The Wagon Mound, 1961 – The test for remoteness of damage (**325**)
Hughes v *Lord Advocate*, 1963 – Precise chain of events need not be foreseen (**326**)

Status of The Wagon Mound

Certain problems were raised by the decision in *The Wagon Mound*.

(**a**) Being a decision of the Judicial Committee of the Privy Council, it was not binding on English courts but was persuasive only.

In the event the House of Lords in *Hughes* v *Lord Advocate* (1963) (see above) treated the decision in *The Wagon Mound* as a correct statement of the law, subject in *Hughes*' case to an additional principle that the precise chain of circumstances need not be envisaged if the consequence turns out to be within the general sphere of contemplation and not of an entirely different kind which no one can anticipate.

(b) Before *The Wagon Mound* there was a well-established principle called the 'unusual plaintiff [now "claimant"]' rule. For example, if X strikes Y a puny blow which might be expected merely to bruise him, but in fact Y has a thin skull and dies from the blow, the law has regarded X as liable for Y's death. The same rule has been applied where the claimant is a haemophiliac, i.e. a person with a constitutional tendency to severe bleeding.

The courts have held that this principle is not affected by *The Wagon Mound* and remains as an exception to it. However, the 'unusual [claimant]' rule seems to apply only to disabilities existing before the accident and not to disabilities arising afterwards.

The test of remoteness of damage in tort as laid down in *The Wagon Mound* relies upon the foreseeability of a reasonable person both in respect of culpability and liability to compensate. It appears, therefore, that the law of remoteness of damage is not the same as in the law of contract. In *The Heron II* (1967) (see Chapter 18) it will be recalled that the House of Lords decided that a party to a contract is not liable for all foreseeable damage but only for that which is 'in contemplation'.

Finally, it is perhaps worth noting that *damage which is intended* is never too remote and in this connection there is an inference that a person intends the natural consequences of his or her acts.

Smith v *Leech Braine & Co Ltd*, 1962 – The thin skull rule survives (**327**)
Martindale v *Duncan*, 1973 – Poverty is within the unusual claimant rule (**328**)
Morgan v *T Wallis*, 1974 – There must be a prior disability (**329**)
Scott v *Shepherd*, 1773 – Intended damage never too remote (**330**)

Novus actus interveniens: *a new act intervening*

A loss may be too remote a consequence to be recoverable if the chain of causation is broken by an extraneous act. The scope of this concept is as follows:

(a) When the act of a third person intervenes between the original act or omission and the damage, the original act or omission is still the direct cause of the damage if the act of the third person might have been expected in the circumstances (see *Scott* v *Shepherd* (1773)) or did not materially cause or contribute to the injury. There is a duty to guard against a *novus actus interveniens*.

Barnett v *Chelsea and Kensington Hospital Management Committee*, 1968 – An immaterial *novus actus* (**331**)
Robinson v *The Post Office*, 1973 – Complications from an injection (**332**)
Davies v *Liverpool Corporation*, 1949 – Duty to prevent a *novus actus* (**333**)

(**b**) If the act of the third person is such as would not be anticipated by a reasonable person, the chain of causation is broken, and the third party's act and not the initial act or omission will be treated as the cause of the damage.

Cobb v *Great Western Railway*, 1894 – Where a theft broke the chain of causation (**334**)

(**c**) The *novus actus* may be the act of the claimant and in these cases liability will turn on the precise facts.

Sayers v *Harlow UDC*, 1958 – The new act may be that of the claimant (**335**)
McKew v *Holland and Hannen and Cubitts*, 1969 – A fall down the stairs (**336**)

(**d**) In order to establish the liability of the intervenor, it is essential to show that he consciously intended to carry out the act.

Philco Radio Corporation v *Spurling*, 1949 – The person who does the intervening act must intend it (**337**)

Nervous shock

Damages for illness brought on by nervous shock are not necessarily too remote and may be recoverable where the nervous shock causes physical illness and:

(a) the defendant *intended* the shock (see *Wilkinson* v *Downton*, 1897); or
(b) where the shock arises from *negligence*, the claimant was 'foreseeable'.

Nervous shock will be foreseeable:

(a) Where the defendant's negligent act puts the claimant in fear of his or her safety *as a primary victim*;

Dulieu v *White*, 1901 – Nervous shock: fear for one's own life (**338**)

(b) Where the defendant's negligent act threatens or actually injures some person who has a relationship with the claimant, such as a family relationship. The relationship of rescuer and rescued is included. However, the fact that there is a relationship is not enough to allow a successful claim *by a secondary victim*. In addition such a claimant must have:

(i) had *actual* sight or hearing of the event or of its immediate aftermath; or
(ii) although not having seen it, suffered shock by a sensible imagining of it from observed surrounding circumstances; or
(iii) seen the victim afterwards.

There also is the requirement that the defendant must owe the claimant a duty of care, though such a duty can exist not merely in regard to personal injury but also to nervous shock following damage to property.

Chadwick v *British Railways Board*, 1967 – Nervous shock: rescuer and rescued (**339**)

Hinz v *Berry*, 1970 – Where the accident is seen (**340**)

Hambrook v *Stokes*, 1925 – Where the accident is not seen but sensibly imagined (**341**)

McLoughlin v *O'Brian*, 1982 – Where the victim is seen (**342**)

Bourhill v *Young*, 1943 – There must be a duty of care (**343**)

Finally, it should be noted that damages for nervous shock may be recovered where the claimant has witnessed some awful spectacle even though neither his own life nor that of any third party was put in peril.

Owens v *Liverpool Corporation*, 1939 – When a coffin was overturned (**344**)

The above rules were developed because of the following problems inherent in actions for nervous shock:

(a) the difficulty of proving the degree of suffering involved and the possibility of fraudulent claims; thus, only where a known physical or mental condition is manifest are damages awarded;

(b) the difficulty (in terms of endless claims which no insurer would take on) which might arise if the number of possible claims, e.g. from persons not present at the accident, was not limited.

Damage after successive accidents

If a second event, e.g., injury or illness, which is not connected with the tortious accident, comes on before the trial and makes the injury worse, damages are reduced to the extent caused by the further injury or illness. If the second event is a tortious accident, no deduction has traditionally been made.

This statement must now be taken in the light of the decision of the Court of Appeal in *Holtby* v *Brigham & Cowan (Hull) Ltd* (2000) 150 NLJ 544. In that case the claimant had been a marine fitter. During the course of that work he was exposed to asbestos dust. For some part of that period he was employed by the defendants and for the rest of the time of his employment he was employed by another firm in a similar capacity and exposed to asbestos. He contracted asbestosis and sued the defendants for damages representing the full period of exposure. The court made an award of damages less 25 per cent to represent the other employer's liability. The case presents a procedural problem in that a claimant must now ensure that all possible defendants are served process and brought before the court so that the

balance of damages can be recovered in the same action. Otherwise separate proceedings will have to be taken against others who may be liable.

In *Fairchild* v *Glenhaven Funeral Services Ltd* [2003] 1 AC 32 the House of Lords ruled that a person who had contracted mesothelioma as a result of wrongful exposure to asbestos at different times by more than one negligent employer (or occupier of premises) could sue any of them, even though the claimant could not prove which exposure caused the disease because all the employers concerned had materially contributed to the risk of contracting the disease. However, the ruling in *Fairchild* did not say how liability would be apportioned. It was assumed by the parties that each employer would be liable for the whole damage and would then have a claim for a contribution from the others. In other words, liability would be joint and several and this approach was taken subsequently in practice.

However, in *Barker* v *Corus (UK) plc* [2006] 2 WLR 1027 the House of Lords decided on the question of apportionment and ruled that damages were to be apportioned among the employers responsible *according to their degree of contribution* to the chance of a person contracting the disease. This was unsatisfactory because a claimant would have to trace all relevant defendants as far as possible before liability could be apportioned and if any relevant organisation had become insolvent nothing would be recovered from that organisation, the loss falling on the claimant.

The matter is now resolved by the Compensation Act 2006, which in s 3 makes clear that liability is joint and several. Furthermore, it is the intention of the Act that all claimants affected by the judgment in *Barker* will receive full compensation and, to achieve that, the Act will apply to *Barker* and other cases since then retrospectively.

Similar problems arise where the claimant suffers a minor injury but cannot work again because the minor injury has aggravated an existing injury. Here the court may discount the claimant's damages. This happened in *Heil* v *Rankin* (2000) (see p 519) where a police officer, with a pre-disposition to post-traumatic stress disorder from a previous incident, had it revived by a later tortious act and could not work in the force again, had his damages reduced by 50 per cent. This would suggest that while you take your victim as you find him, for foresight, you do not necessarily do so for damages. *Liability* yes, but *damages* no.

Provisional damages

Under the Rules of the Supreme Court there can be an award of provisional damages. Suppose A loses the sight of one eye in an accident caused by B's negligence. There is a risk that he might lose the sight of the other eye. If an award of damages is increased because of this possibility and it does not occur, then the damages were too much. If the sight of the other eye is affected the damages might be too small because the *precise* nature of the injury was not before the court. The judge can now make an award of provisional damages on the basis that the risk will not develop and specify a period during which a 'further award' can be made if it does.

The effect of the Damages Act 1996 and the use of structured settlements was considered in Chapter 18 to which reference should be made.

Discounting damages

In the case of personal injury involving, e.g. inability to work again, the court, in assessing damages for future pecuniary loss, discounts the damages awarded on the basis that the lump sum will be invested and grow and so provide income as well for the claimant. In *Wells* v *Wells* [1998] 3 WLR 329 the Privy Council decided that the rate of growth of the fund should be linked to the average return from government securities over the three years preceding the award, giving a discount rate of 3 per cent. Interest rates and returns from investments have,

of course, fallen and the Damages Act 1996 allows the Lord Chancellor to set the rate by statutory instrument. He did this most recently in the Damages (Personal Injury) Order 2001 (SI 2001/2301). This order sets the rate at 2.5 per cent per annum. The Lord Chancellor has announced that he does not propose 'to tinker with the rate frequently to take account of every transient shift in market conditions'. The courts have power, however, to adopt a different rate (see Damages Act 1996, s 1(2)) if there are exceptional circumstances justifying this. A reduction in the rate is, of course, not popular with defendants and their insurers.

Injunction

An injunction may be granted to prevent the commission, continuance or repetition of an injury, and there is a form of interlocutory injunction called *quia timet* (because he fears) which may be granted, though rarely, even though the injury has not taken place but is merely threatened. As we have seen, injunctions are discretionary remedies and cannot be obtained as of right. Furthermore, an injunction will not be granted where damages would be an adequate remedy. However, it is no defence to say that it will be costly to comply with the injunction, though the court may, as in *Pride of Derby and Derbyshire Angling Association Ltd* v *British Celanese Ltd* [1953] 1 All ER 179, where expensive alterations to sewage plant were required to prevent the pollution of a river, grant an injunction and suspend its operation for such time as may seem necessary to enable the defendant to comply with the order.

Other remedies

The court may order *specific restitution* of land or goods where the claimant has been deprived of possession and a claimant may be given an order for an *account* of profits received as a result of a wrongful act. Thus where a company or other business organisation carries on business under a name calculated to deceive the public by confusion with the name of an existing concern, it commits the tort of *passing off* and can be restrained by injunction from doing so. In addition, the existing concern may be given an order for an *account* of profits received by the offending concern as a result of the deception.

Jobling v *Associated Dairies*, 1980 – Where there is a subsequent non-tortious act (**345**)

Baker v *Willoughby*, 1969 – Where there is a subsequent tortious act (**346**)

Performance Cars Ltd v *Abraham*, 1961 – Where a second accident occurred before the damage from the first was repaired (**347**)

Cessation of liability

Liability in tort may be terminated by *death*, and also by *judgment, waiver, accord and satisfaction and lapse of time*.

Judgment

Successive actions cannot be brought by the same person on the same facts and if a competent court gives a final judgment in respect of a right of action that right of action is *merged* into the judgment. Thus in *Fitter* v *Veal* (1701) 12 Mod Rep 542, the claimant sued the defendant for assault and battery and obtained a judgment for £11. After some years he discovered his

injuries were worse than he had thought and he had to have part of his skull removed. It was held that he could not sue for further damages. This problem is now overcome in appropriate cases by an award of provisional damages. Here there is only *one award* which can be increased if further loss arises; the increase is part of the original award and not a second award.

There are certain exceptional cases, for example where two separate rights have been infringed. Thus in *Brunsden* v *Humphrey* (1884) 14 QBD 141, the Court of Appeal held that a cab driver who had brought a successful action for damage to his cab caused by the defendant's negligence was able to bring a further action for personal injuries. One action was for damage to *property*, the other for injury to the *person*.

Waiver

A person may waive a tort when he forgoes his right to bring an action upon the wrongful act. If, for example, S, a second-hand car dealer, buys a car from T, a thief, and sells it to B, then S will convert the vehicle. If the true owner agrees to settle the matter with S by accepting from S the sale price of the car which S received from B, then the true owner cannot sue S in the tort of conversion because he has waived his right.

Accord and satisfaction

A person may surrender a right of action in tort by deed or an agreement for consideration.

Lapse of time

In actions for damages for negligence, nuisance or breach of duty, e.g. the statutory duty of an employer to fence a dangerous machine, where damages consist of, or include, damages for personal injury, the limitation period is three years (Limitation Act 1980, s 11(1)). Under s 2 of the 1980 Act the period in all other actions in tort is six years. However, actions in respect of registered postal packets under s 91(3) of the Postal Services Act 2000 must be brought within 12 months.

The period of limitation generally begins from the date when the tort was committed, e.g. the date of a trespass to land. However, at one time an action in negligence arose only when the harm was suffered but not, apparently, when it was detected. Thus in *Pirelli General Cable Works Ltd* v *Oscar Faber & Partners Ltd* [1983] 1 All ER 65 the defendants designed a chimney for the claimant. It was in the event a negligent design. Cracks were discovered by the claimants in 1977 but evidence showed that they had appeared in 1970. When the claimants sued in 1978 for negligence the House of Lords held that their claim was statute-barred.

The Latent Damage Act 1986 (which inserted provisions into the Limitation Act 1980) now applies and the limitation period is either six years from the date on which the cause of action accrued or three years from the earliest date upon which the claimant had sufficient knowledge to sue. The Act imposes a 'long-stop' period of 15 years from the negligent act or omission or the occurrence of the damage whether or not the damage was discovered or even discoverable by then. No action can be brought after this time.

'Knowledge' for the above purposes is:

- knowledge of such facts relating to the damage as to cause a reasonable person to consider it sufficiently serious to justify bringing a claim; and
- knowledge that the damage was attributable in whole or in part to the act or omission which it is alleged constitutes negligence.

Knowledge that the act or omission was negligent as a matter of law is not relevant.

The claimant bears the burden of proving that he or she did not have the requisite knowledge during the primary period of six years and that, as regards the second three-year period, he or she first had knowledge no more than three years before he or she issued proceedings.

An example of the use of what is now s 14A of the Limitation Act 1980 is the ruling of the House of Lords in *Haward* v *Fawcetts (a firm)* [2006] l WLR 682. The defendants, a firm of chartered accountants, were retained by Mr Haward and relying on their advice he purchased a controlling interest in a company in 1994. The company did not succeed and further investments by Mr Haward in mid-1995, 1996, 1997 and 1998 failed to improve things. The allegation by Mr Haward was that the company had been insolvent. Mr Haward asked a specialist in corporate rescue to look into the ever-mounting losses and a claim for damages for professional negligence against Fawcetts was commenced on 6 December 2001. The claims for loss in regard to the 1996, 1997 and 1998 investments could proceed but under the primary period of six years, claims in respect of the 1994 and 1995 investments could not. However, Mr Haward relied on s 14A, saying that he had not acquired the requisite knowledge until December 1998, i.e. within three years of the start of his action.

The House of Lords ruled that he did have the requisite knowledge. The performance of the company had missed the original financial predictions by such a massive margin that Mr Haward must have known before December 1998 that something had gone wrong when those predictions were made in the first place and this was the 'essence' of his case, i.e. alleged negligent predictions. He knew he had made a bad investment. The key criterion, said their Lordships, is when a claiment first knows that *in essence* he has a case. The ruling on knowledge as being merely the essence of a case will make it harder for claimants to invoke extensions of time.

The above rules were also rather harsh in personal injury cases where, for example, the claimant did not know that he had a claim or the extent of that claim, as where he had contracted a dust disease and was not aware of its onset. Furthermore, if X had been run down by Y's negligent driving, and unknown to X the injuries inflicted on him at the time of the accident caused him to go blind, say, four years after the accident, then X's cause of action in respect of his blindness was barred before he knew it existed, since it was formerly held that once damage had occurred the cause of action accrued and that time began to run against the claimant even though he was unaware or mistaken as to the consequences of the damage.

The matter is now covered by the Limitation Act 1980. The Act applies only to claims for personal injury arising out of negligence, breach of contract, breach of statutory duty, or damage caused by intentional trespass to the person, as where, e.g., psychological damage follows sexual abuse. A claim form for damages can be served within three years of the claimant becoming aware that the damage was caused by the abuse, which may well be more than three years after the abuse took place (see *Stubbings* v *Webb* [1991] 3 All ER 949). The basic limitation period of three years is retained but time runs from the date of accrual of the cause of action or the 'date of the claimant's knowledge if later'. The 'date of the claimant's knowledge' is the date on which the claimant first had knowledge that his injury was significant and that it was attributable in whole or in part to the act or omission which constitutes the alleged negligence, or breach of duty.

The action may be brought by dependants or on behalf of the estate of a deceased person. Thus actions may be brought within three years of the date of death or of the date on which the personal representatives or dependants, as the case may be, acquired a knowledge of the relevant facts.

If the tort is of a continuing nature, as in the case of nuisance or possibly trespass, an independent cause of action arises on each day during which the tort is committed, and the aggrieved party can recover for such proportion of the injury as lies within the limitation period, even though the wrong was first committed outside the period.

When time does not run

Where the claimant is a minor or person suffering from mental disorder, the period of limitation does not run against him until his disability ends, i.e. on becoming 18 or on becoming sane or on death. But once time has started to run, any subsequent disability will not stop it running.

However, a minor was only regarded as being under a disability if he was not in the custody of a parent when the cause of action accrued. If he was in the custody of a parent the parent was expected to commence an action within the limitation period and if they did not the minor's action would be statute-barred. The Act of 1980, s 8, abolishes that rule so that periods of limitation do not run against a minor whether he is in the custody of a parent or not.

Contingencies

The House of Lords has ruled that the possibility of having to pay money in the future, i.e. a contingent liability, is not enough to start a period of limitation running. In *Law Society* v *Sephton & Co (a firm)* [2006] 3 All ER 401 the House of Lords dismissed an appeal by Sephton, an accountancy practice, which contended that damage to the Law Society which had to pay some £1.2 million from its compensation fund to clients of a Solihull solicitor, Andrew Payne, occurred more than six years before the Law Society issued its claim form on Sephton so that the Society's claim was statute-barred.

Over the period 1988–95, Andrew Payne misappropriated around £750,000 from his client account. He was later struck off and imprisoned. During that period the Law Society had relied on reports by Sephton that the books and accounts of Payne & Co had been examined and that they complied with the Solicitors' Accounts Rules. Lord Hoffmann said that the partner in Sephton was negligent in signing the relevant reports, since he could not have made a proper examination without discovering the misappropriations.

Sephton contended that the damage to the Law Society occurred when it supplied its reports for the years ending 31 October 1988 to 1995 and since the Law Society did not serve its claim form until 16 May 2002 the claim was statute-barred. The claim should not therefore proceed, having been brought more than six years after the damage (Limitation Act 1980, s 2).

The House of Lords did not agree. During the period 1988–95 the liability of the Law Society was only contingent in the sense that a client might make a claim on the compensation fund. In fact, the first claim by a client of Payne & Co was not made until July 1996, with payment being made in October 1996. Thus the Society's claim was made before the limitation period had expired. Sephton's appeal was dismissed.

Special periods of limitation

The periods of limitation in respect of actions against the estate of a deceased tortfeasor have already been considered. However, it should be noted that the Limitation Act 1980 does not operate to extend the time within which an action must be brought against a deceased tortfeasor's estate. So far as the death of an injured party is concerned, the ordinary six-year or three-year periods apply. They run from the accrual of the cause of action as if no death had occurred. As we have seen, personal representatives or dependants may ask for an extension of time under the provisions of the Limitation Act 1980.

Other special periods of limitation are as follows:

(*a*) actions arising out of collisions at sea: two years, subject to extension by the court (Maritime Conventions Act 1911, s 8);

(*b*) proceedings against air-carriers: two years (Carriage by Air Act 1961, s 1(1));
(*c*) a joint tortfeasor who wishes to recover a contribution must bring the action within two years from the date on which he admitted liability or judgment was entered against him (Limitation Act 1980, s 8);
(*d*) actions in respect of damage arising from nuclear incidents: 30 years (Nuclear Installations Act 1965, s 15).

Public authorities and their officers have no special position and actions against them are governed by the same rules as any other action in tort.

It should also be noted that by s 32 of the Limitation Act 1980, the defendant's *fraud* or *negligent concealment* may prevent his pleading that the claim is statute-barred.

Beaman v *ARTS*, 1949 – Limitation of actions: fraudulent concealment of claim (**348**)

Reform

The current law on limitation periods is set for radical change following a government announcement in July 2002 that it accepts in principle the Law Commission's proposals for reform of the law on the limitation of actions for civil claims. The government will introduce legislation when the opportunity arises.

In broad terms a claim would have to be brought within a period of three years from knowledge of the cause of action with a long stop period of 10 years from the accrual of the cause of action after which a claim could not be brought even if a claimant only discovered its existence after that time. The court will have discretion to disapply the three-year period in personal injury claims and no long stop period would apply. The new regime would apply to most tort claims and contract claims and claims for breach of trust. Claims in relation to land would be subject to a limitation period equivalent to the long stop period. Claims on a statute would in general be covered by the primary three-year period and the 10-year long stop period.

At the time of writing there has been no legislation on these reforms.

Assignment

It is against the rules of public policy to allow the assignment of rights of action in tort, since actions for damages should not become a marketable commodity. However, rights may pass to others by operation of law in the following circumstances:

(a) Death. Rights and liabilities in tort survive for the benefit or otherwise of the estate, except actions for defamation unless damage to the deceased's estate has resulted.

(b) Bankruptcy. Rights of action in tort possessed by a debtor which relate to his *property* and which if brought will increase his assets will pass to his trustee in bankruptcy. Actions for *personal torts*, e.g. defamation, remain with the bankrupt.

(c) Subrogation. An insurance company which compensates an insured person under a policy of insurance can step into his shoes and sue in respect of the injury.

21

SPECIFIC TORTS

We shall next examine certain specific torts, beginning with those affecting the person.

Torts affecting the person

Trespass to the person

This has several aspects.

Assault

An assault is an attempt or offer to apply unlawful force to the person of another. There must be an apparent present ability to carry out the threat, the basis of the wrong being that a person is put in present fear of violence. On general principles, pointing even an unloaded weapon or a model gun at another, who does not know that it is unloaded or a model, would amount to an assault.

It is often said that mere words cannot constitute an assault but this is a doubtful proposition. In *Ansell* v *Thomas* [1974] Crim LR 31 the assault seems to have consisted in words threatening forcible ejectment of a director from the company's premises if he did not leave voluntarily. A threat to use force at some time in the future is not an assault, but it seems that it is enough if the threat is to use force if the person addressed does not immediately do some act. In *Read* v *Coker* (1853) 138 ER 1437, it was held that an assault was committed where the defendants threatened to break the claimant's neck if he did not leave the premises. Words, however, may prevent an assault coming into being.

As regards the unauthorised taking of a photograph the position is somewhat complicated. It may be that where a flash is used the simple taking of the photograph without more is unlawful, since it is probably a battery (see below) to project light on to another person in such a manner as to cause personal discomfort. Where no flash is used, it is hard to see how, by itself, the taking of a photograph can amount to a battery, an assault or any other trespass.

Turbervell v *Savage*, 1669 – Words may prevent an assault (**349**)

Battery

Intentionally to bring any material object into contact with the person of another is enough application of force to give rise to a battery. Thus to throw water on a person (*Pursell* v *Horn*

(1838) 8 A & E 602), or to apply a 'tone-rinse' to the scalp of a customer which was not ordered and caused damage, i.e. a skin rash, is enough (*Nash* v *Sheen* (1953) *The Times*, 13 March). Substantial damages will be awarded when the battery is an affront to personal dignity, e.g. the wrongful taking of a fingerprint. It should, however, be noted that a person who has been detained and charged with or told he will be charged with a recordable offence, e.g. an offence punishable by imprisonment, can have his fingerprints taken without consent (s 61, Police and Criminal Evidence Act 1984 (referred to hereunder as PACE)). Persons who are convicted of a recordable offence but fined rather than imprisoned can be required to attend at a police station for prints to be taken. Failure to do so allows arrest without warrant (PACE, s 27). The mere jostling which occurs in a crowd does not constitute battery, because there is presumed consent and in any case there is normally no hostility which is also a requirement. Thus in *Wilson* v *Pringle* [1986] 2 All ER 440, one schoolboy had intentionally pulled a schoolbag off another boy's shoulder. However, this was only a form of horseplay and in the absence of a hostile intention there was no battery. It should be noted that there may be a battery without an assault, as where a person is attacked from behind.

There may be exeptional cases where there is a battery even though there is no physical contact with the victim. Thus, in *Haystead* v *DPP* (2000) *The Times*, 2 June a man hit a woman causing her to drop the child she was holding. The court ruled that in the circumstances there was a battery to both the woman and the child.

As regards strip searching of prison visitors, e.g. for drugs the case of *Secretary of State for the Home Department* v *Wainwright* [2002] QB 1334 is instructive. The Court of Appeal decided that the trial judge was wrong to award basic and aggravated damages to a mother and son who were strip searched without their consent while on a prison visit. The Court of Appeal made clear that an intention to do harm or recklessness as to the same must be present and here the prison officers did not intend harm nor were they reckless. This ruled out the common law rule of trespass and any privacy rights under the Human Rights Act 1998 though the events took place in 1997. As regards intention and recklessness, the Court of Appeal found it necessary to distinguish *Wilkinson* v *Downton* (1897) Case **268**.

This ruling was affirmed by the House of Lords (see *Secretary of State for the Home Department* v *Wainwright* [2003] 3 WLR 1137).

Was there consent?

In considering the defence of *volenti* there has already been some treatment of informed consent in an action for alleged negligence in medical cases (see *Sidaway* v *Bethlem Royal Hospital Governors* [1984] 1 All ER 1018 and the cases appearing with it in Chapter 20). A similar issue was raised in *Freeman* v *Home Office* [1984] 1 All ER 1036. The claimant was serving a sentence of life imprisonment. He was given drugs by a medical officer employed by the Home Office. He claimed that the drugs were given to discipline and control him and not, as he thought, as medical treatment. He claimed that the medical officer had committed battery upon him and that his consent was negatived because it was not informed. The Court of Appeal decided that since the doctrine of informed consent formed no part of English law, the sole issue was whether on the facts the claimant had consented to the administration of the drugs and on that issue the trial judge had found that the claimant had so consented. His claim therefore failed.

In *Re MB (Caesarian Section)* (1997) 147 NLJ 600 the Court of Appeal held that a woman with full capacity could consent to or refuse treatment even though refusal might result in harm to her or her baby. However, doctors were entitled to administer an anaesthetic to carry out birth by caesarian section where it was in the best interest of the woman and her child given that she had a temporary lack of capacity because of panic brought on by fear of injection by needle.