wholesalers would not want to take copies of the *Daily Mirror* if the retailers would not take it; and

(*b*) it was equivalent to an agreement contrary to the public interest within s 21(1) of the Restrictive Trade Practices Act 1956 (see now the Competition Act 1998).

Held – by the Court of Appeal – a sufficient *prima facie* case had been made out on both grounds and the injunctions would be granted.

Comment The essential difference between the *Lumley* and *Gardner* cases is that the interference in *Lumley* was aimed at the other party to the contract, i.e. *direct* interference, whereas in *Gardner* the interference was indirect, i.e. the retailers were not trying directly to persuade the wholesalers not to take the *Daily Mirror* but the inevitable result would be that they would not. If in indirect interference it is unclear from the evidence what effect the interference will have, the court may refuse to grant a remedy.

Thus, in *Middlebrook Mushrooms Ltd* v *TGWU* [1993] IRLR 232, women who were sacked from a mushroom farm, after refusing new contracts that they said had made cuts in their pay, proposed to carry out a leaflet campaign to persuade customers at supermarkets not to buy the farm's produce. The Court of Appeal refused to grant an injunction to prevent this because it was indirect interference and it was not clear from the evidence what effect it would have. Customers might ignore it; they were not like the wholesalers in the *Gardner* case who clearly could not ignore the retailers' ban. Also, to grant an injunction would be contrary to Art 10 of the European Convention on Human Rights and Fundamental Freedoms because it would affect the right of free speech (see now also the UK Human Rights Act 1998).

Civil conspiracy: the principles illustrated

426 *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435

Veitch and the other defendants were officials of the Transport and General Workers Union. The dockers at Stornoway on the island of Lewis were all members of the union and so were most of the employees in the spinning mills on the island. The yarn when spun in the mills was woven into tweed cloth by crofters working at home, the woven cloth being finished in the mills. The tweed thus produced was sold by the owners of the mill as Harris Tweed. The Crofter Company also produced tweed cloth but its yarn was not spun on the island but instead was obtained more cheaply on the mainland. This cloth was sold as Harris Tweed but did not bear the trade mark in the form of a special stamp. The mill owners making the genuine Harris Tweed were being pressed by the union to increase wages but they said that they could not accede to union requests because of the damaging competition of the Crofter Company. Consequently, Veitch and others acting in combination placed an embargo on the Crofter Company's imported yarn and exported tweed by instructing dockers at Stornoway to refuse to handle these goods. The dockers obeyed these instructions but were not on strike or in breach of contract. The Crofter Company sought an interdict (or injunction) against the embargo. The House of Lords *held* that the union officials were not liable in conspiracy because their purpose was to benefit the members of the union and the means employed were not unlawful.

Defamation: what is?

427 *Byrne* v *Deane* [1937] 1 KB 818

The claimant was a member of a golf club in which there had been some gaming machines. The defendants, Mr and Mrs Deane, were proprietors of the club. As a result of a complaint being made to the police, the machines were removed. Shortly afterwards, the following typewritten lampoon was placed on the wall of the clubhouse near to the place where the machines had stood:

> For many years upon this spot
> You heard the sound of the merry bell
> Those who were rash and those who were not,
> Lost and made a spot of cash
> But he who gave the game away,
> May he Byrne in hell and rue the day.
> Diddleramus

The claimant brought this action for libel alleging that the defendants were responsible for exhibiting the lampoon, and that the lampoon was defamatory in that it suggested that he was disloyal to his fellow club members.

Held – the words were not defamatory because the standard was the view which would be taken by right-thinking members of society, and, in the view of the court, right-thinking persons would not think less of a person who put the law into motion against wrongdoers.

Defamation: libel or slander: form of publication

428 *Youssoupoff* v *Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 571

The claimant was a member of the Russian royal house. The defendants produced in England a film dealing with the life of Rasputin who had been the adviser of the Tsarina of Russia. The film also dealt

with the murder of Rasputin. In the course of the film, a lady (Princess Natasha), who was affectionate towards the murderer of Rasputin, was also represented as having been raped by Rasputin, a man of the worst possible character. The claimant was married to a man who was undoubtedly one of the persons concerned in the killing of Rasputin. The claimant alleged that because of her marriage reasonable people would think that she was the person who was so raped. The action was for libel.

Held – the action was properly framed in libel and the claimant succeeded.

Comment This case is generally accepted as authority for the view that a defamatory talking film is always libel. However, the rape of Princess Natasha was in the pictorial part of the film and not on the sound track. It is also uncertain whether a claimant can sue for a slanderous imputation of rape without proving special damage. The Slander of Women Act 1891 provides that the 'words spoken and published . . . which impute unchastity or adultery to any woman or girl shall not require special damage to render them actionable'. However, lack of consent, which is essential in rape, may mean that there is no imputation of unchastity.

Defamation: innuendo: illustrations from case law

429 *Cassidy* v *Daily Mirror Newspapers Ltd* [1929] 2 KB 331

A man named Cassidy or Corrigan who was well known for his indiscriminate relations with women, allowed a racing photographer to take a photograph of himself and a lady, and said that she was his fiancée and that the photographer might announce his engagement. The photograph was published in the *Daily Mirror* with the following caption: 'Mr M Corrigan, the race-horse owner, and Miss X whose engagement has been announced.' The claimant, Cassidy's lawful wife, who was also known as Mrs Corrigan, sued the newspaper for libel alleging as an innuendo that if Mr Corrigan was unmarried and able to become engaged, she must have been cohabiting with him in circumstances of immorality.

Held – since there was evidence that certain of her friends thought this to be so, she was entitled to damages.

Comment The case is authority for the view that a person may be liable for a statement which he does not actually know to be defamatory. It does not decide, nor does any other relevant case, that a person who has taken all possible steps to ensure the accuracy of his statement and could not, by reasonable enquiries, have discovered that his statement was defamatory is or is not liable in defamation.

430 *Morgan* v *Odhams Press* [1971] 2 All ER 1156

In 1965 the *Sun* reported that a kennel girl had been kidnapped by a dog-doping gang. In or about the relevant period various witnesses had seen her in the company of Mr Morgan whose friend she was. The newspaper article made no mention of Mr Morgan's name. Nevertheless, he began an action against the newspaper pleading that he had been libelled by innuendo in that persons would think he was involved either in the kidnapping or the dog-doping, or both.

Held – by the House of Lords – the article was potentially libellous:

(*a*) the newspaper article was not, by itself, capable of being so understood, but;
(*b*) an article to be defamatory of a person need not contain a 'key or pointer' showing it refers to him. Evidence is admissible to import a defamatory meaning to otherwise innocent words.

431 *Tolley* v *J S Fry & Sons Ltd* [1931] AC 333

The claimant was a well-known golfer. The defendants published an advertisement without the claimant's consent containing his picture and underneath the following words:

> The caddy to Tolley said, 'Oh Sir,
> Good shot, Sir! That ball, see it go, Sir.
> My word, how it flies,
> Like a cartet of Fry's,
> They're handy, they're good, and priced low, Sir.'

The claimant brought an action for libel, alleging an innuendo. It was said that a person reading the advertisement would assume that the claimant had been paid for allowing the use of his name in it, and that in consequence he had prostituted his amateur status as a golfer.

Held – the evidence showed that the advertisement was capable of this construction and the claimant was awarded damages.

432 *Sim* v *Stretch* (1936) 52 TLR 669

The defendant had encouraged the claimant's housemaid to leave the claimant's employ and re-enter the defendant's. The defendant later sent the following telegram to the claimant: 'Edith has resumed her services with us to-day. Please send her possessions and the money you borrowed, also her wages.' The telegram was said to impute that the claimant was in financial difficulties and had in consequence

borrowed from his housemaid, and that he had been unable to pay her wages, and was a person of no credit. The claimant succeeded at first instance and in the Court of Appeal, but the House of Lords reversed the judgment, *holding* that the telegram was incapable of bearing a defamatory meaning. In the words of Lord Atkin: 'It seems to me unreasonable that, when there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the statement.' It was also in this case that Lord Atkin suggested the following test of a 'defamatory' statement: 'Would the words tend to lower the [claimant] in the estimation of right-thinking members of society generally?'

433 ***Fulham* v *Newcastle Chronicle and Journal*** [1977] 1 WLR 651

In 1962 the claimant left the Catholic priesthood. He married in 1964, a child being born 14 months later. In 1973 he was appointed as deputy headmaster of a school in Teesside having previously lived in South Yorkshire. A Newcastle newspaper published by the defendants commented upon his appointment stating that he 'went off very suddenly' from Salford where he had been a priest 'about seven years ago' and had subsequently married. The claimant alleged that such statements contained a libellous imputation that he had married while still a priest and had fathered an illegitimate child. The particulars supplied by the claimant simply stated his date of marriage and the date of birth of his eldest child. The defendants sought to strike out his claim. It was *held* – by the Court of Appeal – that only those knowing of the dates of the claimant's marriage and/or the birth of his child could draw the imputation alleged and that since the defendants' newspaper did not circulate in the area where the claimant had been a priest or subsequently lived it was necessary for him to plead particulars of persons receiving the publication having the requisite knowledge and that unless he was able to do so his allegation of innuendo would be struck out.

434 ***Grappelli* v *Derek Block (Holdings) Ltd*** [1981] 2 All ER 272

The claimants, Mr Grappelli and Mr Disley, were jazz musicians with an international reputation. The defendants were their managers and agents. The defendants had, so the claimants alleged, purported to book contracts for them without authority. Then it was said that one of these concerts had been cancelled because Mr Grappelli was seriously ill which was an entirely untrue story. It was said that that was defamatory, not as it stood, but because of an innuendo that people finding out that the claimants were appearing at other concerts on the same dates as those cancelled would think that the claimants had given a false story. It was *held* by the Court of Appeal that where a claimant relies on an innuendo, he must prove that the words were published to a specific person who knew *at the time* of the publication of specific facts enabling him to understand the words in the innuendo meaning. Facts which came into existence afterwards did not make the statement defamatory. As Lord Denning said, the statement was not defamatory as it stood, since it is not defamatory of a person to say that he is seriously ill. At the time the statement was made those becoming aware of it would not have access to facts to suggest that it was wrong. Obviously, later on, when concerts were advertised in the *Sunday Times* on the same dates as those which had been cancelled it might have been possible to construe that Mr Grappelli and Mr Disley were not really ill and that the whole story was a put-up job. However, this information had to be available at the time of publication of the defamatory words since, according to Lord Denning, the cause of action arises in defamation when the words are published and they must be seen to be defamatory then, and not later.

Defamation: the words must refer to the claimant

435 ***E Hulton & Co* v *Jones*** [1910] AC 20

A newspaper published an article descriptive of life in Dieppe in which one Artemus Jones, described as a churchwarden at Peckham, was accused of living with a mistress in France. All persons concerned contended that they were ignorant of the existence of any person of that name, and the writer of the article said that he had invented it. Unfortunately, the name so chosen was that of a Welsh barrister and journalist, and the evidence showed that those who knew him thought that the article referred to him.

Held – the newspaper was responsible for the libel and the claimant was awarded damages.

Comment (i) In cases of this kind the defence of offer of amends may be available under ss 2–4 of the Defamation Act 1996. However, it is by no means certain that it would have been available on the actual facts of this case, because ss 2–4 apply only where the defendant did not know or have reasonable grounds to believe that the statement complained of referred to the claimant or was likely to be understood as referring to him, and was both false and defamatory of the claimant. On the facts of *Hulton* v *Jones* it seems that the publication was attended by some carelessness. It should be noted that the 1996 Act offer of amends is, unlike previous provisions, only available to a defendant who is willing to pay

such compensation as is agreed or assessed by a judge and to publish a correction and an apology.

(ii) In *Hayward* v *Thompson* [1981] 3 All ER 450 the defendants were the editor, a journalist on, and the proprietors and publishers of, a Sunday paper. In one article it was alleged that a wealthy benefactor of the Liberal Party was connected with an alleged murder plot but no name was given. In a later article the paper named the claimant reporting that the police wished to interview him in connection with the alleged murder plot which was not, of course, a defamatory allegation that he was involved in it as the first article had been. It was *held* – by the Court of Appeal – that the two articles could be connected. Thus, the libel in the first article was of the claimant by reason of connection with the second one.

436 ***Knupffer* v *London Express Newspaper Ltd*** [1944] AC 116

The claimant was head in the United Kingdom of a Russian refugee organisation, active in France and the United States of America, but having only 24 members in England. An article in the newspaper ascribed Fascism to this 'minute body established in France and the United States of America', but without mentioning the English branch.

Held – the article was not defamatory of the claimant since he was not marked out by it, even assuming that it was defamatory to call someone a Fascist.

437 ***Schloimovitz* v *Clarendon Press***, *The Times*, 6 July 1973

The claimant by statement of claim (now statement of case) alleged that the definitions of the word 'Jew' contained in three dictionaries published by the defendant were derogatory, defamatory and deplorable and sought an injunction restraining the defendant from publishing such definitions, at least without qualification, in any future editions of such dictionaries.

Held – by Goff, J – what was before the court was not whether the definitions were right or wrong or whether they were justly applied to any Jews, but whether in law the claimant had a cause of action to restrain the conduct of the defendant. No individual could maintain an action in respect of defamatory matter published about a body of persons unless in its terms, or by reason of the circumstances, it should and must be construed as a reference to him as an individual. There were two questions: (*a*) were the words defamatory? (*b*) did they in fact apply to the claimant or were they capable in law of being so regarded? The claimant failed to satisfy the latter test and accordingly the defendant was entitled to have the writ (claim form) and statement of claim struck out. (*Knupffer* applied.)

Comment It was decided in *Farringdon* v *Leigh, The Times*, 10 December 1987, that it was at least arguable that where defamatory words in a publication referred to an unidentified member or members of a group of persons, each of those persons had a cause of action in libel. In these circumstances an action by members of a team of seven police officers was allowed to proceed to trial where they alleged that certain articles in the *Observer* were defamatory of them in alleging that at least two of them, who were unnamed, had passed confidential information to journalists.

Defamation: defences: justification

438 ***Alexander* v *The North Eastern Railway Co*** (1865) 6 B & S 340

The defendant published the following notice:

> North Eastern Railway. Caution. J Alexander, manufacturer and general merchant, Trafalgar Street, Leeds, was charged before the magistrates of Darlington on 28th September, for riding on a train from Leeds, for which his ticket was not available, and refusing to pay the proper fare. He was convicted in the penalty of £9 1s, including costs, or three weeks' imprisonment.

In this action for libel, the claimant contended that the defence of justification could not lie because, although he had been convicted as stated, the alternative prison sentence was 14 days not three weeks.

Held – the substitution of three weeks for a fortnight did not make the statement libellous. It could be justified, since the rest of it was true.

Defamation: defences: fair comment

439 ***London Artists* v *Littler*** [1969] 2 All ER 193

In 1965 four of the principal actors and actresses in a play called *The Right Honourable Gentleman* simultaneously wrote to the defendant, who was the producer of the play, terminating their engagement by four weeks' formal notice. This was, of course, highly unusual and the defendant wrote to the actors and actresses concerned wrongly accusing the claimants, who were their agents, of conspiracy to close down the play. The defendant also communicated the letter to the press. The defendant was now sued for libel. It was *held* – by the Court of Appeal – that he had libelled the claimants because although the subject matter of the allegations was of public interest, i.e. the fate of the play, the defence of fair comment did not apply to the allegation of a plot which was an

allegation of fact. The allegation of a plot was defamatory and had not been justified. In fact, it seemed that all the actors and actresses involved had their own good and different reasons for leaving the play. There was no evidence of combination.

Defamation: defences: qualified privilege

440 *London Association for the Protection of Trade* v *Greenlands* [1916] 2 AC 15

The respondent was a limited company carrying on business as drapers and general furnishers in Hereford. The appellants were members of an unincorporated association consisting of about 6,300 traders and had, as one of their objects, the making of private inquiries as to the means, respectability and trustworthiness of individuals and firms. A member of the association was about to sell goods to the respondent and he asked the association to report on the company, and particularly to say whether the respondent was a good risk for credit of between £20 and £30. In the report submitted, the association declared that the respondent was a fair trade risk for the sum mentioned, but said that it had heavy mortgages charged on its assets, and that the assets barely covered the loans. In fact, the mortgages were secured by a charge upon the real and leasehold property only, and all other assets were entirely free from any mortgage whatever, and constituted a large and valuable fund. The respondent company was originally the claimant in an action for libel contained in the statement about the mortgages, and the statement that it was only good for credit of between £20 and £30.

Held – the occasion was privileged and thus the respondent had no claim in the absence of malice which it had not proved. Judgment was, therefore, given for the appellants.

Comment A further example of qualified privilege arising out of common interest is *Kearns* v *General Council of the Bar* [2002] 4 All ER 1075. In that case the head of the Bar Council's Professional Standards and Legal Services Department sent a letter to all heads of chambers, senior clerks and practice managers stating that the claimants (who were an agency) were not solicitors and that it would, in consequence, be improper to accept work from them unless certain specified conditions were satisfied, e.g. that the instructions came from a solicitor. This statement was not in fact true. Within two days a letter correcting the error and apologising was sent to all the recipients of the original letter. Nevertheless, the claimants brought defamation proceedings. The Bar Council put forward the defence of qualified privilege based on common interest. The claimants did not plead malice and the defendants applied for the case to be summarily dismissed. The High Court allowed the application taking the view that in this sort of case the defence of qualified privilege should apply in the absence of malice.

441 *Osborn* v *Thomas Boulter & Son* [1930] 2 KB 226

The claimant, a publican, wrote a letter to the defendants, his brewers, complaining of the quality of the beer. The defendants sent one of their employees to investigate and report. After receiving the report, Mr Boulter dictated a letter to his typist in which he suggested that the claimant had been adding water to the beer, and pointing out the penalties attaching to this if the claimant was caught. The claimant sued, alleging publication to the typist and certain clerks.

Held – the occasion was privileged, and since the claimant could not prove malice in the defendants, his action failed.

442 *Beach* v *Freeson* [1971] 2 WLR 805

A Member of Parliament wrote to the Law Society complaining of the conduct of a firm of solicitors reported to him by his constituents. He also sent a copy of the letter to the Lord Chancellor.

Held – by Geoffrey Lane, J – both publications were protected by qualified privilege. The privilege arose out of a Member of Parliament's duty to his constituents and the responsibilities of the Law Society and the Lord Chancellor.

443 *Cook* v *Alexander* [1973] 3 WLR 617

The claimant sued the defendant for libel in respect of an account of a House of Lords debate which he had written for the *Daily Telegraph*. The debate had been about an approved school where the claimant had been a teacher and which had been closed partly because of the claimant's revelations as to the system of punishment there. The newspaper had published a précis of each speech on one of the inside pages, but the claimant objected to a report written by the defendant which appeared on the back page. In this report, known as 'Parliamentary Sketch', the writer gave his impression of the debate and emphasised the salient aspects of it, but there was a reference to the more detailed account on another page. The claimant alleged that the sketch was defamatory of him because it gave great prominence to a speech that was very critical of him and his conduct, while it dismissed in uncomplimentary terms a speech which defended his action. It was *held* – by the Court of Appeal – that

such a Parliamentary sketch was protected by qualified privilege. A reporter was entitled to select from a debate those parts which seemed to him to be of public interest and provided that the account as a whole was fair and honest, such a Parliamentary sketch was protected by qualified privilege.

444 *Horrocks* v *Low* [1972] 1 WLR 1625

At a local authority council meeting Low made a speech defamatory of Horrocks who in answer to Low's defence of justification, fair comment and qualified privilege, alleged that Low had been actuated by express malice.

Held – by the Court of Appeal – malice could not be inferred. Low held an honest and positive belief in the truth of his statement and had not abused the privileged occasion. '[The defendant] is not to be held malicious merely because he was angry or prejudiced even unreasonably prejudiced, against the [claimant], so long as he honestly believed what he said to be true. Such is the law as I have always understood it to be.' (*Per* Lord Denning, MR)

'What has to be proved is that the defendant was activated by malice in the popular meaning of the word: that is to say, in speaking as he did, he must have been actuated by spite or ill-will against the person defamed or by some indirect or improper motive.' (*Per* Edmund Davis, LJ)

'When there is . . . [gross and unreasoning] prejudice there will often, perhaps usually, be reckless indifference whether what is said is true or false. But if there is honest belief that it is true, there cannot in any judgment be recklessness whether it be true or false.' (*Per* Stephenson, LJ)

445 *Egger* v *Viscount Chelmsford* [1964] 3 All ER 406

Mrs Egger, a judge of Alsatian dogs, was on the list of judges of the Kennel Club, and Miss Ross, the secretary of a dog club in Northern Ireland, wrote to the Kennel Club asking it to approve of Mrs Egger as a judge of Alsatians at a show. The assistant secretary of the Kennel Club, C A Burney, wrote to Miss Ross to say that the committee could not approve the appointment. Mrs Egger brought an action for libel against the 10 members of the committee and the assistant secretary on the ground that the letter reflected on her competence and integrity. There were two long trials at both of which the judge ruled that the occasion was privileged. The jury disagreed the first time, but at the second trial the jury found that the letter was defamatory and that five members of the committee were actuated by malice but three were not. The other two had meanwhile died. The judge gave judgment against all the defendants including the assistant secretary.

Held – on appeal – the defence of qualified privilege is a defence for the individual who is sued, and not a defence for the publication. It is quite erroneous to say that it is attached to the publication. The three committee members innocent of malice were entitled to protection and were not liable. The assistant secretary also had an independent and individual privilege, and was not responsible or liable for the tort of those members of the committee who had acted with malice. Even in a joint tort, the tort is the separate act of each individual; each is severally answerable for it; and each is severally entitled to his own defence.

Defamation: media developments in qualified privilege

445a *Loutchansky* v *Times Newspapers Ltd (No 2)* [2002] 1 All ER 652

The Times newspaper published articles alleging that Dr Grigori Loutchansky was in charge of a major Russian criminal organisation involved in money laundering and the smuggling of nuclear weapons. The defence was qualified privilege based on public interest. *The Times* was found liable by reason of having failed to apply the House of Lords guidelines in *Reynolds* v *Times Newspapers Ltd* [1999] 3 WLR 1010. *The Times* appealed to the Court of Appeal.

The Court of Appeal dealing with *Reynolds* said that the House of Lords had established in that case that when deciding whether to publish defamatory material to the public the relevant interest was that of the public in a modern democracy, to free expression and the promotion of a free and vigorous press to keep the public informed. However, there was a corresponding duty on the journalist and his or her editor to behave responsibly and if they did not do so privilege could not arise. In regard to responsible behaviour, the House of Lords in *Reynolds* laid down a number of matters to be considered. In the *Loutchansky* case the court considered that *The Times* failed a number of these tests as follows:

- reliability and motivation of its sources of information;
- urgency (the judge had found that there was none);
- did the articles contain the gist of the claimant's side of the story? (it did not said the judge);
- was comment sought from the claimant? (apparently not).

Up to that point the Court of Appeal would have dismissed the appeal but the High Court judge had introduced an additional test, i.e. would *The Times* have been subject to legitimate criticism if it had failed to publish the information? This the Court of Appeal felt was too strict from the newspaper's point of view. The case was remitted to the High Court and the judge for him to examine his findings on the *Reynolds* principles but without the more stringent test identified in his judgment.

Comment (i) Courts dealing with this type of case will now have to use the more liberal approach to media publication set out in *Jameel* v *Wall Street Journal Europe* [2006] 3 WLR 642 (see p 599).

(ii) A further item of interest arose in this case from the posting of the article on *The Times* website. Section 5 of the Defamation Act 1996 reduces the limitation period for bringing claims for defamation from three years to one year. But how is this period to be applied where a libel is published on an Internet website and remains there for some time? The claimant in *Loutchansky* brought his action more than one year after the libel was first published on *The Times* website that contained news items and remained on the website for some time receiving a number of visits every month. *The Times* contended that the time should run from first publication which is the rule applied in the USA. The claimant contended that taking the number of visits each month since first publication his claim was within the one year period. On this point the Court of Appeal ruled that there had been a continuing publication so that the claimant's case was not barred by the one year limitation rule. The first or single publication rule could not be adapted to an English law context. Time does not begin to run until the material is removed from the website.

Defamation: consent of the claimant to publication

446 ***Chapman* v *Lord Ellesmere and Others*** [1932] 2 KB 431

The claimant was a trainer and one of his horses, after winning a race, was found to be doped. An inquiry was held by the Stewards of the Jockey Club, as a result of which they decided to disqualify the horse for future racing, and to warn the claimant off Newmarket Heath. The decision was published in the *Racing Calendar*. The claimant contended that the words were defamatory because they implied that he had doped the horse. The defendants, who were the proprietors of the *Racing Calendar*, contended that the words were not defamatory, and meant simply that the claimant had been warned off for not protecting the horse against doping. Evidence showed that it was a condition of a trainer's licence that the withdrawal of that licence should appear in the *Racing Calendar*, which was also to be the recognised vehicle of communication for all matters concerning infringement of rules.

Held – the claimant being bound by the terms of his licence, the doctrine of *volenti non fit injuria* applied as regards publication in the *Racing Calendar*, so that the claimant had no cause of action.

Defamation: damages: compensatory not punitive

447 ***Davis* v *Rubin*** [1967] 112 Sol J 51

The claimants were chartered accountants of good reputation and they wished to buy the lease of business premises. The defendants, who were the landlords, wrote to the holder of the lease saying that they would not accept the claimants if the lease was assigned and referred in a defamatory fashion to the claimants' business and references. The claimants sued for damages in respect of the libel published in the letter, and were awarded £4,000 each. The Court of Appeal, allowing the defendants' appeal, said that the damages were 'excessive, extravagant and exorbitant'. There had been publication to one person only and there was no evidence that the claimants' reputation had been diminished in the minds of other persons. A reasonable sum would not have exceeded £1,000 each and a new trial was ordered on the issue of damages.

Comment Over the past few years damages awarded by juries in defamation cases have generally been regarded as excessive, often exceeding those granted for serious physical injuries. Section 8 of the Courts and Legal Services Act 1990 allows the Court of Appeal to substitute its own award of damages for those of the jury at first instance instead of ordering a new trial. As regards defamation, this power was used in *Rantzen* v *Mirror Group Newspapers* [1993] 3 WLR 953.

The defendants had alleged that Esther Rantzen had kept secret the fact that a particular person was a child abuser and that this had put children at risk. They were found guilty of libel and the jury in the High Court awarded Ms Rantzen £250,000.

On appeal the Court of Appeal reduced the award to £110,000, using the s 8 power and also because of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Convention is designed, among other things, to prevent the restriction of free speech, which excessive libel damages obviously do (see also *John* v *Mirror Group Newspapers* (1995)).

The matter of an excessive award of damages arose in *Grobbelaar* v *News Group Newspapers Ltd* [2002] 4 All ER 732. The Court of Appeal had regarded a verdict of libel and an award of damages of £85,000 by a jury to G as perverse in terms of the evidence. It was alleged that G

had conspired to fix and had actually fixed football matches. The Court of Appeal said that the decision and the award were perverse because they could only have been based on the fact that G was innocent in terms of the allegations whereas he had admitted taking money to fix matches. It therefore quashed the decision. The House of Lords restored the verdict in terms of the libel but reduced G's damages to £1.

Rylands v *Fletcher*: strict liability: escape of fire

448 ***Emanuel* v *Greater London Council*** (1970) 114 Sol J 653

A contractor employed by the Ministry of Public Building and Works removed prefabricated bungalows from the Council's land. The contractor lit a fire and negligently allowed sparks to spread to the claimant's land where buildings and goods were damaged. The claimant sued the GLC and it was *held* – by James, J – that:

(*a*) on the facts the Council remained in occupation of the site;
(*b*) the contractor was not a 'stranger' to the Council since it retained a power of control over his activities; and
(*c*) although the Council had not been negligent and was not vicariously liable for the contractor's negligence since it did not employ him, it was strictly liable under *Rylands* v *Fletcher* for the escape of fire.

Rylands v *Fletcher*: there must be an escape: whether the rule applies to personal injuries

449 ***Read* v *J Lyons & Co Ltd*** [1947] AC 156

The appellant was employed by the Ministry of Supply as an Inspector of Munitions in the respondents' munitions factory. In the course of her employment there she was injured by the explosion of a shell which was in course of manufacture. She did not allege negligence on the part of the defendants, but based her claim on *Rylands* v *Fletcher*. The trial judge found that there was liability under the rule, but the Court of Appeal and the House of Lords reversed this decision, *holding* that the rule did not apply since there had been no escape of the thing that inflicted the injury. In the words of Viscount Simon, LC, 'Escape for the purpose of applying the proposition in *Rylands* v *Fletcher* means escape from a place which the defendant has occupation of, or control over, to a place which is outside his occupation or control.' It was also suggested *obiter* in this case that the rule in *Rylands* v *Fletcher* does not extend to personal injury, but only to injury to property.

Comment The *ratio* of the Court of Appeal in *Hale* v *Jennings Bros* [1938] 1 All ER 579 suggests that there may be liability for personal injury. In that case a stallholder at a fair suffered personal injury because of the escape of the defendants' chair-o-plane. It was held that she had a good claim under *Rylands* v *Fletcher*.

Rylands v *Fletcher*: does not depend on ownership of land: covers escapes of a variety of offensive and dangerous substances

450 ***Charing Cross Electricity Supply Co* v *Hydraulic Power Co*** [1914] 3 KB 772

The defendant's water mains under a public street burst and damaged the claimant's cables which were also laid under the street.

Held – the defendant was liable under the rule in *Rylands* v *Fletcher*, because the rule was not confined to wrongs between owners of adjacent land and did not depend on ownership of land. Here it could be applied to owners of adjacent chattels.

451 ***Attorney-General* v *Corke*** [1933] Ch 89

The defendant was the owner of disused brickfields, and he permitted a number of gypsies to occupy them and live in caravans and tents. The gypsies threw slop water about in the neighbourhood of the fields and accumulated all sorts of filth thereabouts. The court *held* that *Rylands* v *Fletcher* applied, and an injunction was granted against the defendant. While it was not unlawful to license caravan dwellers, it was abnormal use of land, since such persons often have habits of life which are offensive to those persons with fixed homes.

Comment Reference should also be made to *Smith* v *Scott* (1972).

Rylands v *Fletcher*: not applicable to escape of things naturally on land: other claims

452 ***Giles* v *Walker*** (1890) 24 QBD 656

The defendant wished to redeem certain forest land and ploughed it up. Thistles grew up on the land and thistle-seed was blown in large quantities by the wind from the defendant's land to that of the claimant.

Held – there was no duty as between adjoining occupiers to cut things such as thistles which are the natural growth of the soil, therefore, the defendant was not liable. Presumably if a person deliberately set thistles on his land, he would be liable under the rule in *Rylands* v *Fletcher*, for it is not usual to cultivate weeds on one's land.

Comment An action for nuisance would probably have succeeded here, because a person is liable for a nuisance on his land (even if he has not caused it) if he lets it continue (but note Weeds Act 1959).

453 ***Davey* v *Harrow Corporation*** [1957] 2 All ER 305

The roots of the defendant's elm trees spread to the claimant's land and caused damage to the claimant's property.

Held – the defendant was liable in nuisance, whether the trees were self-sown or not. It was no defence to an action for nuisance that the thing causing the nuisance was naturally on the defendant's land, though it might be a defence to liability under the rule in *Rylands* v *Fletcher*.

Rylands v *Fletcher*: defence of act of God

454 ***Greenock Corporation* v *Caledonian Railway Co*** [1917] AC 556

The Corporation, in laying out a park, constructed a concrete paddling pool for children in the bed of a stream, thereby altering its course and natural flow. Owing to rainfall of extraordinary violence, the stream overflowed and poured down the street, flooding the railway company's premises. The House of Lords *held* that this was not an act of God and the Corporation was liable. The House of Lords indicated the restricted range of the defence of act of God and of the decision in *Nichols* v *Marsland* (1876), distinguishing that case on the ground that whereas in *Nichols* v *Marsland* the point at issue was the liability for storing water in artificial lakes, the point here was interference with the natural course of a stream, and anyone so interfering must provide even against exceptional rainfall.

Rylands v *Fletcher*: defence: wrongful act of stranger

455 ***Rickards* v *Lothian*** [1913] AC 263

The defendant was the occupier of business premises and leased part of the second floor to the claimant. On the fourth floor was a men's cloakroom with a wash basin. The cloakroom was provided for the use of tenants and persons in their employ. The claimant's stock in trade was found one morning seriously damaged by water which had seeped through the ceiling from the wash basin on the fourth floor. Examination showed that the waste pipe had been plugged with various articles such as nails, penholders, string and soap, and the water tap had been turned full on. The defendant's caretaker had found the cloakroom in proper order at 10.20 pm the previous evening.

Held – the defendant was not liable under the rule in *Rylands* v *Fletcher* because the damage had been caused by the act of a stranger.

Rylands v *Fletcher*: defence: common benefit

456 ***Peters* v *Prince of Wales Theatre (Birmingham) Ltd*** [1943] KB 73

The defendants leased to the claimant a shop in a building which contained a theatre. In the latter there was, to the claimant's knowledge, a sprinkler system installed as a precaution against fire and the system extended to the claimant's shop. In a thaw, following a severe frost, water poured from the sprinklers in the defendants' rehearsal room into the claimant's shop and damaged his stock. The claimant sued for damages for negligence, and under *Rylands* v *Fletcher*.

Held – there was no negligence on the part of the defendants and there was no liability under *Rylands* v *Fletcher*, because the sprinkler had been installed for the common benefit of the claimant and defendants.

THE LAW OF PROPERTY

Ownership and possession: rights of owner paramount

457 ***Moffat* v *Kazana*** [1968] 3 All ER 271

The claimant hid banknotes in a biscuit tin in the roof of his house. He sold the house to the defendant, one of whose workmen discovered the money. In this action by the claimant to recover the money it was *held* – by Wrangham, J – that the claimant succeeded. He had never shown any intention to pass the title in the money to anyone. Therefore, his title was good, not only against the finder, but also against the new owner of the house.

Adverse possession or squatters' rights

458 ***Hayward* v *Challoner*** [1967] 3 All ER 122

The predecessors in title of the claimant landowner let land to the rector of a parish at a rent of 10s (50p) a year. The rent was not collected after 1942 and the claimant now sued for possession.

Held – by the Court of Appeal – a right of action in respect of rent or possession must be held to have accrued when the rent due was first unpaid, and therefore was barred by what is now the Limitation

Act 1980. The rector as a corporation sole had acquired a good squatter's title.

459 ***Littledale* v *Liverpool College*** [1900] 1 Ch 19

The claimants had a right of way for agricultural purposes over a strip of grass land belonging to the defendants. The claimants put up gates which they kept locked at each end of the strip, and used the grass for grazing, keeping the hedges of the strip clipped. They now claimed ownership of the land by virtue of adverse possession.

Held – the claimants' acts could be construed as protecting the right of way, rather than excluding the owner, and were insufficient to establish the claimants' title to the land.

460 ***Smirk* v *Lyndale Developments Ltd*** [1974] 2 All ER 8

The claimant had a service tenancy of a house owned by the British Railways Board. In 1960 he took effective possession of an adjacent plot of land owned by the Board, though the Board was unaware of his action. The claimant did not communicate to the Board at any time that he disclaimed the Board's title. The Board sold the house and the plot to the defendants who granted a new tenancy of the house to Smirk on different terms not including the adjacent plot. The claimant asserted a possessory title to that plot. It was *held* – by Pennycuick, V-C – that the claimant did not have a good possessory title to the plot.

Bailment: damage to goods; action by bailee

461 ***The Winkfield*** [1902] P 42

This was an Admiralty action arising because a ship called the *Mexican* was negligently struck and sunk by a ship called the *Winkfield*. The *Mexican* was carrying mail from South Africa to England during the Boer War. The Postmaster-General made, among other things, a claim for damages in respect of the estimated value of parcels and letters for which no claim had been made or instructions received from the senders. The Postmaster-General undertook to distribute the amount recovered when the senders were found. An objection was made that the Postmaster-General represented the Crown and was not liable to the senders (see now Crown Proceedings Act 1947).

Held – as a bailee in possession the Postmaster-General could recover damages for the loss of the goods irrespective of whether or not he was liable to the bailors.

Comment It should be noted that a bailee cannot sue for loss or damage to the bailed goods if the bailor has already brought a successful claim for that loss or damage. Thus, in *O'Sullivan* v *Williams* [1992] 3 All ER 385, A allowed B to use his car while he was on holiday. While it was parked outside B's home it was written off when an excavator fell off a tractor on to it. A sued for damages and that action was settled by the payment of an appropriate sum. B sued for damages for nervous shock and inconvenience due to the loss of the car. It was held by the Court of Appeal that B's claim for nervous shock succeeded but that she could not recover damages for inconvenience since this arose from damage to the bailed chattel.

Bailment and licence distinguished

462 ***Ashby* v *Tolhurst*** [1937] 2 All ER 837

The claimant drove his car on to a piece of land at Southend owned by the defendants. He paid one shilling to an attendant who was the defendants' servant and was given a ticket. He left the car with the doors locked. When he returned his car had gone, the attendant having allowed a thief, who said he was a friend of the claimant, to drive it away. The ticket was called a 'car-park ticket' and contained the words: 'The proprietors do not take any responsibility for the safe custody of any cars or articles therein, nor for any damage to the cars or articles however caused nor for any injuries to any persons, all cars being left in all respects entirely at their owner's risk. Owners are requested to show a ticket when required.'

Held that:

(*a*) the relationship between the parties was that of licensor and licensee, not that of bailor and bailee because there was in no sense a transfer of possession. There was, therefore, no obligation upon the defendants towards the claimant in respect of the car;

(*b*) if there was a contract of bailment, the servant delivered possession of the car quite honestly under a mistake and the conditions on the tickets were wide enough to protect the defendants;

(*c*) there could not be implied into the contract a term that the car should not be handed over without production of the ticket.

Comment (i) Where the claimant hands over the key, the court may find a transfer of possession and a bailment, but the delivery of the key is not conclusive.

Thus, in *Sadler* v *Brittania Country House Hotel* (1993) CLW 40, S left his car by agreement with the hotel in one of the hotel's two car parks for two weeks while he went abroad. He paid £75 for this service. He took the keys with him but nevertheless the car was stolen in his

absence. The system of guarding the cars was negligent. Only one guard checked both car parks on only five days per week, with no cover for breaks. S recovered damages for the loss of the car and inconvenience for loss of use. This was not, the judge said, a car park of 'general invitation' such as a public car park. It was not a temporary parking arrangement and the defendants owed him a duty of care as bailees. They were not mere licensees with no duty of care.

(ii) It was held in *Chappell (Fred)* v *National Car Parks, The Times*, 22 May 1987, that where a vehicle was parked on NCP land for a fee but there was no barrier, the land was open and no keys to the vehicle were handed over, as the owner locked the vehicle and retained the keys, no bailment of the vehicle took place and NCP were not liable for its theft.

(iii) It should not be assumed that because in the *Chappell* case there was no bailment that this result will be arrived at in all such public car parks. A modern multi-storey car park with its careful checks on incoming and outgoing cars and a fee in return for a parking space and tickets to be presented before allowing departure will almost invariably constitute a bailment.

The position may be different where the car park is on open land albeit fenced since in such a case it is difficult to show the essential ingredient of bailment, i.e. that the owner gives the bailee the ability to exclude all others except the owner.

463 *Ultzen* v *Nicols* [1894] 1 QB 92

A waiter took a customer's overcoat, without being asked to do so, and hung it on a peg behind the customer. The coat was stolen and it was *held* that the restaurant keeper was a bailee of the coat and that there was negligence in supervision on the part of the bailee.

Comment In this case the servant seems to have been regarded as taking possession, but it is unlikely that a bailment will arise if a customer merely hangs his coat on a stand or other device provided by the establishment.

464 *Deyong* v *Shenburn* [1946] 1 All ER 226

An allegation that an actor who left his clothes in a dressing room had constituted the theatre owners bailees of the clothes was not sustained.

Bailment: finders and involuntary recipients

465 *Newman* v *Bourne & Hollingsworth* (1915) 31 TLR 209

The claimant went into the defendant's shop on a Saturday in order to buy a coat. While trying on coats she took off a diamond brooch and put it on a show case. She left the shop having forgotten the brooch; an assistant found it and handed it to the shopwalker who put it in his desk. By the firm's rules the brooch ought to have been taken to its lost property office. The brooch could not be found on the following Monday.

Held – there was evidence to support the trial judge's finding that the firm had become a bailee and had not exercised proper care.

466 *Neuwirth* v *Over Darwen Industrial Co-operative Society* (1894) 70 TLR 374

A concert hall was hired for an evening performance. No mention was made of rehearsal but the orchestra rehearsed in the hall during the afternoon without opposition from the proprietors or the keeper of the hall. After the rehearsal Neuwirth left his double-bass fiddle in an ante-room in such a position that when the hall keeper came to turn on the gas in the ante-room he could not do so without first moving the instrument. The fiddle fell and was badly damaged.

Held – there was no contract of bailment between the parties. The care of musical instruments was outside the scope of the hall keeper's authority and there was no evidence that he had been guilty of negligence in the course of his employment.

Comment Reference should also be made to *Elvin and Powell Ltd* v *Plummer Roddis Ltd* (1933).

Bailment: obligations of bailor

467 *Hyman* v *Nye* (1881) 6 QBD 685

The claimant hired a landau with a pair of horses and a driver for a drive from Brighton to Shoreham and back. The claimant was involved in an accident owing to a broken bolt which caused the carriage to upset so that the claimant was thrown out of it.

Held – the trial judge's direction to the jury that the claimant must prove negligence was wrong. There was an implied warranty that the carriage was as fit for the purpose for which it was hired as skill and care could make it.

468 *Reed* v *Dean* [1949] 1 KB 188

The claimants hired a motor launch called the *Golden Age* from the defendant for a family holiday on the Thames. The claimants set sail at about 7 pm on 22 June 1946, and at about 9 pm, when they were near Sonning, they discovered that a liquid in the bilge by the engine was on fire. They attempted to extinguish the fire but were unable to do so, the fire-fighting