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

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

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

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

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

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

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

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

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

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

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

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

The vehicle did not belong to the Post Office, nor was it provided by it. The Post Office had not prescribed the method of travel; admittedly a mileage allowance was payable, but travelling expenses of any other kind would have been paid, e.g. bus or train fare. The question of agency was one of fact and on the facts of this case Aldridge was not an agent. The company which had insured the van was, therefore, liable to indemnify Aldridge in respect of his own liability to Nottingham.

293 *Morgans* v *Launchbury* [1972] 2 All ER 606

In this case the family car was registered in the name of the wife, though it was used mainly by the husband who worked seven miles from home. The wife had asked her husband not to drive the car home himself if he had been drinking. On one occasion the husband had been drinking heavily and asked a friend, C, to drive him home together with three other passengers. There was an accident caused by the negligent driving of C and the husband and he were killed. The three passengers were injured and sued the wife claiming that she was liable vicariously for the negligence of C, who had been appointed to drive on her behalf by her husband. If the wife was held liable, her insurance company would be liable to the claimants. The House of Lords held that she was not liable. The concept of agency required more than mere permission to use. Use must be at the owner's request or on his instructions.

Comment Before 1971 it was not compulsory for road traffic insurance to cover passengers. In fact, Mrs Launchbury had an insurance policy which covered passengers, but only in respect of accidents which occurred while she or her agent was driving. The claimants would have preferred to get their money from the insurance company than to sue the estate of C.

294 *Rambarran* v *Gurrucharran* [1970] 1 All ER 749

In this case Rambarran, a chicken farmer in Guyana, owned a car which was used by several of his sons, Rambarran himself being unable to drive. One of his sons, Leslie, damaged Gurrucharran's car by negligently driving the family car. The Privy Council found that Rambarran was not liable for Leslie's negligence because he did not know that Leslie had taken the car since he was away from home at his chicken farm at the time in question. Furthermore, there was no evidence to show what the purpose of Leslie's journey was, but it was clearly not for any business or family purpose. Ownership of the vehicle was not enough in itself to establish liability.

295 *Klein* v *Calnori* [1971] 2 All ER 701

The defendant, Calnori, was the manager of a public house at Sunbury-on-Thames. While he was busy at the bar, a Mr Freshwater, who knew Calnori, took his car and drove it away without his permission. Later Freshwater telephoned Calnori and told him he had taken his car. Calnori told him to bring it back. On the way back to Sunbury, Freshwater collided with Klein's stationary car severely damaging it. Klein alleged that Calnori was liable for this damage because Freshwater was his agent. By asking Freshwater to bring the car back, Freshwater was driving it partly for Calnori's purposes.

Held – by Lyell, J – Calnori was not liable. If Freshwater had borrowed the car with Calnori's consent, then the loan to Freshwater, for his own purposes, would have involved returning it. In these circumstances Calnori would not have been liable for an accident on the return journey. Therefore, Calnori's liability could not be greater in circumstances in which the car had been taken without his consent and had been used solely for the taker's purpose.

Comment A similar result was obtained in *Topp* v *London Country Bus (South West)* [1993] 1 WLR 976 where a bus belonging to the defendant company was stolen from a public car park, the keys being in the ignition, and was then involved in a collision in which a woman was killed. Her husband sued the bus company in negligence. The Court of Appeal *held* that, although the bus company may have been negligent to leave the bus with the keys in it in an accessible place, it could not be held responsible for the accident as it had occurred through the voluntary act of a third party over whom the company had no control.

Liability for the torts of independent contractors

296 *Bower* v *Peate* (1876) 1 QBD 321

The claimant and defendant were the respective owners of two adjoining houses, the claimant being entitled to the support for his house of the defendant's land. The defendant employed a contractor to pull down his house and to rebuild it after excavating the foundations. The contractor undertook the risk of supporting the claimant's house during the work and to make good any damage caused. The claimant's house was damaged in the progress of the work because the contractor did not take appropriate steps to support it.

Held – the defendant was liable. The fact that the injury would have been prevented if the contractor had provided proper support did not take away the

defendant's liability. A person employing a contractor to perform a duty cast upon himself, in this case a duty of support, is responsible for the contractor's negligence in performing it.

Comment It would appear that any work on a party wall is regarded as giving rise to a special risk of damage for which there may be liability for the negligent work of an independent contractor. The matter was raised again in *Johnson* v *BJW Property Developments Ltd* [2002] 3 All ER 574. The defendants used an independent contractor to replace a fireplace in a party wall between them and the claimant's premises. The work was done negligently in that the existing firebrick lining was removed and not replaced with fire retardant material. The defendants lit a fire in the new fireplace and it caused a fire and damage to the claimant's premises. The defendants were held liable vicariously for the negligence of the contractor. This was not based on the rule in *Rylands* v *Fletcher* (see p 603) because that does not apply to the escape of a fire from a domestic fireplace but rather on a rule of the common law relating to work giving rise to a special risk of damage. *Bower* v *Peate* (above) was quoted in *Johnson* as an example of this rule in connection with work on party walls.

297 *Salsbury* v *Woodland* [1969] 3 All ER 863

The defendant employed, as an independent contractor, an experienced tree-feller to fell a large tree in his front garden. The contractor was negligent and the tree fell towards the highway bringing down telephone wires on to the highway. A car came along too fast, and the claimant, who was a bystander watching the whole operation, was injured when he dived out of the way of the inevitable collision between the car and the wire.

Held – by the Court of Appeal – the defendant was not liable though the contractor was. There was no special liability in the defendant merely because the contractor was employed to work near, as distinct from on, the highway.

Comment (i) In *Tarry* v *Ashton* (1876) 1 QBD 314 the defendant employed an independent contractor to carry out repairs to a lamp which, though attached to his house, overhung the highway. The contractor failed to secure the lamp properly and it fell, injuring the claimant. It was held that the defendant was liable because it was his duty to make the lamp safe and he was in breach of that duty because the contractor had not secured the lamp properly.

(ii) The liability of occupiers for hazards on the highway was considered in *Rowe* v *Herman, The Times*, 9 June 1997. H engaged independent contractors to build a garage at his home. The contractors laid metal plates on the paving stones outside the house to protect them against heavy lorries delivering materials to the site. The contractors failed to remove them after the completion of the job. R, while walking home at night, tripped over the plates and suffered injury. His action against H failed because H had no control over how the contractor did his work or how he cleared up afterwards. H was not under any special duty merely because his premises abutted the highway.

General defences: *volenti non fit injuria*

298 *Simms* v *Leigh Rugby Football Club* [1969] 2 All ER 923

The claimant was a member of a visiting team playing rugby football on the defendant club's ground when his leg was broken as he was tackled and thrown towards a concrete wall which ran at a distance of 7ft 3ins from the touch line. The League's by-laws prescribed that the distance had to be at least 7ft.

Held – by Wrangham, J – the claimant must be taken willingly to have accepted the risks involved in playing on that field. The ground complied with the by-laws of the Rugby Football League and the defendants were not, therefore, liable under the Occupiers' Liability Act 1957, or in general negligence by reason of the claimant's consent.

Comment (i) In this connection, the decision of the Court of Appeal in *Condon* v *Basi* [1985] 2 All ER 453 is of interest. In that case the defendant, a non-professional player, made a late and reckless slide tackle upon the claimant resulting in the claimant sustaining a broken right leg and the defendant being sent from the field of play. The county court judge awarded the claimant £4,900 for damages for the injuries sustained and the Court of Appeal dismissed an appeal against that decision. It was decided by the Court of Appeal that participants in competitive sport owe a duty of care to each other to take all reasonable care having regard to the particular circumstances in which the participants are placed. If one participant injures another, he will be liable in negligence for damages at the suit of the injured participant if it is shown that he failed to exercise the degree of care appropriate in all the circumstances or that he acted in a manner to which the injured participant could not have been expected to consent. The law is clearly having to respond to the increasing amount of unnecessary violence in certain sports.

(ii) The rule in *Condon* also applies to professional footballers. Thus, in *Watson* v *Gray, The Times*, 26 November 1998 the claimant, a professional footballer, suffered injury in terms of a double fracture to his right lower leg following a high tackle on him after the ball had moved on. The defence of *volenti* did not apply and the claimant succeeded in a damages claim.

(iii) Again, in *Smolden* v *Whitworth, The Times*, 18 December 1996, the defence of *volenti* did not apply where S was seriously injured in an under-19 colts rugby match in the course of which his neck was broken after a scrum collapsed. The referee was held liable as having a duty of care. His conduct had fallen below an acceptable standard in terms of observing rules designed to prevent scrum collapse.

(iv) And, of course, there may be a criminal prosecution as in *R* v *Lloyd* [1989] Crim LR 513 where L was sentenced to 18 months' imprisonment for kicking an opposing rugby player in the face while he was down, fracturing a cheekbone.

299 ***Murray* v *Harringay Arena Ltd*** [1951] 2 KB 529

David Charles Murray, aged six, was taken by his parents to the defendant's ice rink to watch a hockey match. They occupied front seats at the rink, and during the game the boy was hit in the eye by the puck. This action was brought against the defendant for negligence.

Held – the risk was voluntarily undertaken by the claimants. The defendant had provided protection by means of netting and a wooden barrier which, in the circumstances, was adequate, since further protection would have seriously interfered with the view of the spectators.

Comment As the above case shows, it is possible to plead *volenti* against a minor. It is not, however, possible to do so against a person who is mentally disturbed. In *Kirkham* v *Anderton* [1990] 2 WLR 987 a prisoner was remanded in custody. He had suicidal tendencies known to the police which they failed to pass on to the prison authorities. The prisoner killed himself and a claim for negligence was brought against the police authority. The police authority was held liable and the defence of *volenti* failed.

300 ***Hall* v *Brooklands Auto-Racing Club*** [1933] 1 KB 205

The claimant paid for admission to the defendants' premises to watch motor-car races. During one of the races a car left the track, as a result of a collison with another car, and crashed through the railings injuring the claimant. It was the first time that a car had gone through the railings, and in view of that the precautions taken by the defendants were adequate. In this action by the claimant for personal injury, it was *held* that the danger was not one which the defendants ought to have anticipated, and that the claimant must be taken to have agreed to assume the risk of such an accident.

Exclusion clauses: contractual assent and *volenti non fit injuria*: the relationship

301 ***Burnett* v *British Waterways Board*** [1973] 1 WLR 700

Burnett was a lighterman working on his employer's barge. Due to the defendant Board's negligence a capstan rope parted while the barge was docking, injuring Burnett. At the dock office was a notice stating that persons availed themselves of the dock facilities at their own risk. Burnett had read the notice when he was a young apprentice. The defendant admitted negligence but claimed that Burnett had voluntarily undertaken the risk of injury.

Held – by the Court of Appeal – Burnett was an employee sent by his employer and it could not be said that he had freely and voluntarily incurred the risk of negligence on the part of the defendant. In the course of his judgment Lord Denning, MR said: 'If there was a contract with Mr Burnett, of course, the Board could rely upon it. But there was no contract with him. He was just one of the men working on the barges. The contract was with the barge owners . . .'.

Comment If the defence of *volenti* succeeds then, of course, the claimant's suit fails.

General defences: *volenti* – the claimant must know of the risk, though knowledge is not necessarily assent

302 ***White* v *Blackmore*** [1972] 3 All ER 158

The husband of the claimant widow was a member of a 'jalopy' racing club. He went to a meeting organised by the defendants as a competitor but stood outside the spectators' ropes close to a stake. The wheel of a car caught on one of the ropes some distance away so that the stake was pulled up sharply and the husband was killed when he was catapulted some 20 feet. The defendants displayed notices warning the public of the danger and stating as a condition of admission that they were absolved from all liabilities for accidents howsoever caused. The widow claimed damages for breach of s 2 of the Occupiers' Liability Act 1957 and/or general negligence.

Held – by the Court of Appeal – (*a*) even though the deceased had been negligent in standing where he did, the defence of *volenti* would not succeed as the deceased did not know of the risk that had caused his death; (*b*) however, the claim would fail as the defendants were at that time entitled to exclude their liability and this they had done by warning notices.

Comment The case is still an example of the point that for *volenti* to succeed the claimant must know of the risk. However, it has been overtaken on its own facts by the Unfair Contract Terms Act 1977. Where liability for breach of obligations or duties arises from occupation of premises which are used, as here, for business purposes, a person cannot by reference to any contract term or notice exclude or restrict his liability for death or personal injury resulting from negligence (1977 Act, s 1). In the case of other loss or damage, there can be no exclusion or restriction of liability for negligence unless the term or notice is 'reasonable' (1977 Act, s 2). Finally, the 1977 Act cannot be avoided by raising the defence of *volenti* even if the risk is known (1977 Act, s 3). The above applies to occupiers and to actions in general negligence.

303 *Baker* v *James Bros* [1921] 2 KB 674

The defendants were wholesale grocers and they employed the claimant as a traveller. He was supplied by the defendants with a motor car, the starting gear of which was defective. The claimant repeatedly complained about this to the defendants, but nothing was done to remedy the defect. While the claimant was on his rounds, the car stopped, and he was injured whilst trying to restart.

Held – notwithstanding the claimant's knowledge of the defect, he had never consented to take upon himself the risk of injury from the continued use of the car. He was not guilty of any contributory negligence and was entitled to recover damages.

304 *Dann* v *Hamilton* [1939] 1 KB 509

The claimant had been with a party to see the Coronation decorations in London. They made the journey in the defendant's car. During the day and evening the defendant had consumed a quantity of intoxicating liquor, but he drove the party back to Staines where they all got out. The claimant was at this point a 2d bus ride from her home but she accepted the defendant's invitation to take her there. During this part of the journey there was an accident caused by the defendant's negligence, and the claimant was injured. She now sued in respect of these injuries and the defendant pleaded *volenti non fit injuria*.

Held – the defence did not apply and the claimant succeeded. She had knowledge of a potential danger, but that did not mean that she assented to it.

Comment (i) The court left open the question whether the driver was 'dead drunk' or 'very drunk'. In such a case the maxim might have applied.

(ii) It should be noted that the defence of contributory negligence was not pleaded in *Dann*, although Asquith, J encouraged counsel for the defence to raise it, but he would not be drawn. However, it is now accepted that although *volenti* may not apply in a situation such as *Dann*, a claimant may be guilty of contributory negligence if he travels as a passenger when he knows the driver has consumed enough alcohol to impair his ability to drive safely, or if he goes drinking with the driver knowing he will be a passenger later when the drink deprives him of his own capacity to appreciate the danger (so decided in *Owens* v *Brimmell* [1976] 3 All ER 765).

(iii) In *Pitts* v *Hunt, The Times*, 13 April 1990 it was held that a passenger on a motor cycle could not sue the rider whom he had aided and abetted in illegally driving a motor cycle dangerously after they both got drunk together. Further, in *Morris* v *Murray, The Times*, 18 September 1990 a claimant who knowingly and willingly flew with a pilot who was drunk was not entitled to damages for personal injury. The defence of *volenti* applied in both cases.

305 *Smith* v *Baker and Sons* [1891] AC 325

Smith was employed by Baker and Sons to drill holes in some rock in a railway cutting. A crane, operated by fellow employees, often swung heavy stones over Smith's head while he was working on the rock face. Both Smith and his employers realised that there was a risk the stones might fall, but the crane was nevertheless operated without any warning being given at the moment of jibbing or swinging. Smith was injured by a stone which fell from the crane because of negligent strapping of the load. The House of Lords *held* that Smith had not voluntarily undertaken the risk of his employers' negligence, and that his knowledge of the danger did not prevent his recovering damages.

General defences: *volenti* – actions against employers based on breach of statutory duty

306 *Imperial Chemical Industries Ltd* v *Shatwell* [1964] 2 All ER 999

George and James Shatwell were certificated and experienced shot-firers employed by ICI. Statutory rules imposed an obligation on them personally (not on their employer) to ensure that certain operations connected with shot-firing should not be done unless all persons in the vicinity had taken cover. They knew of the risks of premature explosion which had been explained to them; they knew of the prohibition; but on one occasion because a cable they had was too short to reach the shelter, they decided to test without taking cover rather than wait 10 minutes for their

companion Beswick who had gone to fetch a longer cable. James gave George two wires, and George applied them to the galvanometer terminals. An explosion occurred and both men were injured. At the trial it was found that James was guilty of negligence and breach of statutory duty for which the employer was held vicariously liable, damages being assessed at £1,500 on a basis of 50 per cent contributory negligence. The Court of Appeal affirmed, but the House of Lords *reversed*, the decision and *held* that, although James's acts were a contributory cause of the accident to George, the employer was not liable.

(*a*) The employer was not itself in breach of a statutory duty.

(*b*) It could plead *volenti non fit injuria* to a claim of vicarious liability.

(*c*) It had shown no negligence. It had instilled the need for caution, made proper provision, and even arranged a scale of remuneration in a way which removed a temptation to take short cuts.

(*d*) The Shatwell brothers were trained men well aware of the risk involved so the principle of *volenti non fit injuria* applied. Lord Pearce said: 'The defence [of *volenti non fit injuria*] should be available where the employer was not in himself in breach of a statutory duty and was not vicariously in breach of a statutory duty through the neglect of some person of superior rank to the [claimant] and whose commands the [claimant] was bound to obey or who has some special and different duty of care.'

Comment (i) If the employer had been compelled to rely on the defence of contributory negligence, it might have escaped liability if only one man were involved and treated as solely responsible, but where two men were involved, as here, it would have been vicariously liable for James's contribution to George's injury and for George's contribution to James's injury so it would have been compelled partially to compensate each man.

(ii) Deliberate disobedience to regulations and the employer's own orders is not to be excused by impatience to get on with the work. Anyone who does so must be regarded as a volunteer in regard to any resulting injury. That is the gist of this case.

General defences: *volenti* – the rescue cases; generally

307 *Baker* v *T E Hopkins and Son Ltd* [1959] 3 All ER 966

The defendants were building contractors and were engaged to clean out a well. Various methods had been used in order to pump out the water, including hand-operated pumps, but eventually a petrol-driven pump was employed. The exhaust from the engine on the pump resulted in a lethal concentration of carbon monoxide forming inside the well. Two of the defendants' employees went down the well to carry on the work of cleaning it and were overcome by the fumes. Baker was a local doctor and, on being told what had happened, he went along to give what assistance he could. He was lowered down the well on a rope, and on reaching the two men, he realised that they were beyond help. He then gave a prearranged signal to those at the top of the well and started his journey to the surface. Unfortunately, the rope became caught on a projection and Dr Baker was himself overcome by fumes and died. His executors claimed damages in respect of Dr Baker's death.

Held – the defendants were negligent towards their employees in using the petrol-driven pump and the maxim *volenti non fit injuria* did not bar the claim of Dr Baker's executors. Although Dr Baker may have had knowledge of the risk he was running, he did not freely and voluntarily undertake it, but acted under the compulsion of his instincts as a brave man and a doctor.

Comment In an earlier case, *Haynes* v *Harwood* [1935] 1 KB 146, a policeman was injured while stopping a runaway horse and van in a crowded street. It was held that he could recover damages. *Volenti* and contributory negligence did not apply.

308 *Cutler* v *United Dairies (London) Ltd* [1933] 2 KB 297

The defendant's carman left the defendant's horse and van, two wheels being properly chained, while he delivered milk. The horse, being startled by the noise coming from a river steamer, bolted down the road and into a meadow. It stopped in the meadow and was followed there by the carman who, being in an excited state, began to shout for help. The claimant, a spectator, went to the carman's assistance and tried to hold the horse's head. The horse lunged and the claimant was injured. In this action by the claimant against the defendant for negligence it was *held* that in the circumstances the claimant voluntarily and freely assumed the risk. This was not an attempt to stop a runaway horse so that there was no sense of urgency to impel the claimant. He, therefore, knew of the risk and had had time to consider it, and by implication must have agreed to incur it.

Comment Evidence showed negligence in that the horse had bolted before and should not have been used on the milk round at all.

309 ***Hyett* v *Great Western Railway Co*** [1948] 1 KB 345

The claimant was employed by a firm of wagon repairers and he was on the defendant's premises with its authority to carry out his duties. While repairing a wagon he saw smoke rising from one of the defendant's wagons in the same siding and went to investigate. The floor of the wagon, which contained paraffin oil, was in flames. The claimant was trying to get the drums of paraffin oil out, when one of them exploded and injured him. Evidence showed that the defendant railway company knew that there was a paraffin leakage in the wagon, but had nevertheless allowed it to remain in the siding.

Held – the claimant was entitled to recover damages from the defendant, and the maxim *volenti non fit injuria* did not apply. A man may take reasonable risks in trying to preserve property put in danger by another's negligence.

General defences: *volenti* – duty to a rescuer

310 ***Videan* v *British Transport Commission*** [1963] 2 All ER 860

A child managed to get on to a railway line and was injured by a trolley. The Court of Appeal *held* that the child's presence was not in the circumstances foreseeable and the defendant did not owe him a duty of care. However, a duty was owed to his father who was injured trying to rescue him.

Comment (i) It is difficult to follow the reasoning by which the Court of Appeal held that the defendant ought to have foreseen that a stationmaster would try to rescue a minor on the line (the minor being the son of the stationmaster) yet need not have foreseen the presence of that minor himself.

(ii) The situation where no duty of care is owed to the rescuer is dealt with by *Frost* v *Chief Constable of South Yorkshire* [1998] 3 WLR 1509.

General defences: *volenti* – defence irrelevant unless the defendant has committed a tort

311 ***Wooldridge* v *Sumner*** [1962] 2 All ER 978

A competitor of great skill and experience was riding a horse at a horse show when it ran wide at a corner and injured a cameraman who was unfamiliar with horses and who had ignored a steward's request to move outside the competition area. The rider was thrown, but later rode the horse again and it was adjudged supreme champion of its class. The cameraman brought an action for damages, and at the trial was awarded damages on the ground of negligence.

Held – on appeal, no negligence had been established because (*a*) any excessive speed at the corner was not the cause of the accident, and was not negligence but merely an error of judgement; and (*b*) the judge's finding that the horse would have gone on to a cinder track without harm to the claimant if the rider had allowed it to, was an inference from primary facts and unjustified, and in any event an attempt to control the horse did not amount to negligence.

> If, in the course of a game or competition, at a moment when he has not time to think, a participant by mistake takes a wrong measure, he is not to be held guilty of any negligence. . . . A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purpose of the game or competition, notwithstanding that such act may involve error of judgement or a lapse of skill, unless the participant's conduct is such as to evince a reckless disregard of the spectator's safety. The spectator takes the risk because such an act involves *no breach of the duty of care* owed by the participant to him. He does not take the risk by virtue of the doctrine expressed or obscured by the maxim *volenti non fit injuria*. . . . The maxim in English law *presupposes a tortious act* by the defendant. The consent that is relevant is not consent to the risk of injury but consent to the lack of reasonable care that may produce that risk. (*Per* Diplock, LJ)

General defences: *volenti* – public policy; duty of care

312 ***Nettleship* v *Weston*** [1971] 3 All ER 581

The claimant, a non-professional driving instructor, gave the defendant driving lessons after having first satisfied himself that the car was insured to cover injury to passengers. The defendant was a careful driver but on the third lesson she failed to straighten out after turning left and struck a lamp standard breaking the claimant's kneecap. The defendant was convicted of driving without due care and attention.

Held – by the Court of Appeal – since the claimant had checked on the insurance position, he had expressly not consented to run the risk and there was no question of *volenti*. Furthermore, the duty of care owed by a learner-driver was the same as that owed by every driver and the defendant was liable for the damages. A learner-driver owes a duty to his instructor to drive with proper skill and care, the test being the objective one of the careful driver and it is no defence that he was doing his best.

Comment (i) Nobody would suggest that a learner-driver can do any more than his best. However, the mere fact of learning to drive a motor car is dangerous, at least in its initial stages, and the risk of injury has to be upon the driver. This facilitates an insurance claim by the injured party. In addition, the application of an objective standard of care facilitates a speedier and cheaper settlement of the many road accident cases. These two points mean that in essence the learner-driver's standard is a matter of public policy.

(ii) A passenger who knows that a driver is under the influence of drink or drugs may, if he is injured, be barred from recovering damages on the grounds of *public policy* since he is aiding and abetting a criminal offence. As Megaw, LJ said in this case: 'There may in such cases sometimes be an element of aiding and abetting a criminal offence; or, if the facts fall short of aiding and abetting, the passenger's mere assent to benefit from the commission of a criminal offence may involve questions of *turpis causa*.' The phrase '*turpis causa*' denotes something dishonourable or immoral about the claim.

General defences: inevitable accident

313 *Stanley* v *Powell* [1891] 1 QB 86

The defendant was a member of a shooting party, and the claimant was employed to carry cartridges and also any game which was shot. The defendant fired at a pheasant, but a shot glanced off an oak tree and injured the claimant.

Held – the claimant's claim failed. The defendant's action was neither intentional nor negligent.

Comment The defence will not apply where the court finds intention or negligence in the defendant. In *Pearson* v *Lightning, The Times*, 30 April 1998 the eighth and ninth holes of a golf course ran parallel to each other. The defendant was on the eighth fairway and being in the rough had to hit the ball over a coppice of trees. His shot hit a tree and was deflected on to the ninth fairway where it struck the claimant who was injured in the eye. When the defendant saw the ball heading for the claimant he shouted, 'Fore'. The Court of Appeal ruled that the claimant was entitled to damages. Being aware of the position of the fairways, the defendant should have asked the party *before* he made his shot whether he should wait until the party had gone. He did not do so and was liable in negligence, particularly since he knew that he was making a difficult shot.

314 *National Coal Board* v *Evans (J E) & Co (Cardiff) Ltd and Another* [1951] 2 KB 861

Evans & Co Ltd was engaged by Glamorgan County Council to carry out certain work on land belonging to the Council. It was necessary to excavate a trench across the land, and Evans & Co sub-contracted with the second defendants to do this work. An electric cable passed under the land, but the Council, Evans & Co, and the sub-contractors had no knowledge of this and it was not marked on any available map. During the course of the excavation a mechanical digger damaged the cable so that water seeped into it causing an explosion. The electricity supply to the claimant's colliery was cut off, and it sued the defendants in trespass and negligence. Donovan, J, at first instance, found that the defendants were not negligent, but were liable in trespass. The Court of Appeal *held* that the defendants were entirely free from fault and there was no trespass by them.

General defences: act of God

315 *Nichols* v *Marsland* (1876) 2 Ex D 1

For many years there had existed certain artificial ornamental lakes on the defendant's land, formed by damming up of a natural stream the source of which was at a point higher up. An extraordinary rainfall 'greater and more violent than any within the memory of witnesses' caused the stream and the lakes to swell to such an extent that the artificial banks burst, and the escaping water carried away four bridges belonging to the county council. Nichols, the county surveyor, sued under the rule in *Rylands* v *Fletcher* (see Chapter 21).

Held – the defendant was not liable for this extraordinary act of nature which she could not reasonably have anticipated. The escape of water was owing to the act of God, and while one is bound to provide against the ordinary operations of nature, one is not bound to provide against miracles.

Comment If the claim had been in negligence, the defendant would not have been liable because she was not negligent. However, the claim was brought under the rule in *Rylands* v *Fletcher* (see Chapter 21) where liability is strict and negligence is not required, though foresight of consequences may be. Nevertheless, the defendant was not liable because an act of God is a defence to *Rylands* liability.

General defences: necessity

316 *Cresswell* v *Sirl* [1948] 1 KB 241

The defendant, a farmer's son, was awakened during the night by dogs barking, and on going out found certain ewe sheep in lamb, penned up by the dogs in a corner of a field. The dogs seemed about to attack the sheep and had been chasing them for an hour. A

light was turned on the dogs, who then left the sheep and started for the defendant. When they were about 40 yards away, the defendant fired and killed one of the dogs. The owner of the dog sued the defendant for damages. In the county court, judgment was given for the owner of the dog on the ground that such a killing could be justified only if it took place while the dog was actually attacking the sheep. In the view of the Court of Appeal, however, the defendant could justify his act by showing that it was necessary to avert immediate danger to property. It was not necessary that the dog actually be attacking the sheep. This decision is affirmed by s 9 of the Animals Act 1971, which now covers the situation. However, the section requires that the person shooting the dog must have had reasonable grounds to believe that there were no other reasonable means of dealing with the problem or ascertaining the owner. Under s 9 the defendant must notify the police within 48 hours of the killing or injury. Section 9 does not specifically repeal the common law defence in the *Cresswell* case and so the common-law defence may be available instead of s 9 where the police have not been notified.

317 *Cope* v *Sharpe (No 2)* [1912] 1 KB 486

The claimant was a landowner and he let the shooting rights over part of his land to a tenant. A heath fire broke out on part of the claimant's land and the defendant, who was the head gamekeeper of the tenant, set fire to patches of heather between the main fire and a covert in which his master's pheasants were sitting. His object was to prevent the fire spreading. In fact, the fire was extinguished independently of what the defendant had done, and the claimant now sued the defendant for damages for trespass.

Held – the defendant was not liable because when he carried out the act it seemed reasonably necessary, and it did not matter that in the event it turned out to be unnecessary.

Comment (i) In *Rigby* v *Chief Constable of Northampton* [1985] 2 All ER 985, R's shop was burnt out when the police fired a canister of CS gas into the building to force out a dangerous psychopath. R's claim in trespass failed on the ground of the defence of necessity. His claim in negligence succeeded because there was, to the knowledge of the police, no fire-fighting equipment available.

(ii) In *Monsanto plc* v *Tilly* [1999] EGCS 143 the Court of Appeal ruled that the defence of necessity did not apply to the uprooting of genetically modified crops growing under government licence. There was no immediate danger as in *Creswell* and *Cope* and emergency trespass was not justified where a public authority was responsible for public protection.

(iii) In *Re A (Children) (Conjoined Twins: Medical Treatment) (No 1)* [2001] Fam 147 the Court of Appeal considered an application by the parents of six-week-old Siamese twins appealing against a ruling granting medical staff authority to proceed with surgical separation. One of the twins had a good chance of developing normally. The other had severe brain abnormalities, no lung tissue and no properly functioning heart. The blood supply of this twin emanated from the other and she would inevitably die on separation. The Court of Appeal ruled that the wishes of the parents which were against the separation could not be overriden on the basis of benefit to the children because it was clear that separation would not be beneficial to them both and both interests had to be considered equally. However, permission to go ahead with the separation was granted since the death of one of the twins was inevitable and the operation that would result in the death of one of the twins would not be a crime or actionable at civil law because the defence of necessity would apply. The three constituents of that defence were present, i.e. (a) the act was required to avoid inevitable and irreparable evil; (b) no more would be done than was reasonably necessary for the purpose to be achieved, and (c) the evil to be inflicted was not disproportionate to the evil avoided.

General defences: mistake

318 *Beckwith* v *Philby* (1827) 6 B & C 635

In this case it was *held* that the mistaken arrest of an innocent man on suspicion of an arrestable offence by an ordinary citizen is not actionable as false imprisonment, if the offence has been committed, and if there are reasonable grounds for believing that the person arrested is guilty of it.

General defences: Act of State

319 *Buron* v *Denman* (1848) 2 Exch 167

The captain of a British warship was *held* not liable for trespass when he set fire to the barracoon of a Spaniard slave trader on the West Coast of Africa and released the slaves. The captain had general instructions to suppress the slave trade, and in any case his conduct in this matter was afterwards approved by the Admiralty and the Foreign and Colonial Secretaries. It seems, therefore, that neither the official responsible nor the Crown can be sued for injury inflicted upon others outside the territorial jurisdiction of the Crown, if this is authorised or subsequently ratified by the Crown.

320 ***Nissan* v *Attorney-General*** [1967] 2 All ER 1238

The claimant, a British subject, was the tenant of a hotel in Cyprus. In December 1963, the government of Cyprus accepted an offer that British Forces stationed in Cyprus should give assistance in restoring peace to the island. The British troops occupied the claimant's hotel for some months and the claimant now sued the Crown for compensation. It was *held* – *inter alia* that the Crown was obliged to pay compensation and that a plea by the Crown of an 'Act of State' was no defence as against a Britsh subject.

321 ***Johnstone* v *Pedlar*** [1921] 2 AC 262

Johnstone was the Chief Commissioner of the Dublin Metropolitan Police. He was the defendant in an action in which Pedlar sued for the detention of £124 in cash and a cheque for £4 15s 6d. Pedlar was convicted of being engaged in the illegal drilling of troops in Ireland, and the above property was found on him at the time of his arrest. Pedlar, who was a naturalised citizen of the United States of America, sued for the return of his property, and the defence was 'Act of State'. A certificate given by the Chief Secretary for Ireland was put in at the trial, certifying that the detention of the property was formally ratified as an Act of State.

Held – Pedlar was entitled to claim his property, because the defence of 'Act of State' cannot be raised against an alien who is a subject of a friendly nation.

General defences: statutory authority

322 ***Vaughan* v *Taff Vale Railway*** (1860) 5 H & N 679

The defendants were *held* not liable for fires caused by sparks from engines which they were bound by statute to run and which were constructed with proper care.

Comment (i) By s 1 of the Railway Fires Acts 1905 as amended by s 38 of the Transport Act 1981, railway companies are under a liability of up to £3,000 for damage to crops caused by fire by engines run under statutory authority, though the advent of diesel and electric trains makes the statute somewhat out of date.

(ii) Even if the authority to act is absolute, the damage will not be excused unless it is necessarily incidental. Thus, it is not necessary to the processing of sewage that rivers be polluted. (*Pride of Derby and Derbyshire Angling Association* v *British Celanese Ltd* [1952] 1 All ER 1326.)

323 ***Penny* v *Wimbledon Urban District Council*** [1899] 2 QB 72

The defendant Council, acting under conditional powers conferred upon it by s 150 of the Public Health Act 1875, employed a contractor to make up a road in its district. The contractor removed the surface soil and placed it in heaps on the road. The claimant, while passing along the road in the dark, fell over one of the heaps, which had been left unlighted and unguarded, and was injured. She now sued for damages.

Held – she succeeded. Although the Council was operating under statutory powers it must, if it does acts likely to cause danger to the public, see that the work is properly carried out, and take reasonable measures to guard against danger. The Council did not discharge this duty by delegating it to a contractor, and the local authority was liable for negligence.

324 ***Marriage* v *East Norfolk Rivers Catchment Board*** [1950] 1 KB 284

In pursuance of their powers under s 34 of the Land Drainage Act 1930, the Catchment Board deposited dredgings taken from the river on the south bank of that river, so raising its height by one to two feet. When the river next flooded, the flood waters instead of escaping over the south bank, as they had always done, ran over the north bank and swept away a bridge leading to a mill owned by the claimant. Section 34(3) of the Land Drainage Act 1930 provided that, in the event of injury to any person by reason of the exercise by a drainage board of any of its powers, the board concerned should make full compensation, disputes being settled by a system of arbitration. The claimant had issued a writ (now claim form) for nuisance against the board.

Held – no action in nuisance lay; the claimant's only remedy was to claim compensation under s 34(3).

Remoteness of damage: the foresight test

325 ***Overseas Tankship (UK) Ltd* v *Morts Dock and Engineering Co Ltd (The Wagon Mound)*** [1961] AC 388

The appellant was the charterer of a ship called the *Wagon Mound*. While the ship was taking on furnace oil in Sydney harbour, the appellant's servants negligently allowed oil to spill into the water. The action of the wind and tide carried this oil some 200 yards and over to the respondent's wharf where the business of shipbuilding and repairing was carried on. The servants of the respondent were at this time engaged in repairing a vessel, the *Corrimal*, which was moored alongside the wharf, and for this purpose they were

using welding equipment. The manager of the respondent, seeing the oil on the water, suspended welding operations and consulted the wharf manager who told him it was safe to continue work – a decision which was justified, because previous knowledge showed that sparks were not likely to set fire to oil floating on water. Work, therefore, proceeded with safety precautions being taken. However, a piece of molten metal fell from the wharf and set on fire a piece of cotton waste which was floating on the oil. This set the oil alight and the respondent's wharf was badly damaged. The case eventually came before the Judicial Committee of the Privy Council on appeal.

Held – the appellant was successful in its appeal, the Judicial Committee holding that foreseeability of the actual harm resulting was the proper tort test. On this principle, the Privy Council *held* that the damage caused by the fire was too remote, though it would have awarded damages for the fouling of the respondent's slipways by oil, if such a claim had been made, since this was foreseeable.

Comment In *Overseas Tankship (UK) Ltd* v *Miller Steamship Property Ltd (The Wagon Mound (No 2))* [1966] 2 All ER 709, the same blaze had caused damage to the respondent's ship (it was the owner of the *Corrimal*). However, the members of the Privy Council had by this time the decision of the House of Lords in *Hughes* v *Lord Advocate* (1963) (see below) before them. It said that the precise nature of the particular injury suffered need not be foreseeable so long as it was one of a kind that was foreseeable, i.e. within the *band* of reasonable foreseeability. Therefore, the respondent recovered damages in negligence and also nuisance. The Privy Council held that in the case of nuisance, as of negligence, it is not enough that the damage was a direct result of the nuisance if the injury was not foreseeable.

326 *Hughes* v *Lord Advocate* [1963] 1 All ER 705

Workmen opened a manhole in the street and later left it unattended having placed a tent above it and warning paraffin lamps around it. The claimant and another boy, who were aged eight and 10 respectively, took one of the lamps and went down the manhole. As they came out, the lamp was knocked into the hole and an explosion took place injuring the claimant. The explosion was caused in a unique fashion because the paraffin had vaporised (which was unusual) and been ignited by the naked flame of the wick. The defendants argued that although some injury by burning was foreseeable, burning by explosion was not.

Held – by the House of Lords – the defendants were liable. 'The cause of this accident was a known source of danger, the lamp, but it behaved in an unpredictable way. . . . This accident was caused by a known source of danger but caused in a way which could not have been foreseen and in my judgment that affords no defence.' (*Per* Lord Reid) 'The accident was but a variant of the foreseeable. It was, to quote the words of Denning, LJ in *Roe* v *Minister of Health* [see Chapter 21], "within the risk created by the negligence". . . . The children's entry into the tent with the ladder, the descent into the hole, the mishandling of the lamp, were all foreseeable. The greater part of the path to injury had thus been trodden, and the mishandled lamp was quite likely at this stage to spill and cause a conflagration. Instead, by some curious chance of combustion, it exploded and no conflagration occurred, it would seem, until after the explosion. There was thus an unexpected manifestation of the apprehended physical dangers. But it would be, I think, too narrow a view to hold that those who created the risk of fire are excused from the liability for the damage by fire because it came by way of explosive combustion. The resulting damage, though severe, was not greater than or different in kind from that which might have been produced had the lamp spilled and caused a more normal conflagration in the hole.' (*Per* Lord Pearce)

Comment (i) A good illustration of the rule in *Hughes* that the *precise* mechanics of the way in which harm occurs need not be foreseen if it is within the risk caused by the negligence appears in *Draper* v *Hodder* [1972] 2 All ER 210. The defendant owned 30 Jack Russell terriers which he kept on his ungated premises. The dogs could run into a nearby house which was owned by the claimant's parents. That house was also ungated. On one occasion the dogs ran into the yard of the nearby house and one or more of them attacked the claimant, a three-year-old boy and bit him. His action for damages succeeded. It was foreseeable immediately that the dogs would bowl over and scratch the child. Nevertheless, the fact that one or more of them bit him was within the risk created by the negligence.

(ii) In spite of the more liberal attitude taken to foresight in *Hughes*, some things are still too remote as consequences. For example, in *Meah* v *McCreamer (No 2)* [1986] 1 All ER 943 the claimant had been injured in a car accident by reason of the defendant's negligence. The claimant alleged that he had suffered a personality change leading to him attacking women. He raped one and indecently assaulted another. The women recovered damages against him and he tried to recover them from the defendant. It was held that the alleged damage was too remote.