1981 May 12

[L. LOIZOU, HADJIANASTASSIOU AND MALACHTOS, JJ.]

COVOTSOS TEXTILES LTD.,

Appellants-Defendants,

v.

NIKI SERGHIOU,

Respondent-Plaintiff.

(*Civil Appeal No.* 5257).

Negligence—Contributory negligence—Apportionment of liability —Principles on which Court of Appeal interferes—Common sense approach—Master and servant—Installation of factory machines—Labourer passing through narrow space between machines, her dress caught in the sprocket of a machine and injuring her leg—No warning of the danger—And never told not to pass—Though she ought to have realized the danger, trial Court's apportionment of liability, 50% on each party, sustained.

Volenti non fit injuria—Master and servant—Principles applicable.

Damages—General damages—Personals injuries—18 years old weaver sustaining serious injuries on right leg, causing severe avulsion of the femoral region with exsanguinating haemorrhage—Permanent insufficiency of the artery with impairment of her walking—Permanent foot drop and post phlebitis—Unable to work standing on her foot—Serious pain and earning capacity diminished—Possibility of amputation of leg remote—Award of £7,000 upheld —Court entitled to award global sum without apportioning it under various heads.

The respondent-plaintiff was employed by the appellants-defendants as a weaver at a weekly salary of £4.— At the material time the appellants were installing the weaving machines of their factory. The installation was carried out by two Swiss engineers and some local engineers. The respondent and a fellow-employee had instructions to follow the installation of the machines; and they were watching the installation from the middle corridor of the premises. In order to get there

it was necessary to pass from the nearest point through the space between the machines. There was no chain on the sprocket of the machines and no cover; and there was no fencing or barrier preventing them from passing through the machines. When respondent proceeded to pass through the narrow passage in order to watch the movement of the machines, as she had instructions to do so, her dress was caught in the sprocket of the weaving machines, it was rolled on to it and as a result her leg was severely injured. 5

In an action by the respondent against the employers for damages the trial Court found that the respondent was not warned of the danger and she was not told not to pass through the passage where the accident occurred; and after taking into consideration the age of the respondent—she was 18—her inexperience, the lack of any warning or instructions from the appellant company and the fact that she ought to have realized the danger and should not have passed from there, found that both parties were equally to blame for the accident. The trial Court dealt, also, with the defence of volenti non fit injuria and rejected it. Liability was decided on the basis of common law negligence because the company's premises were not operating as a factory at the time. 10 15 20

The respondent sustained very serious injuries on her right leg. This caused severe avulsion of the femoral region with exsanguinating haemorrhage due to laceration of the artery and vein. At the time of the trial she had permanent insufficiency of the artery with impairment of her walking. She also had permanent foot drop supported by a caliper and a continuous drainage from the wound and post phlebitis. She was unable to work standing on her foot. Furthermore, she sustained serious pain and her earning capacity was diminished. However, the possibility of an amputation of her leg was remote. 25 30

The trial Court awarded to the respondent the sum of £7,000 as general damages on a full liability basis.

Upon appeal by the defendants it was contended: 35

(a) That the trial Court misdirected itself on the Law and failed to apply the Law properly to the facts of this case in holding that the defence of volenti non fit injuria was not available to the appellants;

(b) That the conclusion of the trial Court that the respondent's contributory negligence was only 50% was unreasonable having regard to the totality of the evidence and/or to the credible evidence which was before the Court.

(c) That the amount of £7,000 damages ascribed by the trial Court as general damages was manifestly excessive having regard to the injuries of the respondent and the medical evidence before the trial Court.

The respondent cross-appealed contending that the trial Court erred in finding that she contributed to the accident to the extent of 50 per cent having regard to the evidence adduced and that the amount of £7,000 of general damages was unreasonably low, having regard to the injuries sustained and/or the incapacity suffered by the respondent.

Held, (1) (after stating the principles governing the defence of volenti non fit injuria—vide pp. 488-96 post) that the doctrine of volenti non fit injuria cannot afford a defence to the claim of the appellants because that defence is available only when the respondent freely and voluntarily, being an employee, with full knowledge of the nature and extent of the risk impliedly agreed to incur it, and to waive any claim for injury; that, on the contrary, the trial Court has found that she has not impliedly agreed to incur it and to waive any claim for injury; that the defence of volenti non fit injuria cannot be invoked by the appellants-defendants in the present case, because knowledge of the risk is not enough; nor is a willingness to take the risk of injury; that nothing will suffice short of an agreement to waive any claim for negligence; that the respondent must agree, expressly or impliedly to waive any claim for any injury that may befall her due to the lack of reasonable care by the employee at the time; or more accurately, to the failure of the appellant to measure up to the standard of care that the common law requires of him; that the maxim, in the absence of express contract, had no application to negligence simpliciter where the duty of care is based solely on proximity of neighourship; accordingly contention (a) should fail.

(2) (After stating the Law governing contributory negligence and apportionment of liability and the principles on which the Court of Appeal interferes with apportionment of liability

made by trial Courts—vide pp. 497–511 *post*) that once the trial Court had made an apportionment, having taken all factors into account, this Court ought not to disturb it (see The "*Koningin Juliana*" [1975] 2 Lloyds Law Reports 111); that in the particular circumstances of this case and adopting the common sense approach (see *Davies* v. *Swan Motor Co.* (*Swansea*) *Ltd.* [1949] 1 All E.R. 620) this Court has decided to uphold the trial Court's apportionment of liability, viz., 50 per cent to the respondent and 50 per cent to the appellant, once both the respondent and the appellant were equally to blame for the faults which the trial Court had found, and because it became a matter of appreciation to decide how they should be weighed so as to arrive at a just apportionment of blame; accordingly contention (b) should fail.

(3) That this Court is not convinced either that the Court acted upon some wrong principle of law or that the amount awarded was so very high as to make it, in the judgment of this Court, an erroneous estimate of the damages to which the respondent is entitled; that, indeed, this Court would not be justified in disturbing the finding of the trial Court as to the amount of damages, because after taking all the circumstances into consideration, including the injuries of the respondent and the medical evidence before the trial Court, the amount of £7,000 as general damages on the basis of full liability is not on the high side; accordingly contention (c) should, also, fail.

Held, further, that in spite of the fact that the trial Court, in assessing general damages has not specified the heads under which general damages were awarded, nevertheless, in awarding a global sum as general damages without apportioning it under the various heads of damages, the Court was entitled to do so.

Held, with regard to the cross-appeal, that in the particular circumstances of this case, the trial Court correctly apportioned the liability of both parties and correctly reached the conclusion that the amount of £7,000 was the proper one in the light of the findings of fact made by the trial Court; accordingly the cross-appeal should fail.

Appeal and cross-appeal dismissed.

Cases referred to:

Thomas v. *Quartermaine* [1887] 18 Q.B.D. 685 at p. 696;

Yarmouth v. *France*, 19 Q.B.D. 647 at p. 659;

Smith v. *Baker and Sons* [1891] A.C. 325 at p. 337;

Thrussell v. *Handyside* [1888] 20 Q.B.D. 359;

Membery v. *Great Western Rail Co.* [1889] 14 App. Cas. 179 (H.L.);

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Baker v. *James* [1921] 2 K.B. 674 at p. 683;

Williams v. *Birmingham Battery and Metal Co.* [1899] 2 Q.B. 338;

Osborne v. *London and North Western Rail Co.* [1888] 21 Q.B.D. 220 at pp. 223–224;

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Wing v. *London General Omnibus Co. Ltd.* [1909] 2 K.B. 652 at p. 667;

Bowater v. *Rowley Regis Corp.* [1944] K.B. 476;

London Graving Dock Co. Ltd. v. *Horton* [1951] A.C. 737 at pp. 744, 783;

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Haynes v. *Harwood* [1935] 1 K.B. 146;

Nettleship v. *Weston* [1971] 3 All E.R. 581 at p. 587;

Bennett v. *Tugwell* (an infant) [1971] 2 All E.R. 248 at pp. 252–253;

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Burnett v. *British Waterways Board* [1973] 2 All E.R. 631 at pp. 635–636;

Vassilico Cement Works v. *Stavrou* (1978) 1 C.L.R. 389 at p. 401;

Whitehouse v. *Jordan and Another* [1981] 1 All E.R. 267;

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British Fame (Owners) v. *Macgregor (Owners) The Macgregor* [1943] 1 All E.R. 33 at p. 34;

The Umtali [1938] 160 L.T. 114;

Christodoulou v. *Angeli* (1968) 1 C.L.R. 338 at p. 345;

Brown v. *Thompson* [1968] 1 W.L.R. 1003:

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Christodoulou v. *Menicou and Others* (1966) 1 C.L.R. 17;

Caswell v. *Powell Duffryn Associated Collieries Ltd.* [1939] 3 All E.R. 722 at pp. 730–731;

The "Koningin Juliana" [1975] 2 Lloyds Law Reports 111.

Appeal.

Appeal by defendants and cross-appeal by the plaintiff against the judgment of the District Court of Limassol (Stylianides, P.D.C. and Hadjitsangaris S.D.J.) dated the 19th November, 1973 (Action No. 1293/71) whereby the defendants were adjudged to pay to the plaintiff the sum of £3,832.—as damages for personal injuries sustained by her in the course of her employment with the defendant company.

G. Cacoyannis, for the appellants.

B.L. Vassiliades, for the respondent.

Cur. adv. vult.

L. LOIZOU J. The judgment of the Court will be delivered by Mr. Justice Hadjianastassiou.

HADJIANASTASSIOU J.: This is an appeal against the judgment of the Full Court of Limassol in Action No. 1293/71 whereby the appellants were adjudged to pay to the respondent the sum of £3,832 and costs, as damages for personal injuries which the respondent had sustained in an accident in the course of her employment with the appellant company.

1. *THE FACTS*:

The plaintiff, Niki Serghiou of Pelendri, on 11th January, 1971, was employed by the defendants Covotsos Textiles Ltd. as a weaver at a weekly salary of £4. She was 18 years of age and was trained as a hand weaver in Greece together with a certain Eleni Sazou a co-villager of hers for a period of two years.

The installation of the machines in the company's factory started on 11th January, 1971, and was carried out by two Swiss engineers, who arrived in Cyprus for that purpose, and some local engineers. The work continued until the 15th when the plaintiff was involved in an accident because her dress was caught in the sprocket of one of the machines when she was passing through the narrow space, and as a result of that accident her leg was severely injured.

According to Eleni Sazou, who was the main witness regarding the accident, they had instructions to work in the department

in which the engineers were installing the weaving machines. The foreman, a certain Taxiarchos Papas, gave them instructions to watch the installation of the machines, and the work which was carried out was by the two engineers as well as by a certain Sofoclis and the foreman. They were watching the installation of the weaving machines from the middle corridor, and in order to get there it was necessary to pass from the nearest point through the space between the machines. There was no chain on the sprocket and no cover. There was no fencing or barrier preventing them from passing through the machines.

The last machine marked "Θ" was put into operation one hour before lunch time and it was found operating during and after lunch time. On their return after lunch, they waited for the return of the Swiss engineers and the two foremen. When finally they arrived they proceeded to pass through the narrow passage in order to watch the movements of the machine, as they had instructions to do so. Both were wearing dresses and when she passed through that narrow passage the plaintiff followed her but unfortunately her dress was caught in the sprocket of the weaving machine and it was rolled on to it. The plaintiff was screaming from pain because her leg was injured. Fortunately a certain Sofoclis managed to switch the machine off. In spite of the fact that there was no fencing, she added that everybody was passing between the machines and nobody told them or warned them of the danger in passing between those machines. Later on after the accident they were given instructions and were also supplied with trousers and pullovers, and fences were also placed near the machines and a chain was placed on the sprocket.

In a long and exhaustive cross examination by counsel for the defence, the witness remained adamant and insisted (to use the words of the trial Court) that she and the plaintiff were told to watch the installation of the weaving machines as well as to fetch any spare parts the engineers would need. Among their duties she added was also the sweeping up in the morning, the washing of the floor including the dust which was falling from the walls during the installation of the air conditioning. After the accident they gave a statement to P.C. Georghios Odysseos on the 19th January, 1971, regarding the accident. In going through this statement one can see that this officer

had recorded at the end that the statement was read to her, and as it was correct, she signed it in his presence.

The trial Court, quite rightly in our view, attached a lot of importance to the document in question, because had the Court accepted and/or believed such a statement once it contained such damning statements regarding the negligence of the plaintiff, the case might have been disposed by the Court without having to examine anything else. Indeed in going through some passages of that statement, where it was conceded that Papas the mechanic warned them many times before the accident not to pass from there because it was dangerous; and that on the very day they passed from there because they were absent minded, and failed to think of the danger in doing so, we would reiterate, those were damning statements against the plaintiff if believed by the Court. Finally, this statement continues as follows: "For anything done I am to blame as well as Niki, the plaintiff, and nobody else. There was no protective fence of the trochalia and not a written notice that there was danger but they told us on a number of times not to pass from there".

This witness admitted also that she and the plaintiff could have gone around the machine and not to pass from the area where the accident occurred, but in re-examination she told the Court that the police constable did not write down what she had told him. He was asking questions she added and was answering by a mere yes or no. She conceded, however, that her statement was read over to her but she added she did not know that the case would come to Court, and that she was not asked to agree with what D.W.1. wrote down.

The version of the plaintiff was that just before lunch time she and her friend Sazou passed by that narrow space whilst the machine was in motion and in the presence of the mechanics, and nobody told them anything about passing near the machines or indeed warned them of any danger either at that time or earlier. When they returned from lunch she admitted again that they passed in between the machine which was in motion, and from another one in order to reach point 'D' on *exhibit* 7. On the other hand, she said that all the mechanics passed from there, as well as, her friend Sazou safely, and she was the only unlucky one. In attempting to pass from there she felt something pulling her back. She looked back and saw that her

dress was caught in the sprocket of the machine, and as a result of that, her leg was injured and she was calling out for help. One of the mechanics managed to switch off the machine.

The plaintiff alleged in the pleadings, and in Court that as 5 a result of that accident her leg became quite useless, and that she could neither walk nor stand on it. Pausing here for a moment, there is no doubt that the allegation of the plaintiff regarding the injuries on her leg was accepted by the Court as being very serious injuries. The plaintiff further stated 10 that the dyeing room and the reeling room of the factory were operating at the time of the accident as well. In cross-examination she admitted that in starting work at the factory of the defendant company, she did not know anything about the weaving machines as she was not a mechanic but, she maintained 15 that by watching the installation of those machines she would have been better equipped to handle the machines, and that she would know if anything went wrong with them. Indeed she repeated her statement that she and other employees were passing in between the machines at the scene of the accident 20 frequently prior to her accident, and she did not consider such action dangerous either when the machine was not in motion or when in motion. After she was injured she added that she lost consciousness and when she recovered she found herself in the hospital. On 19th January, 1971, whilst still at the 25 hospital she gave a statement to D.W.1. (See *exhibit* 10). She denied however that the statement was read over to her and alleged that questions only were put to her by the police constable.

There is no doubt that because of her own statement she 30 gave the opportunity to counsel for the defence to cross-examine her at length but she denied the statement that they have placed eight weaving machines on the same side and the one from the other was in a very small distance; and that there was no space for a person to pass. She further denied as saying "we instead 35 of going round in order to reach to the other side we thought to pass from the place of the trochalia". Finally she added that she realized now that it was dangerous to pass in between the machine which was in operation because her dress was caught and she was injured. She further said that she had no personal 40 complaint against Mr. Covotsos but her only complaint was

that she was not duly warned of the danger. Indeed she denied that she was warned by D.W.3 two or three times of the danger in passing through.

In support of her statement Christakis Ioannou, one of the electricians working at the factory, said that he was working in the very same room where the accident occurred. He saw the plaintiff and her friend Sazou there but he added he was not sure what they were doing there although he thought that they were helping the mechanics. He further said that there was work in the reeling room and that he did not hear anyone giving instructions to the plaintiff and her friend Sazou as to from where they should pass.

As we said earlier the plaintiff's allegation was that the accident was due to the negligence and/or the breach of statutory duty of the defendant company, their servants and/or their agents. On the contrary Athanassios Covotsos, the Managing Director of the defendant company, denied that the accident was due to the negligence of the servants and/or that the company was in breach of a statutory duty. It appears that the defendant company was registered in 1969 and the factory finished at about the end of 1970. The machines started being installed since August 1970, and those machines were imported from Switzerland, and West Germany, and the manufacturers were responsible for their installation and their running in. By 'running in' he explained that he meant to complete the installation until the moment the machines were operated for production purposes. According to D.W.2 Mr. Covotsos although the machines in the dyeing and winding departments were installed, the air conditioning was waiting to be installed as it was indispensable for the functioning of the factory. The weaving department, he added, where the accident occurred was the last in line to be finished. Indeed he said without the weaving department the factory could not have any production at all and the other two sections were preparatory for raw materials. The first machine to be started was the one marked "Θ" on *exhibit* 7, and said that it was not operational as the reed, the shuttle, the harnesses and the harns were not on. The sprocket was running without the chain which was installed in March 1971. The chain connects the lower part with the upper part of the machine which makes the design of the weaving, but without the chain there can only be production of plain cloth.

He also conceded that the various fences were not constructed on the day of the accident. He further claimed that there was no rule in the factory for female workers to wear dresses or trousers but he admitted that on the inauguration ceremony 5 they were wearing grey trousers and orange blouses for better presentation of the factory. Speaking also about the plaintiff and her friend Sazou, he said that he employed them as they were experienced in weaving in Greece. But he added until the inauguration date they were cleaning the machines when idle, 10 sweeping the floors, conveying woods and later they started preparing the equipment of the machines, that is, they were passing the threads of the warp beems through the shafts and through the reed before they were placed in the machine. Finally he said that until the date of the accident the main job of the 15 plaintiff was cleaning up and when he was informed of her accident at 3.00 p.m. he visited the hospital immediately to see her.

In cross-examination he said that the factory was not insured at the time of the accident, and added that he was sorry from 20 the humanitarian point of view but he said he was not worried as he, prima facie, thought that he was not to be blamed for this accident.

Taxiarchos Demetriou Papas, commonly known as Michalis, in giving evidence said that he started work with the defendant 25 company in January, 1970 as a mechanic and was the foreman in the weaving department on the date of the accident. The plaintiff and her friend Sazou, were under his supervision and their job was to clean the said weaving department, and not to follow the installation of the machines, as such a course had 30 nothing to do with them. Indeed he added, before the lower part of the machine marked "Θ" on *exhibit* 7 was put in motion on the date of the accident, he informed both not to approach the machine as there were uncovered parts which were dangerous. This warning was given to the two employees before, as he 35 saw them on the previous days passing in between the machines. The Swiss mechanics, he added, also shouted to them not to approach the machines. He also added that he did not see the two girls passing from the area of the accident in the morning and he did not remember if the machine marked "Θ" on *exhibit* 40 7 was left in motion when they all went for lunch. He further said that even when the machine was in motion he and the other

mechanics were passing from near the parts which were in motion as they had to check them. He admitted that he did not see the accident but he saw the plaintiff after the accident and her clothes were wrapped round the sprocket. He took a knife and freed her. In cross-examination he admitted that the plaintiff and her friend were engaged to work for the purpose of supervising and working on the weaving machines. He considered it sensible for a person working on the machines to know about them after they were installed but not earlier. Their job was merely to sweep the floors and not to approach the machines during the installation. Finally he admitted that he made a statement to the constable D.W.1 and in making that statement he said that "I apostasis apo tin trochallia ine schedon 15-20 pontous pou schedon then hori no perasie atomon". The Court dealing with that part of the statement of this witness said it was significant that those words were alleged to have been uttered to D.W.1, and P.W.2 in almost the same way; D.W.3 said that the way the machines were not fenced, was dangerous for the two girls to approach them and their former experience on wooden weaving machines was inadequate to give them any experience on the sofisticated machines.

The trial Court before proceeding to make their findings of fact proceeded to say a few words about the witnesses who testified before them. With regard to D.W.1, the police constable, the Court said: "We regret to say (that) he did not impress us at all and regret he was acting on behalf of the State in obtaining the statements he produced. Whilst on this witness, we have to comment on the statements. The contents and the wording of both statements are almost identical. Though taken separately, both these young girls were unnecessarily apologetic, and for no reasons they put all the blame on themselves and did their best to exonerate their employer from liability. Why such questions were put and why such answers were given we fail to understand. The value of these statements is insignificant and we shall not rely on them".

Dealing further with the director of the company the Court expressed the view that he had his own foreman (D.W.3) his mechanics and labourers and he did not take particular interest in the way the work was being done except that as owner he followed up, but not closely, the progress of the installation

of the factory. Speaking also about D.W.3 the Court said that he endeavoured in Court to exonerate himself and the company from any liability. He is the ordinary foreman who did not realize that it was his duty to instruct and warn the young employees of the danger. Finally the Court said that they would not accept that the duties of the two girls were only to sweep up floors, and that they were there to follow up the installation and the operation of the machines to get knowledge and experience. But at the same time they were doing the very little cleaning that was necessitated by other work such as the installation of the air conditioning. Indeed the Court added, neither the plaintiff nor P.W.1 were warned by anyone of this danger. They were neither ordered to wear trousers instead of dresses; and further, they were not told not to pass by the machine in motion or through the corridor where the accident occurred.

Finally the Court came to the conclusion that the plaintiff and her friend Sazou ought to have realized the danger and should not have passed from there, especially when they were wearing dresses, but "we have to take, however, into consideration their youthful age, their inexperience and the lack of any warning or instructions from the defendant company". In effect, the Court found that the plaintiff was also to blame for the accident.

The trial Court, before proceeding to apportion the liability between the parties, dealt with the defence of volenti non fit injuria, raised by counsel for the defence, and having rejected it they proceeded to state that in deciding the liability they based themselves on the common law negligence, once the company's premises were not operating as a factory at that time. Having found also that both parties were equally to blame for the accident and having dealt with the question of general damages, in the light of the three medical reports, the trial Court had this to say at p. 176:-

> "We accept fully the evidence of Dr. Demetriades, which was not in any way disputed by learned Counsel for the Defence, and we find that the Plaintiff, an 18 year old girl at the time of the accident, sustained very serious injuries on her right leg. This caused severe avulsion of the femoral region with exsanguinating haemorrhage due to laceration of the artery and vein. She has now permanent insufficiency

of the artery with impairment of her walking. She also has permanent foot drop supported by a caliper and a continuous drainage from the wound and post phlebitis. She is unable to work standing on her foot. Furthermore, she sustained serious pain and her earning capacity is diminished. However, the possibility of an amputation of her leg is remote".

Then the trial Court in considering what was the proper amount of compensation said:-

"We have directed ourselves to similar authorities including *Yiangos Christodoulou* v. *Pantelis Angeli* (*supra*)*. Our conclusion is that the sum of £7,000 as general damages will fairly and reasonably compensate the Plaintiff for her injuries.

As we have already apportioned liability between the parties as 50% and special damages were agreed at £664, we hereby give Judgment in favour of the Plaintiff and against the Defendant Company for the sum of £3,832.— with costs to be assessed by the Registrar".

On appeal, the first complaint of counsel for the appellants was that the trial Court misdirected itself on the law, and failed to apply the law properly to the facts of this case in holding that the defence of volenti nor fit injuria was not available to the appellant. Counsel further submitted that all the ingredients of the defence were present and had been established by evidence which the Court ought to have accepted.

Can the appellant-defendant invoke the defence of volenti non fit injuria in the present case? We think it is necessary to add that where a plaintiff relies on the breach of a duty to take care, owed by the defendant to him, it is a good defence that the plaintiff consented to that breach of duty, or knowing of it, voluntarily incurred the whole risk entailed by it. (See *Thomas* v. *Quartermaine*, [1887] 18 Q.B.D. 685, C.A., at p. 696 per Bowen, L.J., approved in *Yarmouth* v. *France*, 19 Q.B.D. 647, C.A. at p. 659 per Lindley, L.J; and in *Smith* v. *Baker and Sons*, [1891] A.C. 325, H.L., at p. 337. In such a case, the maxim volenti non fit injuria applies. The applica-

* (1968) 1 C.L.R. 338.

tion, of course, of this maxim does not depend on the relationship of employer and employed, and it is of general application to all. (See *Smith* v. *Baker and Sons* (*supra*)). In addition, we would add that the maxim is volenti and not scienti. A
5 man may know of a danger and be obliged to incur it. (See *Thrussell* v. *Handyside*, [1888] 20 Q.B.D. 359). (See also *Membery* v. *Great Western Rail Co.*, [1889] 14 App. Cas. 179, H.L., and *Baker* v. *James*, [1921] 2 K.B. 64 at p. 683).

In order, therefore, to establish the defence, the plaintiff
10 must be shown not only to have perceived the existence of danger, for this alone would be insufficient. (See *Thomas* v. *Quartermaine* (*supra*) and *Smith* v. *Baker and Sons* (*supra*)). It is, of course, necessary that the plaintiff should be shown to have notice of the danger and voluntarily accepted the risk. (See
15 *Williams* v. *Birmingham Battery and Metal Co.*, [1899] 2 Q.B. 338, C.A.)

The question, of course, whether the plaintiff's acceptance of the risk was voluntary is generally one of fact, and the answer today may be inferred from his conduct in the circumstances.
20 There must, however, be a finding of fact to this effect. (See *Osborne* v. *London and North Western Rail Co.*, [1888] 21 Q.B.D. 220 D.C. at pp. 223–224, per Wills, J. following the view expressed in *Yarmouth* v. *France*, [1887] 19 Q.B.D., 647, C.A. at p. 657, per Lord Esher, M.R.)

25 The inference of acceptance is more rigidly to be drawn in cases where it is proved that the plaintiff knew and comprehended it. (See *Thomas Quartermaine* (*supra*)). Such knowledge is no more, however, than evidence of assumption of risk. (See *Baker* v. *James*, [1921] 2 K.B. 674 at p. 683, per McCardie,
30 J.).

Indeed, where the danger was apparent or a proper warning was given to it, and where there is nothing to show that he was obliged to incur it, but not full comprehension of its extent, or where while taking an ordinary and reasonable course, he
35 had not an adequate opportunity of electing whether he would accept the risk or not. (See *Osborne* v. *London and North Western Rail Co.*, [1888], 21 Q.B.D. 220, D.C., and *Wing* v. *London General Omnibus Co. Ltd.*, [1909] 2 K.B. 652, C.A. at p. 667, per Fletcher Multon L.J.). But where the relationship

of master and servant existed, the defence of volenti non fit injuria is theoretically available but is unlikely to succeed. If the servant was acting under a compulsion of his duty to his employer, acceptance of the risk will rarely be inferred. (*Bowater* v. *Rowley Regis Corp.*, [1944] K.B. 476 C.A., applied in *London Graving Dock Co. Ltd.* v. *Horton*, [1951] A.C. 737, H.L. at pp. 744, 783). 5

Indeed, owing to his contract of service, a servant is not generally in a position to choose freely between acceptance and rejection of the risk, and so the defence does not apply in an action against his employer. The maxim volenti non fit injuria we may add, will not apply if the act which results in injury is done to prevent danger to persons. *Haynes* v. *Harwood*, [1935] 1 K.B. 146, C.A. 10

In a recent case, in *Nettleship* v. *Weston*, [1971] 3 All E.R. 581, Lord Denning M.R., dealing with the defence of volenti non fit injuria, expressed the view that the knowledge of risk or even willingness to take the risk will not amount to volenti, and had this to say at p. 587:- 15

> "This brings me to the defence of volenti non fit injuria. Does it apply to the instructor? In former times this defence was used almost as an alternative defence to contributory negligence. Either defence defeated the action. Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered, and in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him. That is shown in England by *Dann* v. *Hamilton*(1) and *Slater* v. *Clay Cross Co Ltd.*(2); and in Canada by *Lehnert* v. 20 25 30 35

(1) [1939] 1 All E.R. 59
(2) [1956] 2 All E.R. 625

Stein(1); and in New Zealand by *Morrison* v. *Union Steamship Co. of New Zealand Ltd.*(2). The doctrine has been so severely curtailed that in the view of Diplock LJ: '... 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': see *Wooldridge* v. *Sumner*(3).

Applying the doctrine in this case, it is clear that Mr. Nettleship did not agree to waive any claim for injury that might befall him. Quite the contrary. He enquired about the insurance policy so as to make sure that he was covered. If and in so far as Mrs. Weston fell short of the standard of care which the law required of her, he has a cause of action. But his claim may be reduced insofar as he was at fault himself—as in letting her take control too soon or in not being quick enough to correct her error.

I do not say that the professional instructor—who agrees to teach for reward—can likewise sue. There may well be implied in the contract an agreement by him to waive any claim for injury. He ought to insure himself and may do so, for aught I know. But the instructor who is just a friend helping to teach never does insure himself. He should, therefore, be allowed to sue".

In *Bennett* v. *Tugwell* (*an infant*), [1971] 2 All E.R. 248, Agner, J., dealing with the defence of volenti non fit injuria, had this to say at pp. 252-253:-

"The gist of this defence is not so much the assent to the infliction of injury as the assumption of the risk of such injury (see Fleming on Tort(4), cited by Salmond on the Law of Torts(5). Counsel for the plaintiff submits that a subjective test is the appropriate one and that I am concerned with what was in the innermost recesses of the parties' minds. I do not accept that this is so. What is required is an objective approach. Legal enquiry into a

(1) (1963) 36 DLR (2d) 159
(2) (1964) NZLR 468
(3) [1962] 2 All E.R. 978 at 990
(4) 2nd Edn, p. 253
(5) 15th Edn, 1969, p. 668.

person 'volens' is not into what he feels or inwardly consents to, but into what his conduct or words evidence that he is consenting to(1). Thus I consider it irrelevant, save on the issue of credibility in the manner I have already indicated, that the defendant had no intention to deprive the plaintiff of any remedy which might exist by virtue of his father's policy of insurance or that the plaintiff believed that the notice could not deprive him of the right he wrongly believed he had of suing the defendant's father's insurers.

Counsel for the plaintiff relies on the passage in Salmond's The Law of Torts(2) which reads:

'But today the courts lean against the defence of volenti when it is sought to deduce or infer a licence in advance to commit a tort. Something like a contract must probably be shown'.

Dealing with the last sentence first, the defendant does not assert a contract. Counsel for the defendant contended that the arrangement under which the plaintiff and the defendant gave each other lifts were friendly arrangements which gave rise to no legal obligations or rights except which the general law of the land imposed or implied and that the only questions were first, whether those legal rights and duties could be modified or surrendered on the facts of this case.

This was the reasoning and approach of John Stephenson J. in *Buckpitt* v. *Oates*(3) which I respectfully adopt and follow. In fact if the defendant had been relying on a contract the still opaque waters of 'fundamental breach' might yet again have had to be disturbed. As regards the earlier part of the quotation from Salmond(4), the authority cited is from the Court of Appeal in New Zealand, *Morrison* v. *Union Steamship Co of New Zealand Ltd*(5). The facts in that case have no connection with those in this

(1) See 82 LQR 64
(2) 15th Edn, 1969, p. 669
(3) [1968] 1 All E.R. 1145
(4) 15th Edn, 1969, p. 669
(5) (1964) NZLR 468

case. In the course of a long and detailed judgment as to the law, Turner J. stated(1):

'I am of the opinion that in the absence of express agreement or at least of some transaction or intercourse between
5 the parties which may be short of contract, but from which the plaintiff's assent may be clearly inferred, the maxim violenti non fit injuria cannot now be invoked in respect of negligent acts of the defendant which are still in the future at the time when the plaintiff is said by his conduct
10 to have shown himself volens'.

McCarthy and North JJ(2) preferred to rest their judgments on the ground that the case could be disposed of on its facts. Put in a postive form I would not venture to disagree with Turner J. The defendant must prove
15 on the balance of probabilities that the plaintiff did assent to being carried at his own risk and to exempt the defendant from liability for the negligence which caused this accident. There is no requirement for a contract.

On the facts which I have found and for the reasons which
20 I have given the plaintiff's assent in my judgment is clearly to be inferred. I hope I may be permitted to end this already lengthy judgment with the hope that its main effect will be to expedite the passage of legislation to make passenger insurance compulsory, a change in the law
25 which the profession has long sought'".

In *Burnett* v. *British Waterways Board*, [1973] 2 All E.R. 631, Lord Denning, M.R. had this to say at pp. 635-636:-

"The third question is whether the notice affords a defence. If the board had made a contract with Mr. Burnett, in
30 which this notice was incorporated, of course, the board could rely on it. But there is no shadow of ground for saying that there was a contract between the board and Mr. Burnett. He was just one of the men working on the barge coming in. His only contract was with the barge
35 owners.

Irrespective of whether there was a contract properly

(1) (1964) NZLR at 478
(2) (1964) NZLR at 480, 482.

so called, there are cases which show that if Mr. Burnett agreed, expressly or impliedly, to be bound by the terms of the notice, he could not claim. Thus there are several cases where the driver of a vehicle gives a passenger a lift and, at the same time, gives him reasonable notice that he rides at his own risk. The passenger is bound by the notice. He cannot claim: see *Buckpitt* v. *Oates*(1), *Bennett* v. *Tugwell (an infant)*(2) and *Birch* v. *Thomas*(3). Likewise when a man is given a free pass to go on a vehicle, he is bound by the conditions on it. Similarly when dangerous operations are in progress on land and apparent, and the owner gives a licensee permission to go on it, but at the same time gives him reasonable notice that he comes at his own risk, again he cannot claim: see *Ashdown* v. *Samuel Williams & Sons Ltd*(5) and *White* v. *Blackmore*(6). In some of these cases, there may not be a contract properly so called; but the passenger who accepts the lift, or the licensee who takes advantage of the permission, is bound by the notice. He has a choice either to go on the premises on the terms of the notice, or not to go to them. If he goes, he is taken to have impliedly agreed to take the risk. Just as in the 'ticket' cases, a man, by accepting the ticket with the conditions, is taken to have agreed to them: see *Parker* v. *South Eastern Railway Co.*(7) The 'ticket' cases are, of course, based on contract, whereas the licensee cases are not. But in each the basis is implied agreement.

In the present case the plaintiff had no choice. No agreement can be implied or imputed to him. The judge put it well(8):

'The plaintiff was not somebody arriving on his own at the entrance to the dock and saying: 'Well, I will not go in because of this notice.' He was an

(1) [1968] 1 All E.R. 1145
(2) [1971] 2 All E.R. 248
(3) [1972] 1 All E.R. 905
(4) [1947] 1 All E.R. 258
(5) [1957] 1 All E.R. 35
(6) [1972] 3 All E.R. 158
(7) [1877] 2 CPD 416
(8) [1972] 2 All E.R. 1358

employee on a barge, part of a train of barges, and by the time he had got to the dock it was certainly beyond his ability to make a choice and not go in'.

On this ground—that there was no choice to the plaintiff –the judge held that the plaintiff was not bound by the notice. I agree entirely.

The other ground on which it was sought to deprive the plaintiff of his claim was the doctrine of volenti non fit injuria. This defence too must be based on implied agreement. It is only available when the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk, impliedly agreed to incur it: see *Legang* v. *Ottowa Electric Railway Co*(1); and to waive any claim for injury (*Nettleship* v. *Weston*(2). No such agreement could possibly be implied here. In my opinion therefore the board cannot rely on the notice as a defence to this action.

I ought perhaps to say a word about s. 10(1) of the Transport Act 1962. It says that it is the duty of the board 'to have due regard to efficiency, economy and safety of operation as respects the services and facilities provided by them'. It was suggested that that was a statutory duty which would carry a right to damages if it was broken. But the answer is given by s. 10(4) which says that s. 10(1)–

> 'shall not be construed as imposing, either directly or indirectly, any form of duty or liability enforceable by proceedings before any Court to which the Board would not otherwise be subject'.

So no reliance can be placed on breach of that statutory duty.

I think the case is properly to be considered as one where the board was under a duty at common law to use reasonable care: that this duty was broken: and that the board are not protected by the notice because Mr. Burnett never agreed to it. He had seen it and read it, but he had no choice in the matter".

(1) [1926] A.C. 725 at 731

(2) [1971] 3 All E.R. 581 at 587.

It should be added that Bennett Tugwell was distinguished in *Burnett* v. *British Waterways*, [1973] 2 All E.R. 631.

In *Vassiliko Cement Works* v. *Christos Stavrou*, (1978) 1 C.L.R. 389, dealing with the defence of volenti non fit injuria, raised by the appellants, in delivering the judgment of the Court 5 of Appeal, I had this to say at p. 401:-

> "In our opinion, the learned trial Judge properly applied his mind to the legal effect of that doctrine and we endorse and approve his statement in the light of the authorities quoted earlier that this defence rarely finds application 10 in cases of injuries suffered by workers in the course of their work and as a result of hazards emanating from this system of work. The gist of the defence, in the words of Ackner J., does not lie in the assent to the infliction of injury but involves an assumption to the risk. (See *Bennett* 15 v. *Tug-well*, [1971] 2 All E.R. 248). In order to establish the defence the plaintiff must agree to waive any claim that he may have to injury that may befall him due to lack of reasonable care on the part of the defendants. Knowledge or willingness to take the risk will not substantiate 20 the defence of volenti. (See also *Stavrinou Costa and Another* v. *Municipal Corporation of Limassol*, (1975) 1 C.L.R. 84; and *Cyprus Trading Corporation* v. *Chimonas* (1975) 1 C.L.R. 211.)"

In the present case, in our view, the doctrine of volenti non 25 fit injuria cannot afford a defence to the claim of the appellants because that defence is available only when the respondent freely and voluntarily, being an employee, with full knowledge of the nature and extent of the risk impliedly agreed to incur it, and to waive any claim for injury. On the contrary, the 30 trial Court has found that she has not impliedly agreed to incur it and to waive any claim for injury. Indeed, the evidence before the trial Court, and particularly of the police constable was not believed and no such agreement can be implied on the part of the respondent once she had no choice in the matter, 35 being ordered to follow up by the foreman the installation and the operation of the machines in order to get knowledge and experience.

With respect, the defence of volenti non fit injuria cannot be

invoked by the appellants-defendants in the present case, because knowledge of the risk is not enough; nor is a willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. Indeed, we think that the respondent must agree, expressly or impliedly to waive any claim for any injury that may befall her due to the lack of reasonable care by the employee at the time: or more accurately, to the failure of the appellant to measure up to the standard of care that the common law requires of him. According to Diplock L.J. the maxim, in the absence of express contract, had no application to negligence simpliciter where the duty of care is based solely on proximity of neighbourship.

CONTRIBUTORY NEGLIGENCE:

The second complaint of counsel for the appellants was that the conclusion of the Court that the respondent's contributory negligence was only 50% is unreasonable having regard to the totality of the evidence and/or to the credible evidence which was before the Court; and that the Court was wrong in law and/or in fact in disregarding the statements given to D.W.1 the constable, by the respondent and P.W.1. In addition counsel argued that the Court in arriving at its decision failed to analyse the contents of those statements and to give any valid reasons for their rejection. As to the finding of the Court, counsel went on to add that the respondent was not warned as to the danger in question was unreasonable having regard to the evidence and because of the finding that the respondent passed through the dangerous corridor earlier in the morning.

In our view regarding the apportionment of liability as to the question of contributory negligence, time and again it was said that in an action for injuries arising out of negligence it was a defence at common law if the defendant proved that the plaintiff by some negligence on his own part, directly contributed to the injury in the sense that his negligence formed a material part of the effective cause thereof. Indeed when this is proved the plaintiff's negligence is said to be contributory. It is now enacted, both in England and in Cyprus, that where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons a claim in respect of that damage is not to be defeated by reason of the fault of the person suffering the damage but the damages recoverable

in respect thereof are to be reduced to such an extent as the Court thinks just and equitable having regard to the claimant's share in the responsibility for the damage. Where the defendant is negligent and the plaintiff is alleged to have been guilty of contributory negligence, the test to be applied is whether the defendant's negligence was nevertheless a direct and effective cause of the misfortune. The existence of contributory negligence does not depend on any duty owned by the injured party to the party sued and all that is necessary to establish a plea of contributory negligence is to prove that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury. The principle involved is that, where a man is part author of his own wrong, he cannot call on the other party to compensate him in full. The standard of care depends upon foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty, we repeat, of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent man he might hurt himself. The plaintiff is not usually bound to foresee that another person may be negligent unless experience shows a particular form of negligence to be common in the circumstances. If negligence on the part of the defendant is proved and contributory negligence by the plaintiff is at best a matter of doubt, the defendant alone is liable. There is no doubt that in the present case the trial Court found that both the respondent and the appellants were guilty of negligence and having regard to all the evidence before the trial Court we think that we cannot interfere with their finding. This Court in a number of cases said time and again that they will not interfere with regard to findings based on credibility once the Court believes the evidence of the witnesses. This finding of ours covers also the complaint of counsel regarding the warning as to the danger but again the evidence on this issue was conflicting and the trial Court believed the evidence of the respondent and her friend Sazou. Cf. *Whitehouse* v. *Jordan and Another*, [1981] 1 All E.R. 267.

APPORTIONMENT OF LIABILITY:

Dealing now with the apportionment of the liability complained of we think it is necessary to state that in inquiring as to the claimant's share in the responsibility it should be

determined not only by the causative potency of his acts but also by the parties blameworthiness. In such cases both the amount of the reduction of damages and the costs of the partially successful plaintiff are in the discretion of the trial Judge. The trial Court, it is true, did not go as far as to state the principle referred to earlier but in effect they took guidance from the case of *British Fame (Owners)* v. *Macgregor (Owners) The Macgregor* [1943] 1 All E.R. 33 (H.L.). Viscount Simon L.C. delivering the first speech regarding the variation of apportionment of liability on appeal said at p. 34:-

> "The Court of Appeal has thought it right, while maintaining the view that both ships are to blame, to vary the distribution of the blame by putting two thirds of it on the British Fame and relieving the Macgregor so that the Macgregor has to carry only the remaining one-third. It seems to me, my Lords, that the cases must be very exceptional indeed in which an appellate Court, while accepting the findings of fact of the Court below as to the fixing of blame, none the less has sufficient reason to alter the allocation of blame made by the trial Judge. I do not, of course, say that there may not be such cases. I apprehend that, if a number of different reasons were given why one ship is to blame, but on examination some of those reasons were in the Court of Appeal found not to be valid, that might have the effect of altering the distribution of the burden. If there were a case in which the Judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that might perhaps be—it would be, I think—a reason for considering whether there should be a change made on appeal. But subject to rare exceptions, I submit to the House that when findings of fact are not disputed and the conclusion that both vessels are to blame stands, the cases in which an appellate tribunal will undertake to revise the distribution of blame will be rare."

Later on Viscount Simon L.C. dealing with a passage used by Lord Wright in *The Umtali* case [1938] 160 L.T. 114 had this to say:-

> "It appears to me, my Lords, that that passage directly applies here. I do not find in the judgments of the Court of Appeal or in the arguments which have been addressed

to us by the respondents sufficient ground for interfering with the apportionment decided upon by Bucknill, J. That apportionment, in my judgment, should stand, and I move that this appeal be allowed with cotts".

As we said earlier the trial Court in dealing with the question as to contributory negligence relied on the same case and quoted a passage from the speech of Lord Wright at p. 35:- 5

"With the greatest respect to the Court of Appeal, and without in any way expressing any conclusion on the actual decision at which they there arrived, I venture to think that their statement of principle is not quite in accord with the authorities, so far as laid down up to the present. *The Umtali*(1), which is a decision of this House, was not cited to the Court of Appeal, but there was cited *The Karamea*(2), in which Lord Sterndale, M.R., a great authority on these matters, dealing with this question of apportionment at p. 78, says: '... I think it would need a very strong case indeed to induce this Court to interfere with his discretion as to the proportions of blame. We have power to do it, but I do not suppose that we should ever think of doing it.' 10 15 20

Warrington, L.J., is reported, at pp. 83, 84, as saying: 'It may well be and probably is the case that if the Court arrives at the same conclusion both on the facts and in law it would not interfere merely because the learned Judge in his discretion has given proportions which this Court thinks it would not have given'. 25

Scrutton, L.J., at p. 89, says: '... if the Court of Appeal agrees with the findings of fact and law of the learned judge below, and the only difference is that it attaches more importance to a particular fact than he did, it would require an extremely strong case to alter the proportions of blame which the learned judge below has attributed to the ships...' 30

It seems to me that these observations of three very eminent judges are quite in accord with what was said in *The Umtali*(1), and with what Viscount Simon, L.C., has just said. I do not say, any more than they did, that under proper conditions, such as those indicated by the three 35

(1) The Umtali [1938], 160 L.T. 114
(2) The Karamea, [1921] P. 76

members of the Court of Appeal in *The Karamea*, the judge's apportionment might not be interfered with by an appellate Court; but I do repeat that it would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and is different in essence from a mere finding of fact in the ordinary sense. It is a question not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations; it involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that the Courts have warned an appellate Court against interfering, save in very exceptional circumstances, with the judge's apportionment. The accepted rule was clearly stated by Lord Buckmaster with the assent of the other Lords, in *The Otranto*(1), at p. 204, in these words:

> 'Upon the question of altering the share of responsibility each has to take, this is primarily a matter for the judge at the trial, and unless there is some error in law or in fact in his judgment it ought not to be disturbed.' "

In *Yiangos Christodoulou* v. *Pandelis Angeli* (1968) 1 C.L.R. 338, the plaintiff a young mechanic, eighteen years of age at the time of the accident in February, 1964, was employed by the defendant who runs a motor-garage in Nicosia. The injuries sustained by the workman were quite serious necessitating the amputation of his left leg as from about the middle of the thigh. The trial Court awarded damages of £6,688 under two heads: General damages £6,000 and special £688. In finding negligence on both sides, the trial Court apportioned the liability equally between the parties and gave judgment for the workman for £3,344. From this judgment, the employer took the present appeal on four grounds which in substance may be reduced to two: (a) against the findings of the trial Court on the question of negligence and the apportionment of

(1) *Kitano Maru S.S. Owners* v. *Otranto S.S. Owners, The Otranto* [1931] A.C 194.

liability; and (b) against the amount of the award. Shortly before the hearing of the employer's appeal, a cross appeal was filed on behalf of the workman also complaining against the apportionment of liability; and against the amount of general damages awarded. Vassiliades, P. delivering the unanimous 5 judgment of the Court of Appeal, in which I was also a member, made these observations at p. 345:-

"The matters for determination in this appeal may be put in two groups: (a) The findings of the trial Court as to the cause of the accident; and (b) The amount of compensa- 10 tion.

The approach of this Court to both these matters has been stated in a number of cases. In *Kyriacos Mylonas and 2 Others* v. *Margarita Kaili* (1967) 1 C.L.R. 77, the Court said at p. 79: 15

'The principles on which this Court decides appeals on the credibility of witnesses are well settled and we need not enter into them in detail. It must be shown that the trial Judge was wrong and the onus is on the appellant to persuade this Court. Matters of credibi- 20 lity are within the province of the trial Judge and if, on the evidence before him, it was reasonably open to him to make the findings which he did, then this Court will not interfere with the judgment of the trial Court.' 25

This was referred to in *Moustafa Imam* v. *PapaCostas* (reported in this Vol. at p. 207 ante); and was followed in the case as well as in other cases mentioned therein".

Dealing further with the question of damages the Court had this to say: 30

"This Court will not interfere with the amount assessed by the trial Court, unless persuaded that such assessment was an entirely erroneous estimate of the damages to which the plaintiff is entitled in the circumstances of the case. (*Du Puch* v. *Georghiou and Others* reported in this Vol. 35 at p. 202 ante)."

Dealing also with the apportionment of liability and having referred to the case of *Brown* v. *Thompson* [1968] 1 W.L.R. 1003 the Court said:

"We propose following the same course. Where no error of principle has been shown and no misapprehension of the facts on the part of the trial Court has been made to appear on appeal, this Court will be reluctant to interfere
5 with the apportionment made by the trial Court even if somewhat differently inclined.

In the present appeal we have not been persuaded by either side that there are sufficient reasons for disturbing the findings of the trial Court; or for interfering with their
10 assessment of the damages; or the apportionment of the liability in the District Court."

Finally the Court said:

"We would add, however, that we read the part of the judgment of the trial Court referring to the duty of the
15 employer towards his servant, and to his failure to give safety warning to his workman regarding a known danger, as expressing a view directly connected with the circumstances of the present case; particularly the lack of maturity and experience of his young workman; and the circum-
20 stances in which the exployer's instructions for the adjustment of the wire-ropes were given.

In the result, both the appeal and the cross-appeal are dismissed; and in the circumstances, we make no order for costs in these appeals."

25 In *Tessi Christodoulou* v. *Nicos Savva Menicou and Others*, (1966) 1 C.L.R. 17, the plaintiff claimed damages for the severe injuries sustained by her while a passenger in the bus of the second defendant by the negligent driving of the first defendant. The special damages were agreed at £1,000 and the Full District
30 Court of Kyrenia assessed the general damages at £4,000, but found that the plaintiff was 60 per cent to blame for the accident, reduced the damages accordingly, and awarded her the sum of £2,000.

The plaintiff appealed against that judgment, and the defen-
35 dant cross-appealed. The appeal was argued on behalf of the plaintiff on three grounds, but I shall refer only to grounds (a) and (c), viz., that the finding of the trial Court as to the plaintiff's contributory negligence was not supported by the

evidence, and that the amount of general damages assessed by the Court was unreasonably low. Mr. Justice Josephides, delivering the unanimous judgment of the Court of Appeal, said at p. 28:-

"It is now convenient to deal with the plaintiff's first ground of appeal, to the effect that the finding of the trial Court that she was guilty of contributory negligence was not supported by the evidence, and with the cross-appeal of the defendants, to the effect that the finding of the trial Court that the driver was guilty of contributory negligence was likewise not supported by the evidence.

In considering this matter it should be borne in mind that the conclusions reached by the trial Court were conclusions of fact. There is no doubt that this Court is competent to reverse findings of fact of the Courts below where there is no adequate evidence to support such findings; and to reverse conclusions based on an error in law. The question which falls for our determination is: Did the trial Court on the findings they made, if such findings were supported by the evidence, apply the law correctly?

Now, what is the law on this point? Section 51 of our Civil Wrongs Law, Cap. 148, which reproduces the provisions of the common law on the point, provides that negligence consists of doing some act which in the circumstances a reasonable prudent person would not do or failing to do some act which, in the circumstances, such person would do, and thereby causing damage. But compensation for such damage is only recoverable by a person to whom the person guilty of negligence owed a duty in the circumstances not to be negligent. The owner of a vehicle owes such a duty not to be negligent to all persons who are carried for reward in his vehicle (Section 51 (2)(c))………

The general principle would appear to be that those driving or having control of vehicles owe a duty of care to their passengers, and that if the plaintiff can show he was lawfully in the defendant's vehicle and suffered an accident of a type which would not normally have occurred

if that vehicle had been properly driven, then the onus will be on the defendant to show he was not negligent. Each case of this kind must depend on its own facts, and the simple test to be applied is 'did the driver in the circumstances act reasonably or unreasonably by doing something which a reasonable person would not do and leaving undone something a reasonable person would do?"

Then, turning to the question of contributory negligence, and having quoted the case of *Caswell* v. *Powell Duffryn Associated Collieries Ltd.*, [1939] 3 All E.R. 722 the judgment of Lord Atkin at pp. 730–731, he had this to say at p. 31:–

"The effect of the *Caswell* decision is that the standard of negligence is in all cases not an absolute standard but is dependant upon the attendant circumstances, and in the case of contributory negligence consisting of neglect of one's own personal safety the Court must have regard to the distractions of the plaintiff or deceased at the time of the accident and to the strain and fatigue of the work which may make a workman give less thought to his personal safety that persons with less trying surroundings and preoccupations. Thus, though there is only one standard *of negligence that standard is subject to qualification in* all cases. The *Caswell* case was considered and applied in *Davies* v. *Swan Motor Co.* (*Swansea*) *Ltd.* [1949] 1 All E.R. 620, where it was held that, in any event, to constitute contributory negligence it was not necessary to show that the conduct of the passenger amounted to the breach of any duty which he owed to the defendant, but it was sufficient to show a lack of reasonable care by the passenger for his own safety. This principle was subsequently applied in the Privy Council Case of *Nance* v. *British Columbia Electric Railway Co. Ltd.* [1951] 2 All E.R. 448.

In assessing degrees of liability the common sense approach had to be adopted. Evershed L.J., as he then was, in considering questions of apportionment of blame under the English Law Reform (Contributory Negligence) Act, 1945, in the *Davies* case (*supra*), at page 628, said: 'In arriving at the conclusion at which I do arrive, I conceive it to be my duty to look at the whole facts of the case as they emerged at the trial both of the action and of the third

party proceedings, and then, using common-sense, to try fairly to apportion the blame between the various participants in the catastrophe for the damage which the deceased suffered'. See also page 629 in the same Report.

The *Davies* case, which showed that the common sense approach had to be adopted, was referred tc with approval in a recent case by the Court of Appeal in England: See '*The George Livanos*' [1965], 'The Times' Newspaper, December 14".

Having also considered a number of extracts from the evidence in support of the submission that the finding of the trial Court that the plaintiff was guilty of contributory negligence was not supported by the evidence, he had this to say:-

"Having fully considered these submissions and having read the whole record of the evidence, we are of the view that in the present case there was adequate evidence to support the findings made by the trial Court that the driver was guilty of negligence in driving his bus and that the plaintiff was likewise guilty of contributory negligence. Having regard to the following circumstances, that is to say, that Phryne Street was a very narrow street (9 feet 9 inches with the berm), that there was a projecting wall, that the bus was 7 feet 2 inches wide and that the road had potholes and was bumpy, we are of the view that the wall was a potential source of danger and that it was the duty of the driver to reduce speed and leave a reasonable safety margin between his bus and the wall, on the footing that owing to the condition of the road and the sudden swerve it was reasonable to foresee that the passengers in the bus might be knocked against the wall. Instead of doing that, the driver increased speed and drove too close to the wall causing the plaintiff's arm to be crushed between the bus and the wall.

The finding of the trial Court that the plaintiff, although acquainted with the road, did not use reasonable care for her own safety in leaving her arm protruding out of the bus, is adequately supported by the evidence. It is true that if the plaintiff had not been in that position she would not have been injured, but adopting the common-

sense approach, as laid down in the *Davies* case, we are of the view that the plaintiff, in the circumstances of this case, was not to blame more than the driver, so that, although we agree with all the other conclusions in the *careful and well reasoned judgment of the trial Court*, we do not feel that we can uphold their apportionment of liability as to 60 per cent to the plaintiff and 40 per cent to the driver. We are of the view that, in the circumstances of this case, this liability should be apportioned equally, that is to say, 50 per cent to the plaintiff and 50 per cent to the driver".

Dealing further with the apportionment of the sum assessed as general damages, Mr. Justice Josephides went on to add:-

"The third and final ground of appeal was that the sum of £4,000 assessed as general damages by the trial Court was unreasonably low. The trial Court awarded a global sum as general damages without apportioning it under the various heads of damage, which they were entitled to do.

The Court stated in their judgment that in assessing the damages they took into consideration the following: that at the time of the accident the plaintiff was a girl of 17 years of age and had been studying shorthand and typing, and that as a result of the accident she was prevented from completing her studies and working as a shorthand-typist, and that her earning capacity was diminished as well as her choice of employment; the pain and suffering of two operations and the probable necessity of further operations of bone grafting with the consequential pain and suffering and the considerable expense; the ugly and repulsive scars that would permanently disfigure her arm and that she would need expensive plastic operation abroad for skin grafting in order to reduce the scars; the loss of amenities, such as sports, and her being handicapped in the carrying out of her duties as a housewife and in doing other work requiring fine movements of the fingers; and, finally, the injury to her health arising out of the non-union of the fracture of the bone which has remained for a long period in inter-metallary nail and restriction of the movements of the fingers due to paralysis to the nerves.

Appellant's counsel submitted that the trial Court did not take into sufficient consideration the evidence of Dr. T. Evdokas, a psychiatrist, whose evidence it was stated went much further than the irritability of the plaintiff as an after-effect of her injuries. This doctor stated that, in his opinion, irrespective of the plastic operations, the plaintiff would be handicapped psychologically and liable to develop inferiority complex and that, besides the emotional aspect of the scars, her prospects of marriage were prejudiced; but he added that a successful plastic operation would improve her psychological condition".

Finally, the learned Judge concluded as follows:-

"Having given the matter our best consideration we are not convinced either that the Court acted upon some wrong principle of law or that the amount awarded was so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled (*Flint* v. *Lovell* [1935] 1 K.B. 354 at page 360, C.A.; *Cacoyianni* v. *Papadopoullos*, 18 C.L.R. 205; and *Kemsley Newspapers Ltd.* v. *Cyprus Wines and Spirits Co. Ltd. K.E.O.* (1958) 23 C.L.R. 1 at page 15). For these reasons we would not be justified in disturbing the finding of the trial Court as to the amount of damages. In any event, we do not think that, taking all the circumstances into consideration, the amount of £4,000 assessed as general damages on the basis of full liability is on the low side.

In the result the appeal is allowed and the judgment of the District Court varied to the extent that judgment for the plaintiff is entered in the sum of £2,500 against both defendants with costs for one advocate here and in the Court below.

The cross-appeal is dismissed."

In *The "Koningin Juliana"*, [1975] 2 Lloyds Law Reports 111 at p. 112:-

"This was an appeal by the owners of the ferry vessel Koningin Juliana from a majority decision of the Court of Appeal (Lord Denning, M.R., Lord Justice Cairns and Sir Gordon Willmer, [1974] 2 Lloyd's Rep. 353) allowing

an appeal by the owners of the coaster Thuroklint from a decision of Mr. Justice Brandon, [1973] 2 Lloyd's rep. 317. The case concerned a collision which took place between the vessels on Jan. 1, 1971, near Harwich harbour.

5 Mr. Justice Brandon had apportioned the blame between the vessels as to two-thirds to the Thuroklint and one-third to the Koningin Juliana. On appeal, the majority of the Court of Appeal (Lord Denning, M.R., and Lord Justice Cairns; Sir Gordon Willmer dissenting), held that 10 the blame should be apportioned equally."

Lord Wilberforce, delivering the first speech, had this to say at pp. 112-113:-

"My Lords, I do not propose to undertake a detailed examination of events which led to the collision. The 15 learned Judge made careful findings of fact, which were upheld by the Court of Appeal and not challenged in this House. The advice of the Nautical Assessors was, with one exception as to which that given at the trial was preferred, to the same effect in each Court below. The 20 report of the case, before Mr. Justice Brandon, [1973] 2 Lloyd's Rep. 317, contains a chart of the location which can be consulted: The detailed times, bearings, speeds, etc., are clearly found by the trial Judge. There is now no dispute as to the faults committed by each vessel: as 25 to the Thuroklint, in a clear and continuing breach of r.25(a) of the Collision Regulations which in narrow channels requires power-driven vessels to keep to the starboard side of the fairway or mid-channel; in failing to indicate alterations of course to star-board by signals of one short 30 blast; in going hard to starboard just before the collision. As to the *Koningin Juliana, in bad look-out and apprecia*tion; in failure to starboard sufficiently at the Buard Buoy and instead attempting to cross ahead of the Thuroklint; in failure to take steps, having steadied after starboarding 35 on 109 deg. (true), to take off her way by stopping and reversing engines.

All of these faults being found, it became a matter of appreciation to decide how they should be weighed so as to arrive at a just apportionment of blame.

Mr Lords, this summary of the issue is, I believe, sufficient to make it clear that the case is one where, the trial Judge having made an apportionment, taking all factors into account, a Court of Appeal, including this House, ought not to disturb it. The modern authority which reflects 5 this principle is the decision of this House in *The Macgregor, British Fame (Owners)* v. *Macgregor (Owners)*, [1943] A.C. 197; [1942] 74 Ll. L. Rep. 82, where the reasons for the rule are clearly and authoritatively stated. I shall not repeat them: they are as valid and as generally appli- 10 cable today. Of subsequent cases relied on as to some degree diminishing the force of The Macgregor I need only refer to two. In *The Almizar*, [1971] 2 Lloyd's Rep. 290, the apportionment of the trial Judge, was reversed after his crucial finding, on advice, had, on different advice, 15 been rejected by the Court of Appeal. On further advice in this House, the apportionment was further varied. I think that it is clear that in both appeal Courts the new apportionment was based upon the advice those Courts had received, so that the factual elements upon which the 20 apportionment has to be based were not the same. Variation of the apportionment in these circumstances is clearly authorized by the Macgregor (sup).

In *The British Aviator*, [1965] 1 Lloyd's Rep. 271, the trial Judge's apportionment (two-fifths—three-fifths) was 25 altered by the Court of Appeal to equal apportionment. No fresh findings of fact were made by the Court of Appeal nor were the findings of the Judge disagreed with. The revision was made on the basis that the Judge had taken 'a wrong view of the facts': he did not 'appreciate the 30 seriousness of the fault' of the Crystal Jewel. Mr Lords, I must say that I doubt the validity of this decision and I note that Lord Justice Willmer, whose authority lends its weight, himself clearly thought the case to be on the borderline (see p. 278). I deprecate the use of this case 35 as a basis for weakening of the *Macgregor* rule.

Attempts were made by learned Counsel for *Thuroklint* to discover errors, or errors of appreciation, in the judgment of the trial Judge, but in my opinion these were not made good. The only criticism which appeared possibly to 40 have any substance was that he had grouped three faults

of the *Koningin Juliana* into one 'composite fault'. But if does not follow from this that he failed to give proper weight to the elements forming the composite fault, or that he would have given more weight to them if he had regarded them as separate faults. I certainly find it impossible to believe that he was led, by his description, into the crude mathematical sum suggested by the learned Master of the Rolls. The efforts of Counsel were still less successful when applied to the judgment of Lord Justice Willmer. This, in my respectful opinion, is clear, correct and unanswerable and I would be content to accept the whole of it. The majority of the Court was unable to establish the necessary foundation for departing from the Judge's apportionment.

I would allow the appeal and restore the judgment of Mr. Justice Brandon. The appellants should have their costs in this House and in the Court of Appeal".

For the reasons we have given at length, and in the particular circumstances of this case, and adopting the common sense approach, as laid down in the *Davies* case (*supra*), we have decided to uphold the trial Court's apportionment of liability, viz., 50 per cent to the respondent and 50 per cent to the appellant, once both the respondent and the appellant were equally to blame for the faults which the trial Court had found, and because it became a matter of appreciation to decide how they should be weighed so as to arrive at a just apportionment of blame.

As we said earlier, once the trial Court had made an apportionment, having taken all factors into account, this Court ought not to disturb it: (See the *Koningin Juliana* (*supra*)). With that in mind, we would dismiss the contention of counsel for the appellants that the amount of damages of £7,000 ascribed by the trial Court as general damages is manifestly excessive, having regard to the injuries of the respondent and the medical evidence before the trial Court.

Finally, we ought to state that in spite of the fact that the trial Court, in assessing general damages has not specified the heads under which general damages were awarded, nevertheless, we think that in awarding a global sum as general damages

without apportioning it under the various heads of damages, the Court was entitled to do so.

For the reasons we have given, and in the light of the authorities quoted, we are not convinced either that the Court acted upon some wrong principle of law or that the amount awarded was so very high as to make it, in the judgment of this Court, an erroneous estimate of the damages to which the respondent is entitled. Indeed, we would not be justified in disturbing the finding of the trial Court Court as to the amount of damages, because after taking all the circumstances into consideration, the amount of £7,000 as general damages on the basis of full liability is not on the high side.

Counsel for the respondent, after filing a cross-appeal, complained that the trial Court erred in finding that the respondent contributed to the accident to the extent of 50 per cent having regard to the evidence adduced, and that the amount of £7,000 for general damages on a full liability basis is unreasonably low, having regard to the injuries sustained and/or the incapacity suffered by the plaintiff.

We have considered the contention of counsel, but in the particular circumstances of this case, we think that the trial Court correctly apportioned the liability of both parties and correctly reached the conclusion that the amount of £7,000 was the proper one in the light of the findings of fact made by the trial Court.

In the result, both the appeal and cross-appeal are dismissed and the judgment of the District Court is affirmed. The appellants to pay to the respondent half the costs of the appeal.

Appeal and cross-appeal dismissed.
Order for costs as above.