

CAUSATION, CONTRIBUTORY NEGLIGENCE AND *VOLENTI NON FIT INJURIA*

P. S. ATIYAH*

Oxford

The decision of the House of Lords in *I.C.I. Ltd. v. Shatwell*¹ has resuscitated the moribund defence of *volenti non fit injuria* in employer-employee cases. Whether the case proves to be a new point of departure in the law of tort generally or is ultimately put on one side as a decision on its own peculiar facts remains, of course, to be seen. The facts and the decision do, however, give rise to a number of difficult and interesting questions which it is proposed to examine in this article.

The plaintiff, George Shatwell, and his brother James were shotfirers employed in the defendants' quarry. Both were experienced and certificated men. In the course of their employment they were required to test a series of detonators by connecting the circuit to a galvanometer. For many years no risk was thought to be involved in this process, and no special precautions were legally required or were thought necessary. In fact there was a slight element of risk which had been discovered by I.C.I., and, as a result, under the Quarries (Explosives) Regulations 1959 the testing of detonators was required to be done from a place of shelter. I.C.I. had also arranged for a lecture to be given to their shotfirers to explain the risk, and they had reinforced the statutory regulations with instructions to the same effect. They had also taken severe disciplinary action against a shotfirer who had neglected the safety precautions. There was no doubt that the brothers Shatwell knew all about this. There was one other fact mentioned by a number of their lordships although it could hardly have been relevant except on the assumption that moral fault, or the lack of it, was in issue, and that was that I.C.I. had so arranged their system of remuneration that no incentive was provided for taking short cuts in this respect. The accident which led to the litigation was caused by the

*P. S. Atiyah, New College, Oxford.

¹ [1964] 2 All E.R. 999.

brothers Shatwell testing a detonator without taking shelter while a third shotfirer had gone to obtain some wires which would have enabled them to conduct the test from a safe distance. Although he would have returned within a matter of minutes George suggested to James that they should test the detonator without waiting, and James agreed. The detonator exploded and both brothers were injured. George sued I.C.I. claiming damages for negligence and breach of statutory duty on the basis that I.C.I. were vicariously liable for James' part in the proceedings. The trial judge and the Court of Appeal awarded him damages which they reduced by 50% on the ground of his own contributory negligence. The House of Lords held that *volenti non fit injuria* was a complete defence to the action.

Two principal questions were argued in the Lords. The first was whether James' part in the proceedings was a cause of the accident. All the judges treated the case as one of joint action by the two men, and on this basis, the majority held, following *Stapley v. Gypsum Mines Ltd.*,² that each brother's part must be held to be part cause of the other brother's injury. Lord Reid, who had been one of the majority in the *Stapley* case, and Lord Hodson and Lord Donovan, all appeared to think that the *Stapley* case was indistinguishable on the causation point, and that they could not dispose of it simply as a decision on a question of fact. But in any event it seems that they would probably have decided the causation point in the same way even if it had not been for the *Stapley* case. Lord Radcliffe dissented on this point, and Lord Pearce, though not dissenting, appeared at least to think that it was a question of fact, and that the House could not have reversed the trial judge's decision if it had gone the other way.

On the second point, all five members of the House agreed that *volenti non fit injuria* was a defence both to the negligence at common law and to the breach of statutory duty. It seems that counsel concentrated his argument almost exclusively on breach of statutory duty³ and that the common law negligence point was not seriously argued in the House, but some of their lordships dealt with both points in their speeches. So far as the breach of statutory duty was concerned the House had to dispose of two earlier cases in which it had been said that *volenti non fit injuria* was not a defence to such an action, namely *Baddeley v. Granville*⁴ and *Wheeler v. New Merton Board Mills Ltd.*⁵ Their lordships were

² [1953] A.C. 663.

⁴ (1887), 19 Q.B.D. 423.

³ *Supra*, footnote 1, at p. 1015.

⁵ [1933] 2 K.B. 669.

unanimous in distinguishing these cases on the ground that in both of them the employers had themselves been "at fault", whereas in the present case the employers were in no way to blame.

There is one other background point to be mentioned. The regulations in question imposed the duty not to test the detonators until everyone had taken shelter on the shotfirer himself. The duty was not imposed on the employer to see that this was done. Now it may be recalled that at common law it is still an open question, certainly in the House of Lords, whether an employer is vicariously liable for a breach of statutory duty where the duty is directly imposed on his employee and not on him. The point was expressly left open in *Harrison v. National Coal Board*⁶ and in *National Coal Board v. England*⁷ and again in this case. It would only have been necessary to decide this point if it had been held that there was a complete defence to the action in respect of common law negligence, but not in respect of the breach of statutory duty.

But although this point is still open at common law, there is, in relation to mines and quarries, a statutory provision which appears to resolve the controversy, and which is not easy to reconcile with a good deal of the reasoning, if not indeed the actual decision, in the *Shatwell* case. The provision in question (which was not, so far as can be seen, cited to their lordships) is section 159 of the Mines and Quarries Act, 1954,⁸ the relevant part of which is as follows:

For the removal of doubts it is hereby declared that the owner of a mine or quarry is not absolved from liability to pay damages in respect of a contravention, in relation to the mine or quarry, by a person employed by him of — (a) a provision of this Act, of an Order made thereunder or of Regulations; . . . by reason only that the provision contravened was one which expressly imposed on that person or on persons of a class to which, at the time of the contravention he belonged, a duty or requirement or expressly prohibited that person, or persons of such a class or all persons from doing a specified act, or as the case may be, that the prohibition, restriction or requirement was expressly imposed on that person

This provision will be considered more fully later.

So much then for the facts and the actual decision. Before examining the import of the case in detail it is worth observing that the two lines of approach which a court would normally adopt in dealing with such facts, namely, the causation approach and the contributory negligence approach, each appeared to their lordships to lead to an impasse from which they sought to escape by

⁶ [1951] A.C. 639.

⁷ [1954] A.C. 403.

⁸ 2 & 3 Eliz. 2, c. 70.

turning to the defence of *volenti non fit injuria*. Before examining this defence in the light of the speeches it is therefore worth exploring these two avenues to see whether the obstacles which their lordships found—in the one case expressly, in the other implicitly—were really insurmountable. It is proposed then to discuss here the following questions: I. Apportionment of Damages in Cases of Joint Action, II. Joint Action and Causation, III. *Volenti Non Fit Injuria* as a Defence to Negligence at Common Law, and IV. *Volenti Non Fit Injuria* as a Defence to Breach of Statutory Duty.

I. Apportionment of Damages in Cases of Joint Action.

Since the ultimate decision was wholly in favour of the defendants the House did not have to consider the proper principle underlying apportionment of damages for contributory negligence in the circumstances of the case, and such discussion as there was of the point does not suggest that their lordships thought there was any important question of principle involved.⁹ It is, however, suggested that there is an important question of principle involved in such circumstances, and it may not be unreasonable to suppose that their lordships' views (largely unexpressed) on this point were in part responsible for the ultimate decision in favour of the defence of *volenti non fit injuria*. The question which is surely raised by such facts as these is whether it would have been open to the courts so to apportion the damages that the combined percentages awarded to the two brothers would have been less than 100%. In other words, if there had been no question of *volenti non fit injuria* could the courts have given the brothers, say, 20% apiece? Only Lord Pearce expressly alluded to the point. He said:¹⁰

Apportionment of loss through contributory negligence, which can so often provide a fair result, is of no avail in solving this problem. For if one man is held, owing to his greater fault, entitled only to twenty per cent of his loss, then as a general rule, the other must be entitled to eighty per cent of his loss; and the total result would still offend against common sense.

Although none of the other members of the House considered the point in their speeches it is a question of more than academic interest. For if on such facts the courts could award one plaintiff less than 50% without thereby requiring themselves to give the other correspondingly more, they might well look on contributory negligence as a more appropriate, because it is a more elastic,

⁹ See Lord Reid, *supra*, footnote 1, at p. 1002 and Lord Pearce, at p. 1011.

¹⁰ *Ibid.*, at p. 1011.

defence. One suspects—and Lord Pearce virtually says as much—that it was partly because the House felt that this could not be done that they fell back on the principle of *volenti non fit injuria*. It is perhaps not without significance that in the *Stapley* case the House felt no difficulty in awarding the plaintiff only 20% because he was the only person injured. It has been suggested that if both parties had been injured the award of 20% to the one would have necessitated an award of 80% to the other,¹¹ but what has not, at least until the *Shatwell* case, been so obvious, is that in such circumstances a plaintiff may well have a better chance of getting something out of the courts if he is the only person injured. It may well be that this is inevitable, but it hardly seems rational, and it is, therefore, worth examining the premise on which the result seems to be based.

The argument in favour of Lord Pearce's view is, of course, a simple one. If one of two joint actors is awarded, say 20% of the damages which he would have got in the absence of contributory negligence, it can only be because he was 80% responsible for his own injuries. But if he was 80% responsible for his own injuries it would appear logically inescapable that he must also be 80% responsible for the injuries of any other person arising out of the same incident. Therefore the other party should recover 80% of his damages.¹²

There are two possible ways of escape from this dilemma. The first would be to argue that whatever the position might be between the two wrongdoers themselves the same analysis is not necessarily applicable between one of the wrongdoers and the employer. In other words it could be argued that as between I.C.I. and George, I.C.I. would have been entitled to argue that George was contributorily negligent and that his share of the responsibility was overwhelming, if not indeed total. Such a finding, it might be urged, would not preclude a similar finding in an action between James and I.C.I. because the degree of fault to be attributed to George in an action between him and I.C.I. may not necessarily be the same as the degree of fault to be attributed to him in an action between James and himself. No doubt where there is any element of common law negligence or breach of statutory duty

¹¹ Glanville Williams, Comment in (1954), 17 Mod. L. Rev. 66.

¹² This was, in substance, the decision of the majority of the Court of Appeal of Northern Ireland in *Black v. McCabe*, [1964] N.I. 1, where the jury had reduced the plaintiff's damages by 31% on the claim, and the defendant's damages by 25% on the counterclaim. This verdict was set aside on the ground that the proportions awarded to both parties must total 100%.

by the employer himself, and not merely vicariously, this would be so. But where, as in the instant case, the employer's liability is solely vicarious it is difficult to see how a court could reason thus unless it were prepared to jettison completely the currently accepted basis of vicarious liability in favour of something in the nature of the "master's tort" theory. Although there may be a good deal to be said in favour of this theory¹³ it cannot be said yet to represent orthodox legal thinking, and its acceptance would not necessarily simplify the issues which arise in this sort of case. It is far from easy to see how the Law Reform (Contributory Negligence) Act, 1945,¹⁴ would operate where the master's sole "fault" consists in employing a person and thereby creating risks which he ought to bear.

The second possible way of escaping from the dilemma mentioned above is to argue that the line of reasoning leading to that dilemma elevates the test of one party's responsibility into the sole criterion for determining the appropriate reduction in cases of contributory negligence. The Act of 1945 does not require this. It requires only that the court should reduce the damages "to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility". Thus the court would be perfectly entitled to take other factors into account. In the instant case the court might agree that George was, say, responsible to the extent of 80% and James to the extent of 20% but might nevertheless say that it was just and equitable that George should receive say 10% of his damage, and James 40% of his. On this view Lord Pearce's use of the term "apportionment" is question-begging because it assumes that the court must apportion not merely the responsibility but the consequential liability as well. The difficulty about this argument is that it is by no means obvious what considerations a court would be entitled to take into account in determining what is just and equitable. The notion of responsibility is, after all, not a particularly narrow one. It enables the court to take into account the degrees of negligence, the fact that one party may have been in a position of authority over the other and perhaps even (as appears to have been done in *Stapley's* case,¹⁵ although this has not escaped criticism) differing degrees of causal potency. What other factors ought to be taken into account? Nobody would presumably argue that the relative wealth or poverty of the parties

¹³ The thesis is persuasively argued by Dr. Glanville Williams in *Vicarious Liability: Tort of the Master or of the Servant?* (1956), 72 L. Q. Rev. 522.

¹⁴ 8 & 9 Geo. 6, c. 28.

¹⁵ *Supra*, footnote 2.

should be taken into account, or even the actual amount of damage which has been occasioned. If an accident were to take place involving a Mini-Minor and a Rolls-Royce, it would surely not be argued that it would be unjust or inequitable to reduce the damages of the two parties equally (assuming them to have been equally negligent) merely because this would result in the one driver being liable for several thousands while the other (presumably wealthier) driver would only be responsible for some hundreds. What other factors are there then in the *Shatwell* situation which lead one to feel (as it must be confessed, one does feel) that—if the parties were entitled to recover anything—they should each have recovered only a very small proportion of their damage? Surely this is only the feeling that each party was primarily responsible for his own injury, and that although the other may have contributed something, this was only a small, perhaps negligible factor. In other words, one is still reduced to talking in terms of responsibility but one feels that a person may be more responsible in relation to his own injuries than he is in relation to the injuries of the other party. Unfortunately, this avenue of approach also appears to be barred to the lawyer because such authority as there is on the point is to the opposite effect.

There is at least some authority for the view that a person may owe a higher duty of care for the safety of others than he owes for his own safety. Thus it is still possible that a casual act of inadvertence may in some circumstances give rise to liability in negligence to another when it would not amount to contributory negligence. The dicta of Lord Tucker and Lord Morton in *Staveley Iron and Chemical Co. Ltd. v. Jones*¹⁶ throw doubt on this proposition but they do not finally dispose of it. In the same case Lord Reid considered the argument that this view would mean that if two workmen were guilty of such casual acts of inadvertence and injured each other, they would each be entitled to recover in full without any apportionment, and, while expressing no concluded opinion, he says that such a result might well be inevitable. Inconclusive as these dicta are, they certainly lend no countenance to the possibility that a person may be treated as being, as it were, more negligent in respect of his own injuries than of the other party's.

The position appears to be precisely the same where more than two people are involved. If, for example, there had been a third participant in the testing of the detonator in the *Shatwell* case it is thought that, so far as contributory negligence is concerned, the

¹⁶ [1956] A.C. 627.

court would (assuming that it found all three men equally to blame) decide that each man bore the same proportion of responsibility in respect of his own injuries as he bore in respect of the injuries of the other two.¹⁷

There seems therefore to be no escape from the conclusion that two parties who are jointly the cause of an accident must have the entire responsibility divided between them and this means that each party's share of the responsibility both for his own and the other's injuries must be the same.

II. *Joint Action and Causation.*

The *Shatwell* case raises once again the question first seriously canvassed in the *Stapley* case, namely, how far each party in a joint enterprise is responsible for the results of the joint enterprise. It will be recalled that in the *Stapley* case the plaintiff was the widow of a miner who had been working with a fellow workman, Dale. They had been told to fetch down a dangerous roof, but having tried unsuccessfully to do so, gave up the attempt. Contrary to their orders, and also to statutory regulations, they then returned to their ordinary work. Stapley went to work under the dangerous roof while Dale went elsewhere. The roof fell and Stapley was killed. The House of Lords, by a majority of three to two, held that the defendants, the employers, were liable for Dale's negligence and that this negligence was a part cause of the accident, but they reduced the damages by 80%. All the judges treated the question as one of causation: did Dale's acts (or rather omissions) contribute to the accident? The majority said Yes. Thus Lord Oaksey:

Each man was responsible for disobeying the order and, in my opinion, it is quite uncertain whether Stapley would have acted as he did had not Dale agreed that the roof was safe and that they should go on with their ordinary work.¹⁸

And Lord Reid:

There is no doubt that if these men had obeyed their orders the accident would not have happened. Both acted in breach of orders and in breach of safety regulations, and both ought to have known quite well that it was dangerous for Stapley to enter the stope. The present action against the respondents is chiefly based on Dale's fault having contributed to the accident, and on the respondents' being responsible for it, the defence of common employment being no longer available. So

¹⁷ See the discussions by Glanville Williams, *loc. cit.*, *supra*, footnotes 11, and 13 at pp. 536-538, and *Joint Torts and Contributory Negligence* (1950), pp. 398-403, and *cf. Williams v. Port of London Stevedoring Co. Ltd.*, [1956] 1 W.L.R. 551. I agree with Dr. Williams' criticism of this case.

¹⁸ *Supra*, footnote 2, at p. 679.

it is necessary to consider what would have happened if Dale had done his duty. It was his duty either to try a pinch bar or to start boring holes for the shot-firer, and on the evidence I think that it is highly probable that, if he had insisted on doing that instead of agreeing with Stapley to neglect their orders and the regulations, Stapley would not have stood out against him, or tried to resume his ordinary work. Stapley had nothing to gain from his disobedience, and if he had not found Dale in agreement with him, it appears to me unlikely that he would have persisted. But if he had persisted and thereby prevented Dale from carrying out his orders—because Dale could not have worked at the roof if Stapley had persisted in going below it—then it was Dale's duty to go for the foreman, as he, Dale, could not give orders to Stapley. We do not know how soon the roof fell or how long it would have taken Dale to find and bring the foreman, but it is at least quite likely that the foreman would have arrived in time to prevent the accident.¹⁹

These passages with their interesting speculations about what might or might not have happened if things had turned out differently prompt a number of reflections.

In the first place, if it was not already clear in 1953, it is certainly clear beyond doubt today that the plaintiff must not only prove a breach of duty and damage to himself, he must also prove that one was the cause of the other.²⁰ If cases such as this are to be approached on a causal basis it is therefore necessary for the plaintiff to satisfy the court on the balance of probabilities that if the other party to the accident had done his duty the accident *would* not have happened, not that it *might* not have happened. In the light of the cases already cited it would not seem sufficient for the court to say, as Lord Oaksey said in the *Stapley* case, that "it is quite uncertain" whether the accident would have happened if the other party had not been in breach of duty. Such a state of uncertainty on the part of the court would indicate that the plaintiff had failed to discharge the burden of proof.

The second point arising from these remarks is that it may become necessary on this approach to decide precisely what was the duty of the other party to the accident. No doubt in many circumstances this will not raise any particular difficulty, since it will be implicit in the finding that there has been a lack of due care, or a breach of statutory duty, precisely what should have been done to comply with the duty. But this may not always be so. In particular, where the immediate precipitating cause of the accident has

¹⁹ *Ibid.*, at p. 650.

²⁰ See *Bonnington Castings Ltd. v. Wardlaw*, [1956] A.C. 613 and *Cummings (or McWilliams) v. Sir William Arrol & Co. Ltd.*, [1961] 1 All E.R. 623.

been the plaintiff's own act and the other party, while co-operating and agreeing with what the plaintiff has done, has not himself played an active part, it may be necessary to determine not merely whether the other party ought not to have co-operated or agreed with the plaintiff, but also whether he should have actively opposed what the plaintiff did. In the *Stapley* case, as is made clear in the passage cited from Lord Reid's speech, it was Dale's duty to bring the roof down, because he had been given specific instructions to that effect, and it was therefore possible to pose the reasonably simple question: "Would the accident have happened if Dale had done his duty?"²¹ But in the *Shatwell* case, where James did not himself test the circuit, but merely agreed to George's suggestion, the causal approach gives rise to more difficulty. The regulation in question²² provided:

No shotfirer shall fire any round of shots connected in series at a quarry by means of electric shotfiring apparatus unless he has tested the circuit for continuity by means of a suitable testing device and has found it to be satisfactory. A shotfirer shall not make any such test unless all persons in the vicinity have withdrawn to a place of safety and he himself has taken proper shelter.

Now clearly it was the plaintiff, George, who had in the first instance violated this provision by testing the circuit although neither he nor James had taken shelter. Equally clearly, as a matter of criminal law, James would have been guilty of aiding and abetting George and could have been prosecuted for doing so. But what is not so clear is what it was which James did (or did not do) in breach of duty, of which it could be said that had James not done it (or done it, as the case may be) the accident would not have happened. The only breach of statutory duty on James' part would appear to have been the mere act of aiding and abetting George, and the proper question to pose on the causal issue should therefore have been: "Would the accident have happened if James had not aided and abetted George?" This is, of course, *not* the same as the question: "Would the accident have happened if James had actively opposed the suggestion that George should test the circuit as he suggested?" It may well be that the answer to the former question might have been Yes, and the answer to the latter ques-

²¹ But it may not have escaped notice that even in answering this relatively simple question Lord Reid starts by having "no doubt" that the accident would not have happened if the men had done their duty, and goes on, in his speculations, through all shades of probability from "highly probable" to "unlikely" and finally, "quite likely".

²² Regulation 27(4) of the Quarries (Explosives) Regulations, 1959, S.I. 1959, No. 2259.

tion, No, because it is one thing to conclude that a workman would have done what he did alone, and it is another to conclude that he would have done it against the advice of a colleague.

When we turn to the speeches in the *Shatwell* case we find that Lord Reid and Lord Pearce were the only two of their lordships to make it clear precisely why they decided the causation issue in favour of the plaintiff. Lord Reid said:²³

Applying the principles approved in *Stapley's* case I think that James' conduct did have a casual connexion with this accident. It is far from clear that George would have gone on with the test if James had not agreed with him; but, perhaps more important, James did collaborate with him in making the test in a forbidden and unlawful way.

Lord Pearce said:²⁴

In [*Stapley's*] case it could fairly be argued that the accident could not have happened had Dale gone on working the roof as he should have done. In the present case, however, we have no knowledge of what would have happened if James had refused.

He then proceeded to justify his decision on this point by saying that the question of causation was a question of fact and he did not feel free to depart from the concurrent findings of the trial judge and the Court of Appeal.

These observations may well be regarded as more mystifying than clarifying. The passage cited from Lord Reid's speech is ambiguous in that it is not clear whether he was posing the question: "Would the accident have happened if James had not agreed?" or the question: "Would the accident have happened if James had actively opposed the suggestion?" Lord Pearce clearly treats the second as the correct question, but since neither he nor Lord Reid was apparently satisfied that the answer to the appropriate question (whatever it might be) was No, it is difficult to see why they thought that the plaintiff had discharged the burden of proof on him in this respect. It is possible that in his use of the concept of "collaboration" in the last part of the passage from Lord Reid's speech cited above he was intending to base responsibility on something other than a causal basis, that he was suggesting, in other words, that a person who collaborates with another in doing an unlawful act becomes responsible for the consequences whether he can be said to have caused them or not. But in the context in which this passage appears it is clear that Lord Reid was discussing causation and nothing else, and indeed if he was intending to suggest that there might be responsibility on other grounds it is difficult to

²³ *Supra*, footnote 1, at p. 1002.

²⁴ *Ibid.*, at p. 1011.

understand why he should have speculated about whether the accident would have happened had James not agreed with George. One would also have expected him to make some reference to the speech of Lord Radcliffe which so clearly distinguishes causation from responsibility, and which is considered more fully below.

It remains to point out on this issue that even if the question of common law negligence had been pressed (as apparently it was not in the House) it might have been no easier to decide which was the appropriate question. It is far from clear that James' duty at common law would have extended to pressing George *not* to test the detonator in the way in which he did, as opposed to merely not aiding and abetting him to do so.

The third reflection prompted by the somewhat tortuous speculations which their lordships felt called upon to undertake both in the *Stapley* and the *Shatwell* case is the rather more fundamental one whether these speculations were really necessary at all. All their lordships in the two cases—with the exception of Lord Radcliffe in the *Shatwell* case—appeared to assume that if it were once decided that there was a causal connection between the act of Dale in the one case, and that of James Shatwell in the other, and the accident which caused the plaintiff's injuries, then the plaintiff was entitled to recover, subject to the defences of *volenti non fit injuria* and contributory negligence. It is suggested that this assumption was mistaken. The question at issue in both cases was not whether the plaintiff's actions were the sole *cause* of his injuries but whether the plaintiff was in law to be treated as wholly *responsible* for his injuries. It is a demonstrable fallacy to equate causation with responsibility in law. A person may be legally responsible for a consequence which he has not caused, and a person may still more often cause something to happen without being legally responsible for it. Lord Radcliffe did indeed take this point in the *Shatwell* case. He said:²⁵

I do not see how either [George or James] can succeed against the other, since, where both were joined in carrying through the whole operation and each in what he did was the agent of the other to achieve it, there was nothing that one did against the other that the other did not equally do against himself. This, in my view, is the true result of a joint unlawful enterprise, in which what is wrong is the whole enterprise and neither of the joint actors has contributed a separate wrongful act to the result. Each emerges as the author of his own injury.

Strangely enough Lord Radcliffe cited no authority for this view, although it is also true that none of the other members of the

²⁵ *Ibid.*, at pp. 1006-1007.

House cited any authority (other than *Stapley*) for the contrary view. But it is submitted that there is in fact ample authority for the view that two parties who commit a wrong while acting in concert are each wholly responsible for the consequences.

Let it be supposed that a third workman who had played no part in the testing of the circuit had been injured by the explosion in the *Shatwell* case. There is no doubt that he could have sued either George or James (or of course I.C.I.) and recovered in full from either of them. It would have been no answer for George to plead that since James' conduct was a part cause of the accident he, George, could only be liable for that part of the plaintiff's injuries which could be attributed to George. And the reason for this is *not* that it would have been impossible to isolate the share of the blame which would have been attributable to George—indeed the court might well have had to apportion the blame should George, in this hypothetical situation, have chosen to claim contribution from James under the Law Reform (Married Women and Joint Tortfeasors) Act, 1935.²⁶ The reason why George would have been wholly liable to the third party is that he would have been a joint tortfeasor with James.

Now it is clear law that there are at least three classes of joint tortfeasors, namely (1) a master and his servant for whose torts he is vicariously liable, (2) a person who authorises another to commit a tort, and (3) two parties who "take concerted action to a common end".²⁷ In the first class the liability of the one joint tortfeasor (the master) for the torts of the other (the servant) is not based on any causal connection between what the master has done and the plaintiff's injury. In the second class of case such a causal connection may often be present though it is perhaps debatable whether it is a necessary element in liability. But in the third class, with which we are here concerned, there is again, it is submitted, no necessity for any such causal connection to be shown.

In *Arneil v. Paterson*²⁸ the House of Lords held that the owner of a dog who was admittedly liable for damage done by the dog

²⁶ 25 & 26 Geo. 5, c. 30. Moreover in cases of separate tortfeasors causing different damage where it is clear law that each is only liable for the damage caused by him, it may be equally difficult to decide who has caused what. In such circumstances the damages may be apportioned even at common law: see *Bank View Mills Ltd. v. Nelson Corporation*, [1942] 2 All E.R. 477, at p. 483.

²⁷ Per Bankes L.J. in *The Kursk*, [1924] P. 140, at p. 152. The third category may in some circumstances be a sub-division of the second, but not all cases within the third class could be explained in this way, e.g., *Scarsbrook v. Mason*, [1961] 3 All E.R. 767, which is discussed below.

²⁸ [1931] A.C. 560.

in worrying some sheep owned by the plaintiff, was liable for the whole damage notwithstanding that the defendant's dog had been acting in concert with another dog owned by a third party. Lord Hailsham put the point succinctly when he said:²⁹

In this case we have an admission that the two dogs were acting together, and, when that admission is made, then I think that in law each of the two owners is responsible for the whole of the damage, because each dog did, in the eye of the law occasion the whole of the injury of which the pursuers complain.

The last part of this sentence is, it is true, expressed in causal terms, but the words "in the eye of the law" strongly suggest that Lord Hailsham was consciously making use of a legal fiction. The real import of his speech is that two persons acting in concert are each legally responsible for all the consequences of their acts in the same way as they would be if each of them was (as they were not in that case) the sole cause of the consequences. The dog owners were not themselves acting in concert, of course, but the House treated the case as though it were a case of concerted action.

A more familiar case is perhaps *Brooke v. Bool*³⁰ where the defendant, who was the plaintiff's landlord, was looking for a gas leak on the plaintiff's premises with the assistance of a third party, one Morris. Morris and the defendant were examining a gas pipe, and Morris climbed onto a counter to look at the upper part of a pipe. He then struck a match which caused an explosion. Despite the clearest possible finding of fact by the County Court Judge that "the explosion was caused by the negligent act of Morris and was not caused directly or indirectly by any negligence on the part of the defendant," the Divisional Court held for the plaintiff, *inter alia* on the ground that there was a joint enterprise "and that the act which was the immediate cause of the explosion was their joint act done in pursuance of a concerted enterprise".³¹

Another, more recent, illustration of the same point is *Scarsbrook v. Mason*³² where Glyn Jones J. held that a paying passenger in a car who was one of a party going on a trip to Southend was jointly and severally liable for the negligence of the driver.

It would be as tedious as it surely is unnecessary to multiply examples further. It is submitted that it is clear law that *prima facie* in cases of concerted action there is a sharp distinction drawn between the question of causation and the question of responsibility. It may be objected that this same distinction is drawn where several concurrent tortfeasors contribute to the same damage, and each is

²⁹ *Ibid.*, at p. 564.

³¹ *Ibid.*, at p. 585, *per* Salter J.

³⁰ [1928] 2 K.B. 578.

³² *Supra*, footnote 27.

liable in full to an injured third party, but yet they are not debarred from recovering from each other, subject to reduction for contributory negligence. It is, of course, an everyday occurrence for two motorists to cause an accident by their combined but separate acts of negligence in which they and a third person may be injured. There is no difficulty in holding that they are both liable in full to the third party and yet are not totally debarred from remedy against each other. But there is, it is thought, a clear distinction between cases of this sort and cases of concerted action where the two wrongdoers are not several concurrent tortfeasors but joint tortfeasors, and the distinction is surely, as Lord Radcliffe suggested in the *Shatwell* case, that in cases of concerted action the two wrongdoers are each authorising the other to do what he does.

At this stage we may return to the facts of the *Shatwell* case. If it is accepted that George and James were joint tortfeasors and that each was legally responsible for the entire damage it is submitted that the case could have been disposed of without regard to the question of causation at all. It should surely make no difference to the legal responsibility of joint tortfeasors whether or not a third party is injured as a result of their concerted action.³³ In *Brooke v. Bool*,³⁴ for example, a third party (the plaintiff) suffered damage to his property. But suppose that in that case the man who actually struck the match, Morris, had been injured and had sued the defendant, his colleague in the concerted action. Surely it would not be right to argue that the defendant contributed to the accident and (subject to the defence of *volenti non fit injuria*) should have been liable, even in part, to Morris. The right conclusion would surely be that just as Morris and the defendant were jointly and severally liable to the plaintiff, they were each wholly responsible for any injuries they might themselves have incurred. In the light of the ultimate decision in the *Shatwell* case it may well be that *volenti non fit injuria* would have been held to be a defence as between Morris and the defendant on such facts, and if it is correct to regard the authorisation of the wrongful act as the vital factor which makes a defendant responsible for all the consequences of the concerted enterprise, then it may well be that the defence of *volenti non fit injuria* will nearly always be available. It is not easy to visualise circumstances in which one party authorises another

³³ Thus it has recently been held that, where A and B are separate concurrent tortfeasors an apportionment of responsibility in an action by A against B is *res judicata* in relation to a subsequent claim for contribution by A against B as a result of A's being held liable to a third party injured in the accident: *Wood v. Luscombe*, [1964] 3 All E.R. 972.

³⁴ *Supra*, footnote 30.

to commit a wrongful act and yet would not be defeated by an application of this maxim, as now revived by the House of Lords, except where the defendant is in breach of a statutory duty and the maxim is therefore not available to him.

Conversely where the defendant has not authorised the wrongful act in question it seems improbable that—in this sort of case—the maxim *volenti non fit injuria* will be applicable. For example, in *Scarsbrook v. Mason*,³⁵ which has been referred to above, it seems unlikely that the defence could have been raised had the negligent driver been injured and had he sued the defendant. But it seems inconceivable that on such facts the court would hold that the defendant had “contributed” to the accident and was therefore partially liable to the actual driver. Yet a decision for the defendant on such facts would now, it seems, have to be justified solely on causation grounds, with all the uncertainty inherent in the speculations whether the accident would or would not have occurred had there been no concerted action.³⁶

The strictly causal approach to these cases of concerted action leads to another anomaly. Let it be supposed that two workmen A and B, by a concerted act of negligence not raising any question of *volenti non fit injuria*, cause an accident in which a third workman, C, is injured. Clearly, C can sue the employer and recover full damages. Equally clearly, it seems, the employer can sue A and B for breach of contract in committing the negligent act and recover from them the amount he has to pay to C.³⁷ And since A and B are joint tortfeasors against C, it seems that the employer can recover the full amount from either of them. Is it to be said that if A and B are also injured in the accident they can recover (subject to apportionment for contributory negligence) from the employer in respect of their own injuries despite the fact that they are each wholly liable to him in respect of the amount he has to pay as damages to C? The result seems absurd but inescapable after the *Stapley* and *Shatwell* cases.

It has indeed been argued that the same absurdity may arise even where the plaintiff is the only party injured.³⁸ The suggestion is that, in the *Stapley* case, for example, the employers could have

³⁵ *Supra*, footnote 27.

³⁶ It may be that this case goes too far in holding that there was “concerted action”. Had the defendant himself been injured in the action and sued the driver it is difficult to believe that he would have failed or even that his damages should have been reduced for he did not in any sense authorize the negligence.

³⁷ *Lister v. Romford Ice and Storage Co. Ltd.*, [1957] A.C. 555.

³⁸ *Glanville Williams*, *loc. cit.*, footnote 11, at p. 71.

sued Stapley's executors for breach by Stapley of his contract of service in disobeying his instructions, and that the damages recoverable would have included the very sum adjudged payable to Stapley for Dale's negligence. Thus, it is argued, on the principle of avoiding circuity of actions, the court could have avoided awarding any damages at all to Stapley. It is thought that this argument proves too much. If the employer could recover from the employee damages including what he himself has to pay the employee in such a case, it is not easy to see why the employer cannot do the same where there is a simple case of negligence on the part of one employee and contributory negligence on the part of the plaintiff. This would lead to the absurd conclusion that an employer could avoid any liability in such a case, despite the Act of 1945,³⁹ by pleading the contributory negligence as a breach of contract on the part of the plaintiff. This clearly cannot be right, for the Act of 1945 says in imperative terms that the plaintiff's claim "shall not be defeated by reason of the fault of the person suffering the damage", and this provision cannot be evaded by labelling the plaintiff's fault a breach of contract. It remains "fault" within the meaning of the Act and his claim is not to be defeated by reason of that fault, whatever it may be called.

Whether the above arguments are convincing or not, they are, of course, of no avail now. Despite the lip service paid in the *Shatwell* case to the proposition that questions of causation are questions of fact,⁴⁰ it seems that the courts are now irrevocably committed to the causal approach in cases of concerted action and that on similar facts they will almost certainly feel bound to decide that both parties' actions are, in part at least, causes of the consequential damage, except, perhaps, in circumstances (which will surely be rare) in which it can be clearly demonstrated that the assistance of one of the parties made no difference to the result.

III. *Volenti Non Fit Injuria* as a Defence to Negligence at Common Law.

As Lord Reid said in the *Shatwell* case "The defence of *volenti non fit injuria* has had a chequered history".⁴¹ Although it was at

³⁹ *Supra*, footnote 14.

⁴⁰ See Lord Hodson, *supra*, footnote 1, at p. 1008, and Lord Pearce, at p. 1011, but *cf.* Lord Donovan, at p. 1015. *Cf.* also *Williams v. Sykes and Harrison Ltd.*, [1955] 3 All E.R. 225 where Singleton L. J. in the Court of Appeal said, at p. 231: "The parties are entitled to have the decision of this Court on [the question of causation]. It is not a pure question of fact."

⁴¹ *Ibid.*, at p. 1002.

one time fairly readily applied in employer-employee cases⁴² the tide turned against it at the end of the nineteenth century. The decisive case was, of course, *Smith v. Baker & Sons*⁴³ where the House of Lords made it clear that the mere knowledge of the dangers inherent in the conditions of work could not, of itself, be used to justify an inference that the employee agreed to take the risk of the employer's negligence.

In the well known case of *Dann v. Hamilton*⁴⁴ Asquith J. expressed doubt whether *volenti non fit injuria* could ever be a defence to an action for negligence where "the act of the plaintiff relied on as a consent precedes, and is claimed to licence in advance, a possible subsequent act of negligence by the defendant".⁴⁵ And in *Bowater v. Rowley Regis Corporation*⁴⁶ the Court of Appeal gave what at that time appeared to be a virtual knock-out blow to the defence in employer-employee cases. In that case, it may be recalled, the plaintiff was a corporation dustman who was provided with a horse and cart for the performance of his duties. He was required to take out a horse which was known, both to him and the defendants, to be dangerous, and his protests that the horse was unsafe were over-ruled by his employers. Scott L.J. said:

For the purpose of the rule, if it be a rule, a man cannot be said to be truly "willing" unless he is in a position to choose freely; and freedom of choice predicates, not only full knowledge of the circumstances upon which the exercise of the choice is conditioned, so that he may be able to choose wisely, but the absence from his mind of any feeling of constraint, so that nothing shall interfere with the freedom of his will.⁴⁷

Goddard L.J. added that the maxim "can hardly ever be applicable where the act to which the plaintiff is said to be *volens* arises out of his ordinary duty, unless the work for which the plaintiff is engaged is one in which danger is necessarily involved".⁴⁸

A similar fate has met the attempts to set the maxim up as defence in the "rescue" cases. In the recent case of *Baker v. T. E. Hopkins & Sons Ltd.*,⁴⁹ for instance, where a doctor descended into a gas-filled well in which some workmen had been overcome by fumes, the Court of Appeal dismissed the defence of *volenti non fit injuria*, partly, it seems, on the ground that once it was determined that "the act of the rescuer was the natural and probable

⁴² See e.g., *Woodley v. Metropolitan District Ry. Co.* (1877), 2 Ex. D. 384.

⁴³ [1891] A.C. 325.

⁴⁵ *Ibid.*, at p. 517.

⁴⁷ *Ibid.*, at p. 479.

⁴⁹ [1959] 3 All E.R. 225.

⁴⁴ [1939] 1 K.B. 509.

⁴⁶ [1944] K.B. 476.

⁴⁸ *Ibid.*, at pp. 480-481.

consequence of the defendant's wrongdoing, there is no longer any room for the application of the maxim",⁵⁰ and partly on the ground that the plaintiff "acted under the compulsion of his instincts as a brave man and a doctor".⁵¹

More recently still it has been roundly denied that the maxim has any application to cases of negligence. In *Woolridge v. Sumner*⁵² Diplock L. J. said: ⁵³

In my view, the maxim, in the absence of express contract, has no application to negligence *simpliciter* where the duty of care is based solely on proximity or "neighbourship" in the Atkinian sense. 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 (see *Kelly v. Farrans Ltd.*, [1954] N.I. 41, at p. 45 per Lord Macdermott) and requires on the part of the plaintiff at the time at which he gives his consent full knowledge of the nature and extent of the risk that he ran.

It is therefore hardly surprising that the defence of *volenti non fit injuria* has not been raised in many cases in which it might now be thought appropriate,⁵⁴ and that the courts have in some cases exonerated a defendant entirely on causation grounds in circumstances in which it appears that the defence might now be available.⁵⁵ It is against this background that the decision in the *Shatwell* case falls to be considered.

Two preliminary comments may be made on this aspect of the case. The first is that the speeches of their lordships do not appear to throw any doubt on the previous line of authorities to the effect that the defence can only be valid in employer-employee cases in very rare circumstances. Lord Hodson refers to the *Bowater* case with apparent approval and adds:⁵⁶

Economic pressures are usually present which make it unjust to allow an employer where a servant has been injured to say in defence that the servant ran the risk with his eyes open being fully aware of the danger he incurred.

Similarly Lord Pearce said:⁵⁷

⁵⁰ *Ibid.*, per Willmer L. J., at p. 243.

⁵¹ *Ibid.*, per Ormerod L. J., at p. 237.

⁵² [1963] 2 Q.B. 43.

⁵³ *Ibid.*, at p. 69.

⁵⁴ As in the *Stapley* case itself, *supra*, footnote 2.

⁵⁵ *E.g.*, *Rushton v. Turner Brothers Asbestos Co. Ltd.*, [1949] 3 All E.R. 517. But in both these cases the employers were themselves in breach, and this apparently would have put the defence out of court, see below. I have not in fact found any case in which the master was not himself or through a superior servant in breach of duty, which is not surprising as many safety regulations expressly provide that the master is responsible for securing the due performance of duties which are in the first instance imposed on the servant. Cf. section 1 of the Mines and Quarries Act, 1954, *supra*, footnote 8, which was apparently not relied on in the *Shatwell* case.

⁵⁶ *Supra*, footnote 1, at p. 1009.

⁵⁷ *Ibid.*, at p. 1013.

So far as concerns common law negligence, the defence of *volenti non fit injuria* is clearly applicable if there was a genuine full agreement, free from any kind of pressure to assume the risk of loss.

And again:⁵⁸

The plea is in fact very rarely applicable to master and servant cases. It does not apply to consent obtained by any pressures, whether social, economic, or simply habit. The master has an important duty of care for his servant; in general he has more skill in organisation, a wider foresight and more opportunity for innovation. So the assent of the servant to the master's failure very seldom in fact amounts to a real case of *volenti non fit injuria*.

The second comment which may be made on this aspect of the case is that, strangely enough, none of the Law Lords made use of the analysis suggested by Asquith J. in *Dann v. Hamilton* and followed by Diplock L. J. in *Woolridge v. Sumner*. According to this analysis the defendants' argument was in effect that James owed no duty of care to George in relation to the method of testing the detonator because George, by agreeing with James as to the method to be adopted, had impliedly waived any duty in that regard. On this view *volenti non fit injuria* is a total denial of negligence, and not an admission of negligence combined with a plea which defeats the effect of the negligence. This may be largely an academic point since even on the Asquith-Diplock view it seems improbable that a court would refuse to allow a defendant who had clearly pleaded the maxim to raise the defence notwithstanding that he may have admitted negligence. And in view of their lordships' approval of the proposition that economic or social pressure may defeat the plea it would appear that even in the "rescue" cases—where the Asquith-Diplock view is particularly appropriate—no difference in result is likely to arise whichever analysis is adopted. On the one view the maxim is irrelevant in the rescue cases because knowledge or agreement to the risk is merely a factor to be taken into account in deciding whether the defendant owed a duty of care to the plaintiff, and once it is held that the defendant ought to have foreseen the possibility of rescue, it follows almost as a matter of course, that a duty is owed. On the other view, the maxim may be relevant but is not available as a defence because a rescuer is, by definition, acting under the compulsion of events, and is therefore acting under some sort of pressure.⁵⁹

⁵⁸ *Ibid.*, at p. 1012.

⁵⁹ There is, however, one type of case in which the Asquith-Diplock analysis may be of more than academic interest, and that is where the employer is himself in "breach", not of a statutory duty, but of a common law duty. This point is considered further below.

With these preliminary remarks, we may turn to consider what guidance is afforded by the speeches in the *Shatwell* case with regard to the availability of the defence to an action for common law negligence. At the outset there appears to be a difference, certainly of emphasis, and perhaps more, between Lord Reid on the one hand and the other members of the House on the other. Lord Hodson, Lord Pearce and Lord Donovan all appear to take the clear view that "the maxim is based on agreement",⁶⁰ and that the question to be determined was whether George and James had impliedly agreed not to sue each other for any injury they might suffer if an injury occurred.⁶¹ Although nobody suggested that a contract in the strict sense had to be shown—and Lord Hodson expressly denied it⁶²—Lord Pearce adopted a contractual approach in justifying his inference of an agreement by calling in aid the "officious bystander".⁶³ But interspersed with these remarks about "agreement" there are observations to the effect that there was "a voluntary assumption of risk".⁶⁴ These two methods of approach are not entirely the same. The facts in this case were peculiarly susceptible of interpretation in terms of agreement. This would not be so where there was no concerted action between the plaintiff and the other party whose negligence is in question. For example, where a master is in breach of his own common law duty of care in respect of the safety of the premises where the plaintiff is working, but the plaintiff deliberately and without any pressure (for instance because he goes on to a part of the premises where it is not necessary for him to go) "takes a chance" and incurs injury, it would be impossible to infer agreement in the consensual sense. It might, of course, still be said that the plaintiff had "agreed" to accept the risk, but this would be no more than saying that he had assumed it. If the maxim is indeed based on agreement in its normal sense it is by no means clear whether such a case would fall within it, but despite the emphasis on an agreement in the speeches it is not thought that their lordships were intending to exclude the maxim altogether where there is no agreement.

⁶⁰ Per Lord Hodson, *supra*, footnote 1, at p. 1009.

⁶¹ See Lord Pearce, *ibid.*, at p. 1013 and Lord Donovan, at p. 1016.

⁶² *Ibid.*, at p. 1009.

⁶³ *Ibid.*, at p. 1013. Lord Pearce's contractual approach perhaps explains the curious parenthetical observation on the same page that the employers were "vicariously entitled" to the benefit of the "implied term" in the agreement between George and James. It looks as though Lord Pearce was troubled by the thought that the decision was enabling a third party to rely on a term in a contract. But the true view is surely the simpler one that if the servant is not liable the master cannot be vicariously liable.

⁶⁴ Lord Pearce, *ibid.*, at p. 1013, and Lord Donovan, at p. 1016.

It is, however, clear that in the *Shatwell* case the maxim was based on agreement, and on this a number of comments may be made. First, it is to be observed that the agreement was one between George and James. Had the agreement been an agreement between George and the employers to absolve James from his common law duty of care it would have been void under section 1(3) of the Law Reform (Personal Injuries) Act, 1948,⁶⁵ which, of course, abolished the doctrine of common employment.⁶⁶ Had the agreement been an agreement between George and his employers to absolve *them* from *their* duty of care it is not clear what the position would have been. As will be seen below, although it is clear that an employee cannot absolve his employer from his statutory duties, it is not so clear whether the same applies to common law duties. Lord Reid leaves the point open⁶⁷ but the other members of the House confined their consideration of this point entirely to cases of breach of statutory duty. It may be regarded as anomalous if the master can contract out of liability for his own negligence, but cannot (by statute) contract out of liability for the negligence of his employees, but it would surely not be so anomalous if (as Lord Reid suggested might be the case) the employee made an express agreement to work under an unsafe system at a higher wage. It is precisely in this sort of case that what has here been called the Asquith-Diplock approach may point the right conclusion. If the agreement is treated merely as a factor to be taken into account in determining what is the extent of the employer's duty to the employee on the facts of a particular case, it seems neither unreasonable nor contrary to principle to hold that such an agreement may exonerate an employer from a liability which would otherwise rest on him.

If we now turn again to the facts of the *Shatwell* case it will be seen that, in so far as there was an "agreement" at all it was not merely an agreement to assume a risk. It was an agreement to the very act of negligence which was alleged to found the plaintiff's claim. James' negligence consisted of agreeing with George as to the dangerous method of testing the detonator. This, it is thought, was the vital factor in the case, and it is this which distinguishes the case from cases like *Dann v. Hamilton*⁶⁸ on the one hand, and the rescue cases on the other. In the *Dann v. Hamilton* type of case

⁶⁵ 11 & 12 Geo. 6, c. 41.

⁶⁶ Assuming that the agreement would be "collateral" to the contract of service, as it surely would be.

⁶⁷ *Supra*, footnote 1, at p. 1005.

⁶⁸ *Supra*, footnote 44.

the plaintiff has merely agreed to a state of affairs or to conduct which may render the commission of an act of negligence more probable than it would otherwise be. As Asquith J. pointed out in that case this would not be a good ground for inferring that the plaintiff has in effect licenced the defendant to be negligent, and it is an agreement to accept the risk of the defendant's negligence which must be shown, and not merely an agreement to accept the risk of an accident.⁶⁹ In the rescue cases, on the other hand, the defendant's act of negligence has already been committed when the plaintiff incurs the risk, and again it is wrong to infer an agreement, because the plaintiff acts under the compulsion of events. His only choice is to act or not to act. He cannot act without running the risk of the dangers created by the defendant's negligence. Where, however, as in *Shatwell*, the plaintiff has agreed to the very act which he alleges to found a cause of action in negligence, it is surely right and reasonable to hold that the plea of *volenti non fit injuria* succeeds. There is no need to draw inferences of agreement or assent in such circumstances, as would be necessary where the plaintiff has not actually agreed to the very act of negligence in question; and it is, surely, the great difficulty of drawing these inferences which make the maxim such a dubious defence where this is not the case, for it is by no means clear whether the inference of assent is intended to be a genuine inference of fact from the circumstances or is merely a legal consequence which follows from certain facts as was, for example, the doctrine of common employment. If the agreement necessary to found the defence is a genuine agreement then it may indeed be objected that to draw the line at the point where the plaintiff actually agrees to the immediate act of negligence causing the injury is to draw an arbitrary line. But even if this is correct, the line may well be a useful one in that it indicates that overwhelming evidence of a genuine agreement may be needed where the plaintiff has not agreed to the immediate act of negligence. If, on the other hand, the agreement needed to found the defence is merely a legal fiction justifying the application of the maxim in given circumstances, then it is thought that this line is the right one to draw.

Lord Reid, as suggested above, appears to take a different view as to the basis of the defence. Although his speech is not perhaps as clear as one could have wished, it seems that he bases the defence—at any rate on the facts of the case—not on agreement,

⁶⁹ *Kelly v. Farrans Ltd.*, [1954] N.I. 41.

but on a deliberate act committed with full knowledge of the risk. Thus he says:⁷⁰

If we adopt the inaccurate habit of using the word "negligence" to denote a deliberate act done with full knowledge of the risk, it is not surprising that we sometimes get into difficulties. I think that most people would say, without stopping to think of the reason, that there is a world of difference between two fellow-servants collaborating carelessly, so that the acts of both contribute to cause injury to one of them, and two fellow-servants combining to disobey an order deliberately, though they know the risk involved. It seems reasonable that the injured man should recover some compensation in the former case, but not in the latter. If the law treats both as merely cases of negligence, it cannot draw a distinction. In my view the law does and should draw a distinction. In the first case, only the partial defence of contributory negligence is available. In the second *volenti non fit injuria* is a complete defence if the employer is not himself at fault and is only liable vicariously for the acts of the fellow-servant.

It seems that Lord Reid is here saying that the plaintiff's conduct was not merely negligent but was also reckless, and that it is on this ground that the defence succeeds. At first sight there seems much to be said for this point of view. For one thing it meets the objection to the "agreement" theory that in some cases it may simply be impossible to infer anything in the nature of an agreement, for instance because the employer is ignorant of the dangers and no fellow servant is involved. For another thing, it is clear that if a plaintiff were to injure himself deliberately he would have no remedy notwithstanding that there may have been a breach of duty by some other person. And since recklessness is already identified with intentional conduct in so many legal fields it does not seem illogical to say that recklessness should similarly debar a plaintiff of all remedy.

The difficulty about this line of approach is that one suspects that the reason why intentional self-injury would be held to deprive a plaintiff of his remedy is a causal one, in other words it would be held that the plaintiff was the sole cause of his injury. This was certainly Ashworth J.'s approach in *Rushton v. Turner Brothers Asbestos Co. Ltd.*⁷¹ which was a clear case of recklessness. In this case the plaintiff had injured himself by attempting to clean a machine without stopping it—he put his hand right into the machine. Although the learned judge held that the defendants were in breach of statutory duty in that they failed to fence a dangerous part of the machinery, he dismissed the plaintiff's case

⁷⁰ *Supra*, footnote 1, at pp. 1003-1004.

⁷¹ *Supra*, footnote 55.

on the ground that the plaintiff's act was the sole cause of his injury. True he did not use the word "recklessness" but he said of the plaintiff's act that "it was a crazy thing to do", which would seem tantamount to a finding of recklessness. Now if this is the correct approach on such facts it is not easy to see why recklessness should have totally deprived the plaintiff of all remedy in the *Shatwell* case, once the causal issue was determined in his favour, as of course it was.

There is another reason why it is thought that this line of approach is not altogether a satisfactory one. Until now, with the defence of *volenti non fit injuria* so rarely applied, it has been possible for the courts to treat the causation approach and the contributory negligence approach in pretty much the same way. The courts can approach the issue as a matter of degree and in suitable cases may award the plaintiff as little as ten per cent⁷² or nothing at all.⁷³ But whichever approach is adopted the court can have regard to the gravity of the employer's breach of duty. The more serious the employer's own breach of duty the less a court is likely to scale down the plaintiff's damages to nominal proportions. And, so long as the defence of *volenti non fit injuria* is based on agreement it is possible to take into account the seriousness of the employer's breach of duty in considering that plea as well.⁷⁴ But it is not easy to see how this can be done if the defence is based on recklessness. Recklessness in its subjective sense (which is surely the only sense which can be relevant here) has been defined as "the conscious taking of an unjustified risk".⁷⁵ Whether the plaintiff has consciously taken an unjustified risk would not seem to depend on whether the employer's breach of duty is of a minor, technical nature, or whether it is one of great gravity. It may finally be observed that there are a number of Court of Appeal decisions awarding substantially reduced damages to plaintiffs who would appear to have been clearly reckless.⁷⁶

IV. *Volenti Non Fit Injuria* as a Defence to a Breach of Statutory Duty.

It is perhaps in relation to *volenti non fit injuria* as a defence to an action for breach of statutory duty that the decision in the *Shatwell*

⁷² See, e.g., *Hodkinson v. Henry Wallwork & Co. Ltd.*, [1955] 3 All E.R. 236 (C.A.).

⁷³ *Rushion v. Turner Brothers Asbestos Co. Ltd.*, *supra*, footnote 55.

⁷⁴ *Kelly v. Farrans*, *supra*, footnote 69.

⁷⁵ Cross & Jones, *Introduction to Criminal Law* (5th ed. 1964), p. 41.

⁷⁶ See, e.g., *Williams v. Sykes & Harrison Ltd.*, *supra*, footnote 39 (plaintiff's conduct "foolhardy and reckless") and *Hodkinson v. Henry Wallwork & Co. Ltd.*, *supra*, footnote 72 (plaintiff took an "amazing risk").

case most clearly breaks new ground. For until this decision it was possible to assert with some confidence that the maxim could never provide a defence to such an action. This was generally believed to have been decided in *Baddeley v. Granville*,⁷⁷ a decision of the Divisional Court, and *Wheeler v. New Merton Board Mills Ltd.*,⁷⁸ where the Court of Appeal followed the Divisional Court, although with a noticeable lack of enthusiasm. The House unanimously held that although these cases were rightly decided in that in both of them the employers were themselves in breach of statutory duty, they did not apply where the employer was not so in breach, and was only liable (if at all) for the breach by an employee of statutory duties cast directly on him.

It must be remembered that the House decided this part of the case on the assumption that an employer is vicariously liable for a breach of a statutory duty cast directly on an employee and committed by the employee in the course of his employment. As has been stated above, this point is still an open one at common law, and the House did not find it necessary to resolve the issue.

It is indeed strange that (so far as can be seen from the reports in the *All England Law Reports* and the *Weekly Law Reports*) no mention was made in the speeches or in the argument of section 159 of the Mines and Quarries Act, 1954,⁷⁹ which was set out above, and which seems to have been drafted to settle this very controversy in relation to mines and quarries. The marginal note to the section reads, "Liability of owners for breaches of statutory duty by their servants", and although it is not perhaps the easiest of provisions to interpret, it seems clear enough that its purpose was to resolve the doubt created by the cases referred to above in favour of the view that the employer is vicariously liable for his employee's breach of statutory duty. Since the decision in *Shatwell* did not proceed on this ground it might be thought that no harm has been done. But it is by no means easy to reconcile the reasoning of their lordships with this provision. Since the House held that the employers would have been liable to the plaintiff had they been in breach of their own statutory duty it looks very much as though the employers were "absolved from liability to pay damages in respect of a contravention . . . by a person employed by (them) of . . . Regulations . . . by reason only that the provision contravened was one which expressly . . . prohibited that person . . . from doing a specified act".⁸⁰ In other words one would have thought it

⁷⁷ *Supra*, footnote 4.

⁷⁸ *Supra*, footnote 8.

⁷⁹ *Supra*, footnote 5.

⁸⁰ *Supra*, p. 611.

highly arguable that this provision not only means that the employer is to be liable for a breach of statutory duty by an employee, but is to be treated as though he were himself in breach of the duty. However, it may be that the correct interpretation is that the employer is not to be absolved from liability merely because the duty which has been broken was the employee's and not his own, but that if there is any other ground (for instance, *volenti non fit injuria*) on which the employer may be absolved from liability he is not to lose this defence even though it would not have been open to him had the duty been his. It will no doubt be recalled that a similar difficulty over the meaning of the words "by reason only" in section 3 of the Trades Disputes Act, 1906,⁸¹ was resolved somewhat after this fashion in *Rookes v. Barnard*.⁸²

There is one important point in relation to the maxim as a defence to a breach of statutory duty on which their lordships did not speak with one voice. Lord Pearce (and Lord Radcliffe agreed with him on this point) makes it quite clear that the maxim fails as a defence to an action for breach of statutory duty not only where the employer is himself in breach of his duties, but also where another workman of superior status, or having a "special and different duty of care" is in breach of his duties.⁸³ The only case, in his view, where the maxim is a defence to an action of this kind is where the duty is cast on another workman of equal status to the plaintiff and the duty is of a similar kind to those owed by the plaintiff himself. (This is always assuming, of course, that an employer is ever vicariously liable for an employee's breach of statutory duty.) The other members of the House did not expressly consider this possibility, although their speeches emphasize the fact that the employers were not themselves in any way at fault, and it may be that this suggests a conclusion contrary to that arrived at by Lord Pearce.⁸⁴

There is one other difficulty about the reasoning of their lordships which is only partially answered by Lord Donovan. It arises from the fact that the House was insistent that the action should be looked at as though it were an action brought by George against James,⁸⁵ but at the same time equally insistent that I.C.I. were totally free from fault. It appears that Lord Donovan was the only one of their lordships to see—or at any rate to attempt to answer

⁸¹ 6 Edw. 7, c. 47.

⁸² [1964] 2 W.L.R. 269.

⁸³ *Supra*, footnote 1, at p. 1013.

⁸⁴ See, e.g., Lord Donovan, *ibid.*, at p. 1016. But Lord Reid expressly reserved the point—see p. 1004.

⁸⁵ See, e.g., Lord Reid, *ibid.*, at p. 1002, Lord Hodson, at p. 1009 and Lord Donovan, at p. 1016.

—the objection that these two separate lines of approach were not entirely consistent with each other. If the employers would have been held liable had they been in breach of their duties, why was it that James would not have been liable had he been the defendant even though he was in breach of his duty? Lord Donovan's answer was that this was simply a matter of "public policy". It would be contrary to public policy if an employer could "contract out" of duties imposed on him by Parliament for the safety of his workmen, but it was not contrary to public policy for one workman to "contract out" of duties imposed by Parliament on him for the safety of his fellow workers.⁸⁶ This is because the employer and employee are of different bargaining strength, whereas workman and workman are of equal bargaining strength.

No doubt if the term "public policy" is used in the widest sense as indicating those considerations of policy which lead a court to a particular conclusion, this explanation is a perfectly satisfactory one. It is, for example, "public policy" in this wide sense, which has led the courts to reject the maxim as a defence in employer-employee cases where there has been economic pressure. But the term "public policy", especially in relation to agreements—and we have seen that most of their lordships based the maxim on agreement—is usually used in a more technical sense. It is usually used to explain why certain types of agreement are held to be illegal, and there is no doubt that another reason why an agreement may be illegal is that it involves the commission of a criminal offence. It would seem that counsel for the respondent must have argued that, for this reason, the agreement between George and James was just as much illegal as an agreement by an employee to absolve his employer from his own statutory duties would have been. Lord Reid answers this in the last paragraph of his speech⁸⁷ by saying that he can "find no reason at all why the fact that these two brothers agreed to commit an offence by contravening a statutory provision imposed on them . . . should affect the application of the principle *volenti non fit injuria*".

It would seem therefore that the Law Lords were not using the term "public policy" in its technical sense, and this is indeed confirmed by other passages in the speeches.⁸⁸ This is not an entirely academic question because in cases where the employer is *prima facie* in breach not of a statutory duty, but of his common law duty of care, there can be no question of an agreement to absolve

⁸⁶ *Ibid.*, at p. 1016.

⁸⁷ *Ibid.*, at p. 1005.

⁸⁸ *Ibid.*, at p. 1007. Lord Radcliffe talks, perhaps significantly, of "public advantage", and cf. Lord Hodson, at p. 1010.

the employer of his duty being contrary to public policy in the technical sense. Breach of a common law duty of care does not usually involve the commission of an offence, and therefore an agreement to waive the duty would not be an illegal agreement. If, however, their lordships merely meant that an agreement to waive a statutory duty was contrary to public policy in the sense that it was unjust for an employer to extract such an agreement by virtue of his superior bargaining power, the same reasoning may well apply where the duty is a common law duty. The significance of this possibility becoming a reality might be incalculable for it would be a completely novel exercise of the power, thought by many to be dead,⁸⁹ of striking down a provision in an agreement on grounds of public policy even though the case does not fall into any of the existing well-recognised heads of public policy. If a provision in an agreement can be declared contrary to public policy and therefore void on the ground that the parties are not of equal bargaining power, have we not here a weapon which many have been searching for in order to combat the growing use of exemption clauses and the like in standard form contracts? Is it possible that *I.C.I. Ltd. v. Shatwell* may one day be cited as a leading authority in the law of contract as well as tort?

⁸⁹ See, e.g., Lord Wright in *Fender v. Mildmay*, [1938] A.C. 1, at p. 40.