) the wife or husband of the deceased,
  - (b) a person who is a spouse of the deceased within the meaning of the Succession Act,
  - (c) a person who is divorced from the deceased and who establishes a dependency on the deceased,
  - (d) any person who is a parent of the deceased,
  - (e) any person who is a child of the deceased,
  - (f) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased;
- ‘injury’ includes any disease and any impairment of a person’s mental or physical condition;  
 ‘parent’ means father, mother, grandfather, grandmother, stepfather and stepmother.
- (2) For the purposes of sub-s (1) the reference to ‘child’ includes a reference to a legally adopted child, a grandchild and a stepchild.

### *Right of action for wrongful act causing injury or death*

- 3 Where, after 22 January 1981, injury or death is caused by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have been entitled to recover if not killed, the dependants of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been so entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction.

### *Contributory negligence*

- 4 In an action, the right to damages is subject to any apportionment of damages due to contributory fault or neglect of the person who was injured or killed.

### *Commencement of action*

- 5 (1) A person who commences an action under this Act shall—
- (a) file with the statement of claim an affidavit stating that to the best of his knowledge, information and belief the persons named in the statement of claim are the only persons who are entitled or claimed to be entitled to damages under this Act; and
  - (b) in the statement of claim, name and join the claim of any other person who is entitled to maintain an action under this Act in respect of the same injury or death and thereupon such person becomes a party to the action.
- 6 (1) An action under this Act in respect of a person who is killed shall be commenced by and in the name of the executor or administrator of the deceased for the benefit of the person entitled to recover.

- (2) Where—
- (a) there is no executor or administrator; or
  - (b) there is an executor or administrator and no action is, within 6 months after the death of the deceased, brought by and in the name of the executor or administrator,
- an action may be brought by all or any of the dependants for whose benefit the action would have been if it had been brought by the executor or administrator.

*Limitation on time and action*

- 7 (1) Notwithstanding any enactment or rule of law to the contrary, an action must be commenced within three years from the time the cause of action arose.
- (2) In no case shall more than one action lie for and in respect of the same occurrence.

*Assessment of damages*

- 8 Damages recoverable under this Act may include—
- (a) actual out-of-pocket expenses reasonably incurred for the benefit of the injured person;
  - (b) a reasonable allowance for travel expenses actually incurred in visiting the injured person before his death or during his treatment or recovery;
  - (c) reasonable funeral expenses, if those expenses have actually been incurred in respect of the burial of the person for whose death the action is brought;
  - (d) where, as a result of the injury, the dependants provide nursing, housekeeping or other services for the injured person, a reasonable allowance for the loss of income or value of the services;
  - (e) an amount to compensate for the loss of guidance, care and companionship that the dependants might reasonably have expected to receive from the injured person if the injury had not occurred.

*Assessment of damages: disregard of certain benefits*

- 9 (1) In determining the amount of damages to be awarded under this Act, the court shall not take into account—
- (a) the remarriage of a surviving spouse or any prospects of remarriage by a surviving spouse, as a result of the death of the husband or wife, as the case may be; and
  - (b) any insurance money, benefit, pension or gratuity which has been paid or is likely to be paid as a result of death or injury.
- (2) For the purposes of this section—
- ‘benefit’ means a benefit under the National Insurance and Social Security Act (Cap 147) and any payment by a friendly society or trade union for the relief or maintenance of a member’s dependants;
- ‘insurance money’ includes a return of premiums;
- ‘pension’ includes a return of contributions and any payment of a lump sum in respect of a person’s employment.

*Apportionment and payment into court*

- 10 (1) Where damages are awarded under this Act, the amount so recovered after deducting the costs not recovered from the defendant, shall be divided among the dependants in such shares as may be directed.
- (2) Money paid into court in satisfaction of a cause of action may be in one sum without specifying the dependants' shares.
- (3) Where the money paid into court has not been otherwise apportioned, the court may, upon application, apportion it among the persons entitled thereto.

## FATAL ACCIDENTS ACT (JAMAICA)

- 2 (1) In this Act—

'benefit' means any benefit or sum of money paid or payable by a friendly society or a trade union for the relief or maintenance of a member's dependants and includes a return of contributions;

'child' includes son and daughter, and grandson and granddaughter, and stepson and stepdaughter;

'insurance money' means any sum payable in conformity with the National Insurance Act or under a contract of assurance or insurance whether made before or after the 7th day of September, 1979, and includes a return of premiums;

'near relations', in relation to a deceased person, means the wife, husband, parent, child, brother, sister, nephew or niece of the deceased person;

'parent' includes father and mother and grandfather and grandmother, and stepfather and stepmother;

'pension' includes a return of contributions and any payment of a lump sum in respect of a person's employment;

'person' shall apply to bodies politic and corporate;

'personal representative', in relation to a deceased person, means the executor or administrator of the deceased person;

- (2) For the purposes of this Act a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was only related to him illegitimately; and accordingly in deducing any relationship which under the provisions of this Act is included within the meaning of the expressions 'parent' and 'child' any illegitimate person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father.

*Action maintainable against person causing death through neglect etc*

- 3 Whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action, and recover damages in respect thereof, then and in every such case the person who would have been liable, if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured and although the death shall have been caused under such circumstances as amount in law to felony.

*Mode and manner of commencement of an action and assessment of damages*

- 4 (1) Any action brought in pursuance of the provisions of this Act shall be brought—
- (a) by and in the name of the personal representative of the deceased person; or
  - (b) where the office of the personal representative of the deceased is vacant, or where no action has been instituted by the personal representative within six months of the date of death of the deceased person, by or in the name of all or any of the near relations of the deceased person, and in either case any such action shall be for the benefit of the near relations of the deceased person.
- (2) Any such action shall be commenced within three years after the death of the deceased person or within such longer period as a court may, if satisfied that the interests of justice so require, allow.
- (3) Only one such action shall be brought in respect of the same subject matter of complaint.
- (4) If in any such action the court finds for the plaintiff, then, subject to the provisions of sub-s (5), the court may award such damages to each of the near relations of the deceased person as the court considers appropriate to the actual or reasonably expected pecuniary loss caused to him or her by reason of the death of the deceased person and the amount so recovered (after deducting the costs not recovered from the defendant) shall be divided accordingly among the near relations.
- (5) In the assessment of damage under sub-s (4) the court—
- (a) may take into account the funeral expenses in respect of the deceased person, if such expenses have been incurred by the near relations of the deceased person;
  - (b) shall not take into account any insurance money, benefit, pension, or gratuity which has been or will or may be paid as a result of the death;
  - (c) shall not take into account the remarriage or prospects of remarriage of the widow of the deceased person.

*Plaintiff to deliver full particulars of the persons for whom damages claimed*

- 5 In every such action the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant, or his solicitor, full particulars of the person or persons for whom, and on whose behalf, such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

**COMPENSATION FOR INJURIES ACT, CH 8:05 (TRINIDAD AND TOBAGO)**

- 2 (1) In this Act, 'dependant' means wife, husband, parent, grandparent, child, grandchild and any person who is, or who is the issue of a brother, sister, uncle or aunt.
- (2) In deducing any relationship for the purposes of this Act—
- (a) an adopted person shall be treated as the child of the person or persons by whom he was adopted and not as the child of any other person; and, subject thereto;
  - (b) any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child; and

(c) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.

- (3) In this section, 'adopted' means adopted in pursuance of an adoption order made under the Adoption of Children Act.

*Action for compensation maintainable against person causing death*

- 3 Whenever the death of any person is caused by some wrongful act, neglect, or default, and the act, neglect or default is such as would before the commencement of this Act (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been under such circumstances as amount in law to an arrestable offence.

*By whom action in case of death to be brought*

- 4 Every action in respect of any personal injury resulting in death shall be for the benefit of the dependants of the person whose death has been so caused and shall be brought by and in the name of the executor or administrator of the deceased person; but, if within six months of the death, no such action has been taken by and in the name of the executor or administrator, then an action may be brought by and in the name of any of the dependants of the deceased person.

*Limit of time of commencement of action<sup>1</sup>*

- 5 (1) An action under s 3 shall be commenced within four years after the death of the deceased person.  
(2) Not more than one action lies under s 3 for and in respect of the same subject matter of complaint.

*Particulars of persons for whom action brought*

- 6 In every action in respect of injury resulting in death, the plaintiff on the record shall be required, together with the statement of claim, to deliver to the defendant or his solicitor full particulars of the person or persons for whom and on whose behalf such action is brought.

*Measure of damages recoverable and apportionment*

- 7 (1) In every action in respect of injury resulting in death such damages may be awarded as are proportioned to the injury resulting from the death to the persons respectively for whom and for whose benefit the action is brought.  
(2) The amount so recovered, after deducting the costs, if any, not recovered from the defendant, shall be divided among the persons mentioned above in such shares as are determined at the trial.  
(3) It shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under this Act for his wrongful act, neglect or default, without specifying the shares into which it is to be divided by the court; and if the said sum is not accepted and an issue is taken by the plaintiff as to its sufficiency, and the court shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

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1 See also Limitation of Certain Actions Act 1997, ss 6–8.

## ACCIDENTAL DEATHS AND PERSONAL INJURIES (DAMAGES) ACT, CAP 99:05 (GUYANA)

### *Interpretation*

- 2 (1) In this Act—  
 ‘child’ includes son and daughter, and grandson and granddaughter, and stepson and stepdaughter;  
 ‘parent’ includes father and mother and grandfather and grandmother, and stepfather and stepmother;  
 ‘person who has superintendence entrusted to him’ means a person whose sole or principal duty is that of superintendence and who is not ordinarily engaged in manual labour; ...
- (2) For the purposes of this Act a person shall be deemed to be the parent or child of the deceased person notwithstanding that he was only related to him illegitimately; and accordingly in deducing any relationship which, under this Act only, is included within the meaning of the expressions ‘parent’ and ‘child’ any illegitimate person shall be treated as being, or as having been, the legitimate offspring of his mother and reputed father.
- (3) The last preceding sub-section shall not apply in relation to any action in respect of the death of any person before the 23 March 1940.

### *Cause of action when death is caused by negligence*

- 3 (1) Whenever the death of a person is caused by wrongful act, neglect, or default, and the act, neglect, or default is that which would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused in circumstances amounting in law to felony.
- (2) In assessing damages in any action, whether commenced before or after the 23 March 1940, brought under this Part, there shall not be taken into account any sum paid or payable on the death of the deceased under any contract of assurance or insurance, whether made before or after the 23 March 1940.
- (3) In any action brought under this Part, damages may be awarded in respect of the funeral expenses of the deceased person if such expenses have been incurred by the parties for whose benefit the action is brought.
- (4) The last preceding sub-section shall not apply in relation to any action in respect of the death of any person before the 23 March 1940.

### *For and by whom action to be brought*

- 4 The action shall be brought in the High Court and shall be for the benefit of the wife, husband, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in the action the Court may give the damages it thinks proportioned to the injury resulting from the death to the parties respectively for whom and for whose benefit the action is brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in the shares the Court finds and directs:

Provided that—

- (a) not more than one action shall lie for and in respect of the same subject matter of complaint; and
- (b) every action shall be commenced within three years after the death of the deceased person.

*Plaintiff to deliver particulars*

- 5 In the action the plaintiff on the record shall be required to deliver to the defendant or his attorney, together with the statement of claim, full particulars of the person or persons for whom and on whose behalf the action is brought, and of the nature of the claim in respect of which damages are sought to be recovered.

*By whom action may be brought where no representative*

- 6 If and so often as it happens at any time hereafter, in any of the events intended and provided for by this Act, that there is no executor or administrator of the person deceased, or that, there being that executor or administrator, the action in this Act mentioned has not, within six calendar months after the death of the deceased person herein mentioned, been brought by and in the name of his or her executor or administrator, then the action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit it would have been brought if it had been brought by and in the name of the executor or administrator; and every action so brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of the executor or administrator.



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