Cassidy v *Ministry of Health*, 1951 – An organisation test (**282**)
Ferguson v *John Dawson & Partners*, 1976 – A 'when and where' test (**283**)
Lee v *Lee's Air Farming Ltd*, 1960 – Directors and senior employees (**284**)

Dual vicarious liability

The Court of Appeal has ruled that two parties can be jointly and individually liable for an employee's negligence where both have a degree of control over the employee concerned. Either can be sued for the full amount of the damage but the loss can be recovered only once.

Thus in *Viasystems (Tyneside) Ltd* v *Thermal Transfer (Northern) Ltd* [2005] 4 All ER 1181 a sub-contractor and a main contractor were held jointly and equally liable for the negligence of the sub-contractor's employee because his work had been supervised by both an employee of the main contractor and an employee of the sub-contractor.

Comment If one employer is sued, he or she would be able to join the other employer in the action and each would contribute 50 per cent to the loss.

The power to select or appoint

The absence of a power to select or appoint may prevent the relationship of employer and employee arising. Thus, in *Cassidy* v *Ministry of Health* [1951] 2 KB 343 Denning, LJ, as he then was, made it clear that a hospital authority is not liable for the negligence of a doctor or surgeon who is *selected* and *employed* by the patient himself. The employer need not make the appointment himself, and an appointee may be an employee even though the employer *delegated* the power of selection to another employee, or even an independent contractor, such as a firm of management consultants, or was *required by law to accept* the employee, e.g. Ministers of State often have power to appoint members of statutory bodies who become the employees of those bodies.

The power to dismiss

An express power of dismissal is strong evidence that the contract is one of service. Many public bodies have a restricted power of dismissal in the sense that rights of appeal are often provided for, but such rights do not prevent a contract of service from arising, nor does the fact that these authorities cannot dismiss certain of their employees without the approval of the Crown or a Minister.

Payment of wages or salary

A contract of service must be supported by consideration which usually consists of a promise to pay wages, or a salary. Where the amount of remuneration or the rate of pay is not fixed in advance, this suggests that the contract is not one of service, but is for services. The employer usually pays his employees directly, but in *Pauley* v *Kenaldo Ltd* [1953] 1 All ER 226 at p 228, Birkett, LJ said 'a person may be none the less a servant by reason of the fact that his remuneration consists solely of tips'.

An employee may be employed on terms that his remuneration is to consist wholly or partly of commission which the employer pays directly, the commission being a method of assessment of the amount of the remuneration.

Salaries are paid to people who are certainly not employees, e.g. Members of Parliament, whereas payment of wages generally indicates a contract of service. However, little, if anything, turns on the distinction between wages and salaries, and we may conclude that the terms used to describe the way in which a person is paid have little bearing on the relationship between himself and the person who pays him.

In addition to the above indications of a contract of service, the following matters have also been regarded as relevant in deciding difficult cases of relationship.

Delegation

In the normal contract of service the employee performs the work himself, and *power to delegate performance of the whole contract* to another is some indication that there is no contract of service. However, the fact that delegation is forbidden does not show *conclusively* that the contract is one of service, for agreements with independent contractors may forbid delegation.

Exclusive service

The fact that an employer can demand the *exclusive services of another* is a material factor leading to the inference of a contract of service and in some cases it has been the deciding factor. However, in the absence of an express contractual provision an employer cannot usually require the exclusive services of his employee, and cannot complain if the employee works for someone else in his spare time. This being so, an employee and an independent contractor are usually both able to work for more than one person, and the exclusive service test may not help in deciding difficult cases of relationship. However, it is true to say that the typical employee works for one person, and the typical independent contractor works for many.

Place of work

If the services are always rendered on the *employer's premises*, this is some evidence of the existence of a contract of service, though it is not conclusive. Similarly, the fact that a person works at his home or other premises is some evidence of a contract for services.

It may also be a material factor whether the services are rendered by a person having a *recognised trade or profession*, e.g. a surveyor or a consulting engineer, which he is exercising in a business because such persons tend to be independent contractors rather than employees and persons not exercising a particular calling may more easily be regarded as the employees of those who employ them.

Plant and equipment

Provision of large-scale plant and equipment by the employer is an indication of the existence of a contract of service and a person who supplies his own large-scale plant and equipment is often an independent contractor. However, provision of minor equipment, such as tools, carries little weight as a test of relationship, for many employees provide their own tools.

Obligation to work

A contract of service and one for services usually *impose an obligation to do the work concerned* and an obligation to work is not helpful in the matter of relationships. However, persons such as salesmen who are paid entirely by commission, and who are not obliged to work at all, are probably not working under a contract of service.

Hours of work and holidays

The right to control the *hours of work and the taking of holidays* (subject to the general provisions of the Working Time Regulations 1998) is also regarded as evidence of the existence of a contract of service. Further, an independent contractor is usually engaged for a specific job, whereas an employee is usually employed for an indefinite time. However, those on fixed-term contracts will usually be regarded as employees.

Employees and independent contractors

An employee is a person whose work is at least *integrated* into the employer's business organisation, whereas an independent contractor merely *works for* the business but is *not integrated* into it. Thus, firms of builders, architects, and estate agents are usually regarded as independent contractors, while factory and office workers are usually regarded as employees.

An employee works under a contract of service, whereas an independent contractor's contract is said to be one 'for services' under which he is to carry out a particular task or tasks. Although he may be sued for breach of contract if he fails to carry out his contract properly, the purchaser of his services has no other control over the manner of his work.

Rights of non-employees

Before leaving the topic of the relationship between employer and employee, it is worth noting that certain statutory rights are given to persons who are not employees. Rights in respect of discrimination are given to job applicants and contract workers. Job applicants also have the right not to be refused a job because they do not belong to a union. Thus a contract worker, such as a temporary secretary supplied by an agency to an organisation, could make a claim for sexual harassment against that organisation. In some cases, therefore, non-employees have the same rights as employees because the law has been widened to cover them.

Nature of vicarious liability

The doctrine seems at first sight unfair because it runs contrary to two major principles of liability in tort, viz:

(*a*) that a person should be liable only for loss or damage caused by his *own acts or omissions*; and
(*b*) that a person should only be liable where he was at *fault*.

The doctrine of vicarious liability is a convenient one in the sense that employers are, generally speaking, wealthier than their employees and are better able to pay damages, though the doctrine is often justified on the grounds that an employer *controls* his employee. However, it should be noted that control is not in itself a ground for imposing vicarious liability, e.g. parents are not vicariously liable for the torts of their children. It is also said that vicarious liability is a just concept because the employer profits from the employee's work and should therefore bear losses caused by the employee's torts. Again, the employer *chooses* his employee and there are those who say that if he chooses a careless employee he ought to compensate the victims of the careless employee's torts. Further, employer and employee are often identified in the sense that the act of the employee is regarded as the act of his

employer and this theory that an employer and his employee are part of a *group* in much the same way as other associations of persons, e.g. companies, is expressed in the often quoted maxim *qui facit per alium facit per se* (he who does a thing through another does it himself). However, in practice the employer does not really suffer loss because he commonly insures against the possibility of vicarious liability and usually the cost of this insurance is put on to the goods or services which he sells. This has the effect of spreading the loss over a large section of the community in much the same way as welfare state benefits.

Course of employment

In order to establish vicarious liability, it is necessary to show that the relationship between the defendant and the wrongdoer is that of employer and employee, and that when the employee committed the wrong he was in the *course of his employment*. It is sometimes difficult to decide whether a particular act was done during the course of employment, but the following matters are relevant.

Acts personal to the employee

Some acts done by an employee while at work are so personal to him that they cannot be regarded as being within the scope of employment. Thus, in *Warren* v *Henlys Ltd* [1948] 2 All ER 935, the employer of a petrol pump attendant was held not liable for the latter's assault on a customer committed as a result of an argument over payment for petrol. However, where such authority exists, e.g. in the case of door-keepers at dance halls, the employer will be liable if the employee ejects a troublemaker but uses excessive force.

An example is provided by *Vasey* v *Surrey Free Inns plc* [1996] PIQR 373. The claimant went to a nightclub on New Year's Eve with his friends. He was refused entry and responded by kicking a glass door and breaking it. He was followed to a nearby car park by the club doormen. One of his friends offered an apology and said he would pay for the damage. The doormen asked who had broken the door and the claimant said it was him. Shortly after he got back into his car three of the doormen pulled him out and one hit him violently on the head with a weapon causing him grievous bodily harm. The Court of Appeal held the employer of the doormen to be liable. This was not just a personal attack. The doormen were intending to teach the claimant a lesson and protect the employer's property by deterrent means.

This area of the law is subject to continuing development and it appears that more and more the courts will decide, as a matter of fact from the circumstances, that acts which might have been regarded as personal to the employee will be regarded as the liability also of the employer who is normally carrying insurance against such risks.

Lister v *Hesley Hall Ltd*, 2001 – employer liable for employee's sex abuse (**284a**) 

Improper performance of acts within scope of employment

The employer may be liable where the tort committed by the employee is not a personal or independent act but is merely an improper way of performing an act which is within the scope of employment.

The tortious acts for which an employer may be liable must arise out of the employee's employment, but the employer may be liable in such circumstances even if the act is one which he has expressly forbidden his employee to do. The point has arisen in cases in which employees have given lifts to third parties in the employer's vehicle. In *Twine* v *Bean's Express*

Ltd [1946] 1 All ER 202, a driver employed by the defendants gave a lift to a third person who was killed by reason of the employee's negligent driving. Instructions that employees were not to give lifts were displayed in the van. The court held that the employers were not liable because in giving a lift to the third person the driver went *beyond the scope of his employment*.

However, if the express prohibition only affects the way in which the employee is to perform his work and is not regarded as affecting the *scope* of his employment, the employer may be liable.

Century Insurance Co Ltd v *Northern Ireland Road Transport Board*, 1942 – An improper act in course of employment (**285**)

Limpus v *London General Omnibus Co*, 1862 – A race for passengers (**286**)

Rose v *Plenty*, 1976 – Helping the milkman (**287**)

Emergencies

Where the employee takes emergency measures with the intention of benefiting his employer in cases where the latter's property appears to be in danger, the employer will tend to be liable even though the acts of the employee are excessive. Thus in *Poland* v *John Parr & Sons* [1927] 1 KB 236, a boy was injured by a carter who knocked the boy off the back of his cart to protect his employer's property from theft. It was held that the carter's action was within his implied authority and his employers were liable. If, however, the employee's act is not merely *excessive* but *outrageous* as in *Warren* v *Henlys Ltd* [1948] 2 All ER 935, the employer may not be liable, particularly where the act is not connected with the protection of the employer's property generally but, as in *Warren*, an argument about paying for goods (but see the developments considered at p 506).

Employee mixing employer's business with his own

The cases under this heading have arisen largely out of the use of motor vehicles, and since it is clear that there can be no vicarious liability if the employee's wrong is not the result of his carrying out his contract of service, the employer will not be liable if he lends his vehicle to his employee entirely for the employee's own purpose.

However, a more difficult situation arises where the activity is basically an authorised one but the employee deviates from it in order to execute some business of his own. The mere fact of deviation will not prevent the employer being liable and this was made clear in the judgment of Cockburn, CJ in *Storey* v *Ashton* (1869) LR 4 QB 476, when he said:

> I am very far from saying that, if the servant when going on his master's business took a somewhat longer road, that, owing to his deviation he would cease to be in the employment of the master so as to divest the latter of all liability; in such cases it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing to do with his employment.

However, if the journey is unauthorised, the employee does not render his employer liable merely by performing some small act for his employer's benefit during the course of it. Thus in *Rayner* v *Mitchell* (1877) 2 CPD 257, a brewer's vanman, without permission, took a van from his employer's stables for personal reasons, namely to deliver a coffin to a relative's house. On the way back he picked up some empty beer barrels and then was involved in an accident injuring the claimant. It was held that the brewer was not liable.

Britt v *Galmoye*, 1928 – An accident while not on the employer's business (288) 

Employee using his own property on employer's business

The mere fact that an employee is using his own property in carrying out his employer's business will not prevent the employer from being liable for torts arising out of the use of the employee's property. The decided cases are largely concerned with methods of travel, and in *McKean* v *Rayner Bros Ltd* (*Nottingham*) [1942] 2 All ER 650, an employee who was told to deliver a message by using the firm's lorry was held to be in the course of his employment when he performed the task by driving his own car, contrary to his instructions. However, if the employee's act is unreasonable, as where an employee who is authorised to travel by car charters an aeroplane and flies it himself, then the act will be unauthorised and the employer will not be liable if the employee, or a third party, is injured.

Effect of contractual exceptions clauses

Cases may arise in which the employer has attempted to exempt himself from the wrongs of his employee by means of an exemption clause in a contract with a third person who is injured. Such clauses will be effective to exempt the employer from liability if they are properly communicated to the third person. However, they will not protect the employee against his personal liability at common law because he has not usually given any consideration to the third person and is not in privity of contract with him. Statute may extend the protection of an exemption clause in the employer's contract to his employees.

For example, the Carriage of Goods by Sea Act 1971 provides that an employee or agent of a carrier by sea, but not an independent contractor, shall be entitled to avail himself of the same defences and limits of liability as the carrier. As regards an independent contractor, note *New Zealand Shipping Co* v *A M Satterthwaite & Co* (1974) (see also Chapter 15) where stevedores, who were independent contractors, took the benefit of an exemption clause in a contract between the carrier and the owner of the goods. However, the principle of privity will apply in other situations, e.g. to an employee of a carrier of goods by road who would not be protected by an exclusion clause in the contract between his employer and the owner of the goods being carried.

Reference should now be made to the Contracts (Rights of Third Parties) Act 1999 where the parties to the original contract may, if they wish, extend exemption rights to third parties or the court may imply them under the Act unless, of course, the original parties expressly exclude third-party rights (see Chapter 10).

Fraudulent and criminal acts

In early law the courts would not accept the principle of vicarious liability in fraud but gradually the concept was extended, first to cases in which the employee's fraud was committed for his employer's benefit, and later even to cases where the fraud was committed by the employee entirely for his own ends. The leading case is *Lloyd* v *Grace, Smith & Co* [1912] AC 716. The defendants were solicitors and employed a clerk in their conveyancing department. The clerk fraudulently induced the claimant to transfer some property to him and later sold that property at a profit for his own purposes. Nevertheless, the defendants were held liable for the claimant's loss. The liability, however, still depends upon the employee having actual

or apparent authority to undertake work or carry out duties of the sort which have enabled him to commit fraud, and obviously if the fraud is committed outside the course of employment then the employer will not be liable.

Scope of employment frauds were considered in *Balfron Trustees Ltd* v *Peterson* [2001] IRLR 758. The High Court ruled that a firm of solicitors that was not guilty of any dishonesty itself could be vicariously liable for the allegedly dishonest acts of a solicitor it employed. It was alleged that the solicitor in the course of employment knowingly assisted in the implementation of a scheme to misappropriate funds from a pension scheme existing for the former employees of the Balfron Group Ltd. The High Court concluded that the action against the firm in respect of the loss could not be struck out. There was an arguable case against the firm.

The House of Lords also found an innocent firm of solicitors liable in *Dubai Aluminium Ltd* v *Salaam* [2002] 3 WLR 1913. The proceedings arose out of a complex fraud under which Dubai paid out $50 million under bogus consultancy agreements. Dubai claimed against the recipients of money from the scheme and an innocent firm of solicitors. The latter were held vicariously liable for the acts of a solicitor/partner who had allegedly dishonestly assisted in setting up the scheme in the course of his work for the firm.

Criminal conduct on the part of an employee may be regarded as being in the course of his employment so that the employer will be liable at civil law for any loss or damage caused to a third person by the employee's criminal act.

Morris* v *C W Martin & Sons Ltd, 1965 – Vicarious liability for civil aspects of crime (**289**)

Casual delegation

If Y lends his car to X for X's own purposes, then Y is not liable, even if in a general way X is his employee (see *Britt* v *Galmoye* (1928)). Nevertheless, if Y has a purpose and X also has a purpose, and X is driving a car of Y's partly for his own and partly for Y's purposes, then Y would apparently be liable if X committed a tort. This is known as a case of casual delegation of authority. In these cases of casual delegation, the courts are guided by the doctrine of the *de facto* employee, and by using this doctrine they have extended the vicarious liability of the employer into the area of principal and agent. In fact, the person actually committing the wrong is often called the agent. The result is to extend the area of operation of the doctrine of vicarious liability since it is easier to find the relationship of principal and agent than it is to establish the relationship of employer and employee.

However, merely giving permission to use the vehicle is not enough to make the owner liable, nor is he liable merely because he is the owner and there will, of course, be no vicarious liability in the owner where he did not consent to the taking of the vehicle.

Ormrod* v *Crosville Motor Services Ltd, 1953 – A casual delegation (**290**)
Vandyke* v *Fender, 1970 – Employer and employee or principal and agent? (**291**)
Nottingham* v *Aldridge, 1971 – A trainee returning to work (**292**)
Morgans* v *Launchbury, 1972 – Mere permission to drive is not enough (**293**)
Rambarran* v *Gurrucharran, 1970 – Ownership alone does not produce liability (**294**)
Klein* v *Calnori, 1971 – No liability if vehicle driven without owner's consent (**295**)

Liability for torts of independent contractors

An independent contractor is by definition a person whose methods and modes of work are not controlled by the person who employs him, and this being so it would be unfair to give an employer general liability for the torts of such a contractor. However, there are circumstances in which a person may be liable for the torts of an independent contractor employed by him and these are set out below. However, it should be borne in mind that the circumstances listed below are not truly examples of vicarious liability. Instead they are based on the idea that the employer himself is in breach of a primary duty which he owes the claimant, as where, e.g., he undertakes hazardous operations.

(a) Where the employer authorises or ratifies the torts of the contractor. If, for example, an employer authorises, or afterwards, with knowledge, approves the conduct of an independent contractor in tipping the employer's industrial waste material on another's land, both the employer and the contractor will be liable in trespass as joint tortfeasors.

(b) Where the employer is negligent himself, as where he selects an independent contractor without taking care to see, as far as he can, that he is competent to do the work required, or gives a competent contractor imperfect instructions or information, as where, for example, he knows that his land is liable to subsidence and fails to tell a contractor who erects something on the land which slips and causes damage to another.

(c) Where liability for the tort is strict, so that responsibility cannot be delegated. Thus, an employer is liable for injuries to workmen resulting from failure to fence dangerous machinery securely. This duty is laid down by safety legislation, and it is no defence that the employer has delegated the task of fencing to an independent contractor who has failed to do the job properly. Moreover, liability under the rule in *Rylands* v *Fletcher*, 1868 (see Chapter 21) cannot be avoided by employing an independent contractor. It seems also that liability is strict where there is interference with an easement of support.

(d) Finally there is **a miscellaneous group of cases** in which an employer has been held liable for the torts of an independent contractor and the principle which seems to run through them all is that the work which the employer has instructed the independent contractor to undertake is extra hazardous. Thus, work *on or under* the highway is attended with some risk if due precautions are not taken, though work *near* the highway is not for that reason alone regarded as extra hazardous. In *Pickard* v *Smith* (1861) 10 CB NS 470, the defendant who was the tenant of a refreshment room at a railway station was held liable when a coal merchant's servant left the coal cellar flap open while delivering coal to the defendant and a passenger on railway premises fell into the cellar and was injured. Again, in *Honeywill & Stein Ltd* v *Larkin Bros Ltd* [1934] 1 KB 191, the claimants had received permission from the theatre owner to take photographs in a theatre on which the claimants had recently done work. A firm of photographers was employed by the claimants and in order to take indoor photographs had, in those days, to use magnesium flares with the result that the theatre curtains caught fire and much damage was caused. The claimants paid for the damage, and sued the photographers for an indemnity to which the court said they were entitled. It also emerged that the claimants would have been liable if they had been sued by the theatre owner. Work on party walls would also appear to be an example of extra hazardous work.

Bower v *Peate*, 1876 – Where an independent contractor interferes with an easement of support (296)

Where an employer is held liable to a third person for the torts of an independent contractor he will, in most cases, be able to claim an indemnity from the contractor. It should also be noted that an employer is not liable for what are called the *collateral* wrongs of his contractor, but only for wrongs which necessarily arise in the course of the contractor's employment. Thus, if A employs B, an independent contractor, to do some excavation work on his land, A will be liable if, say, his neighbour's greenhouse is damaged by the excavations but A will not be liable for loss caused by B's servants making off with the plants.

Salsbury v *Woodland*, 1969 – Work on or near the highway (**297**)

General defences

Some torts have special defences which can be raised in a particular action, but there are certain general defences which can be raised in any action in tort if they seem to be appropriate.

Volenti non fit injuria

(To one who is willing no harm is done.) This is alternatively called the doctrine of the assumption of risk. There are two main aspects of this defence:

(*a*) deliberate harm;
(*b*) accidental harm.

In the first case the claimant's assent may prevent his complaining of some deliberate conduct of the defendant which would normally be actionable. If A takes part in a game of rugby football, he must be presumed to accept the rough tactics which are a characteristic and *normal* part of the game, and any damage caused would not give rise to an action, although if the same tactics were employed in the street, an action could be sustained. Similarly, although to stick a knife into a person would normally be actionable, if a surgeon does it with the consent of the patient it is not so.

In this connection, cases have come before the courts in recent times in which the issue of *informed consent* has been raised. For example, in *Sidaway* v *Bethlem Royal Hospital Governors* [1984] 1 All ER 1018, the claimant gave her consent for an operation to relieve pain in her neck. The surgeon did not tell her of the possibility of damage to the spinal cord, which was in any case remote. However, there was such damage to the claimant's spinal cord and she sued the surgeon regarding her consent as nullified because not all possible risks had been disclosed to her before she gave it. Her claim failed in the Court of Appeal. The risk of spinal cord injury was in any case too remote to found a claim in negligence. As regards the doctor's duty of disclosure prior to a valid consent, Sir John Donaldson, MR said it was 'giving or withholding information as is reasonable in all the circumstances . . . , including the patient's true wishes, with a view to placing the patient in a position to make a rational choice'. This test was satisfied here and the claimant's consent was valid.

Failure to obtain informed consent can result in liability even if the surgical procedures are carried out without negligence. Thus in *Chester* v *Afshar* [2004] 4 All ER 587 a neurosurgeon carried out a successful operation on the claimant's back. He was liable in negligence because he failed to warn the claimant before the operation of the risk of post-operative paralysis which was suffered by the claimant.

It is of interest to note that in *Chester* the claimant did not assert that if she had known about the post-operative paralysis *she would never have had the operation* but only that she would have asked for a second or third opinion. Nevertheless, the House of Lords ruled that it was only necessary for her to prove that she would not have proceeded with *the operation that was actually performed on her*, though she might have consented to others. This case seems to have changed the 'what if' concept: usually in the past claimants have asserted that they would not have gone ahead with the operation, but now it seems that even though the claimant says that he or she might have gone on with the operation at some stage, he or she will succeed. The issue of causation appears to have produced an area of strict liability. Will the ruling spread to other areas such as financial advice, as where a person says that he or she would still have bought the investment in spite of negligent advice from an adviser? The *Chester* case does raise issues of causation as well as consent.

It is worth noting that there has been a development in what might be called the 'vegetative state' cases. It was held by the House of Lords in *Airedale National Health Service Trust* v *Bland* [1993] 1 All ER 821 that life-sustaining artificial feeding and antibiotic drugs may be lawfully withheld from a patient who is in a persistent vegetative state with no hope of recovery, even though it is known that this will cause the patient to die. The court will make the necessary declaration on the application of relatives and/or the consultant but will normally require independent medical opinion, with the Official Solicitor (see Chapter 3) representing the interests of the patient, including the latter's own previously-expressed wishes, if any. A Practice Note issued by the Official Solicitor in 1994 requires at least two independent neurological reports. However, it was held by the Court of Appeal in *Frenchay Healthcare National Health Service Trust* v *S* (1994) *The Times*, 19 January, that a court would not refuse a health authority's urgent application for a declaration that it might stop life-saving emergency treatment solely on the ground that it had not been possible to obtain independent medical opinions in the pressurised timescale. The court can also give a declaration in other cases, as in *Re S* [1992] CLY para 2917 where a declaration was granted allowing a Caesarean section to be performed on a pregnant woman who had herself refused the operation on religious grounds. The operation was vital in her interests and those of the unborn child.

Simms v *Leigh Rugby Football Club*, 1969 – Effect of consent in sports (**298**)

Implied consent

The claimant may *impliedly* consent to run the risk of accidental harm being inflicted upon him. Thus one of the risks incidental to watching an ice-hockey match is that the puck may strike and injure a spectator or, in attendance at a motor race, that cars may run off the track for various reasons, injuring spectators. These are possible hazards unless spectators are to be so fenced or walled in that they cannot see the sport and the maxim *volenti non fit injuria* would apply.

Murray v *Harringay Arena*, 1951 – Watching ice-hockey (**299**)
Hall v *Brooklands Auto-Racing Club*, 1933 – Watching motor sport (**300**)

While on the subject of implied consent, it is worth noting two cases in this area where the claim relates to accidents arising out of 'horseplay' between school pupils and accidents in the ordinary course of school activities that are beginning to show a trend away from the growing US-style compensation culture that has arrived on the UK legal scene since the introduction of conditional fee arrangements – the well known 'no-win, no-fee' contract.

In *Blake* v *Galloway* [2004] 3 All ER 315, a group of 15 boys went out to play at the lunchtime break. They began throwing bits of bark and twigs at each other. The claimant picked up a piece of bark and threw it towards the defendant's lower body. The defendant threw it back in the general direction of the claimant, striking him in the eye and causing significant injury. The claimant sued in negligence and battery.

The Court of Appeal turned down the claim. In doing so, the court laid down some principles to apply in these cases. They are:

- The accident must not be the result of a departure from the conventions of the activity. For example, in a snowball fight it is a convention that there are no stones in the snowballs. There will normally be no liability unless the conduct in question is regarded by the court as overstepping the mark. In this case there was no deliberate aiming at the claimant's eye, nor were the missiles selected as being inherently dangerous.
- Where the above principles were established the court would *imply consent*.

  An additional case in this area is *Babbings* v *Kirklees Council* (2004) *The Times*, 4 November, where the Court of Appeal refused a right of Appeal to Lauren Babbings when she broke her arm in a gym class. The Court of Appeal said that although such injuries were foreseeable, they were in the nature of the ordinary risks of school activity and Ms Babbings' claim failed. Brooke LJ said of the case: 'How boring things would be if there was no risk.'

When we come to consider the duty of care in negligence in Chapter 21, we shall see how the Compensation Act 2006 is also attacking the compensation culture which has caused problems in terms, for example, of school trips and holidays.

Notice

In addition, the claimant may be *expressly* put on notice that he undertakes a particular activity at his own risk. Thus in *Arthur* v *Anker* (1995) *The Times*, 1 December a motorist parked his car on private property despite having seen a warning notice. His car was clamped and a release fee of £40 charged. He sued for damages for tortious interference with his car. It was held by the Court of Appeal that his claim failed. By reading the sign he had impliedly consented to the clamping of his car. He had voluntarily accepted the risk that this would happen.

However, it is essential for the defendant to show as a matter of fact that the claimant agreed to *accept* the risk. This means, for one thing, that he must have had a choice and if a contract, e.g. of employment, forces him to accept the risk, there is no true assent.

Burnett v *British Waterways Board*, 1973 – No true consent (**301**)

Contractual consent

If a person's assent to harm being inflicted upon him is purely contractual, it can only operate within the limits allowed by the law of contract; the doctrine of privity of contract applies. Thus, if a carrier by road puts an exclusion clause in the contract with the customer excluding liability for damage to the goods, the customer could sue the driver if his negligence caused damage to the goods. The driver could not raise the exclusion clause in his defence because he was not a party to the contract in which it was contained. The above situation will only apply if the parties to the original contract have *not* granted third-party rights to the driver under the Contracts (Rights of Third Parties) Act 1999 or, if *not*, where the court does not in the circumstances *imply* the grant of rights. Sometimes a non-contractual agreement excluding liability for negligence has been upheld.