from exercising their right to protest and demonstrate about issues of public interest, and the courts would resist any attempts to interpret the statute widely. The claimants were refused an injunction against the British Union for the Abolition of Vivisection which was demonstrating by a non-threatening campaign against the company which used animals for research purposes.

With regard to nuisance caused by the spread of weeds, it is uncertain whether the common law has any rules controlling this (see *Giles* v *Walker* (1890)), and reference should be made to the Weeds Act 1959. Where any one of five specified weeds is out of control the Minister of Agriculture can call on the occupier of the land concerned to take action to stop them from spreading. The Minister can get the work done himself if the occupier defaults, and prosecute the occupier.

Negligence – generally

In ordinary language negligence may simply mean not done intentionally, e.g. the negligent publication of a libel. But while negligence may be one factor or ingredient in another tort, it is also a specific and independent tort with which we are now concerned.

The tort of negligence has three ingredients and to succeed in an action the claimant must show (i) the existence of a duty to take care which was owed to him by the defendant, (ii) breach of such duty by the defendant, and (iii) resulting damage to the claimant.

The duty of care – generally

Whether a duty of care exists or not is a question of law for the judge to decide, and it is necessary to know how this is done. The law of contract dominated the legal scene in the nineteenth century and this affected the law of torts. The judges, influenced by the doctrine of privity of contract, used it to establish the existence of a duty of care in negligence in those cases where a contract existed by laying down the principle that, if A is contractually liable to B, he cannot simultaneously be liable to C in tort for the same act or omission.

The House of Lords in *Donoghue* v *Stevenson* (1932) (see Chapter 20) dispelled the confusion caused by the application of the doctrine of privity of contract where physical injury is caused to the claimant by the defendant's negligent act. As we have seen from the *Donoghue* case, the fact that the maker of the ginger beer was liable for its defects in *contract* to the café owner did not prevent him being liable also to *Donoghue* in the *tort of negligence*. There is, of course, now the possibility of giving third parties rights in contract so that the privity rule is avoided, although the tort claim would still be available, and where the rule of privity applies, the tort remedy is the only one available. This results from the Contracts (Rights of Third Parties) Act 1999 (see further Chapter 10). In this case Lord Atkin also formulated what has now become the classic test for establishing a duty of care when he said:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question.

It will be seen, therefore, that the duty of care is established by putting in the defendant's place a hypothetical 'reasonable man' and deciding whether the reasonable man would have foreseen the likelihood or probability of injury, not its mere possibility. The test is objective not subjective, and the effect of its application is that a person is not liable for every injury which results from his carelessness. There must be a duty of care (see *Bourhill* v *Young* (1943) (see Chapter 20)).

Nevertheless, new duties are established from time to time by case law. As we have seen, Lord Macmillan stated in *Donoghue* v *Stevenson* (1932) 'the categories of negligence are never closed'. However, there is always the requirement of foresight, i.e. the claimant must be within the area of foreseeable danger (see *Bourhill* v *Young* (1943), in Chapter 20).

Furthermore, there is, in general terms, no liability for failure to act, i.e. for omissions.

Argy Trading v *Lapid Developments*, 1977 – No liability for omissions (**392**)

Creation of new duties

For a period of time the tendency of the courts was to widen liability in negligence to the point where it was more a matter of public policy whether a particular defendant was liable. The view has been, in some cases, that the court can assume objective foresight and then see whether there is anything to prevent the defendant from being liable, e.g. a very wide liability which is currently not insured against may not be imposed as contrary to public policy.

One major development in this direction was the judgment of Lord Reid in *Home Office* v *Dorset Yacht Club Co Ltd* [1970] 2 All ER 294. This was an action by the owner of a yacht which was damaged by runaway Borstal boys who escaped while the three officers in charge of them were, contrary to instructions, in bed. In holding that the Home Office owed a duty of care to the owner of the yacht, Lord Reid made the following general comment regarding duty of care. '*Donoghue* v *Stevenson* may be regarded as a milestone . . . It will require qualification in new circumstances. But I think that the time has come when we can and should say that it ought to apply unless there is some justification or valid explanation for its exclusion.' In other words, Lord Reid is saying that the court should lean in favour of finding a duty of care. The House of Lords seems also in this case to have found liability for the officers' failure to act, i.e. an omission but this seems to be confined to negligent failure to exercise statutory powers, in this case powers of control over the boys.

Further moves along these lines came in *Anns* v *London Borough of Merton* [1977] 2 All ER 492. In that case, the claimants held a lease of a block of flats built in 1962. Later, considerable settlement caused cracks and the tilting of floors. The claimants blamed the builders and also the local council because, it was alleged, the council had not inspected the flats during building as the by-laws required, so their shallow foundations were not detected. Their Lordships found that the local authority had a duty of care to the claimants and made general comments on the duty of care. Once again, liability arose from a failure to act.

Lord Wilberforce, in particular, took the remarks of Lord Reid (as mentioned) a stage further when he said:

> The position has now been reached that in order to establish that a duty of care arises in a particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages.

First, one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter, in which case a *prima facie* duty of care arises.

Second, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negate, or reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which any breach of it may give rise.

The retreat from *Anns*

However, the Privy Council in *Yuen Kun Yeu* v *Attorney-General of Hong Kong* [1987] 2 All ER 705 and the House of Lords in *Curran* v *Northern Ireland Co-Ownership Housing Association* [1987] 2 WLR 1043 pointed out the danger of assuming that the comments of Lord Wilberforce in *Anns* lead to a rule that objective foreseeability of itself automatically leads to a duty of care and that a defendant with objective foresight is therefore liable unless there are reasons, e.g. public policy, why he should not be so.

The movement towards a position where virtually any event can be foreseen leaving the only bar to liability to rest on public policy came to an end in *Murphy* v *Brentwood District Council* [1990] 2 All ER 908 when the House of Lords overruled its own decision in *Anns* as the 1966 declaration gives it power to do.

The facts of *Murphy* are similar to those of *Anns*, i.e. a house built on inadequate foundations followed by a claim against the local authority for negligent failure to ensure that the house was built in accordance with the relevant regulations. The House of Lords decided that the local authority was not liable and overruled *Anns*. The judgments of the House of Lords indicate that the problem with *Anns* was not so much what it decided in terms of the liability of the local authority but the broad statements as to the duty of care made by Lord Wilberforce in the case. Their Lordships felt that if the case was left as good law, its principles could not be confined to the local authority situation. In fact, it had already started to expand professional liability to the point where accountants, in particular, were unable to get adequate indemnity insurance. In this connection, the retreat from *Anns* is to be seen in the *Caparo* case (see later in this chapter) which some think has gone too far the other way.

It would seem that since *Murphy* we are back to a tighter test of liability. A duty of care will be based upon the need for proximity enshrined in Lord Atkin's neighbour test in *Donoghue*.

Nevertheless, given sufficient proximity new duties can arise in new fact situations. For example, in *Swinney* v *Chief Constable of Northumbria Police* [1996] 3 All ER 449 the Court of Appeal held that the police had a duty of care not to let information supplied to them regarding criminal activities get into the hands of a suspect. A statement by the claimant was allowed, because of police negligence, to get into the hands of a suspect who subjected the claimant to violence and arson of his premises, a public house. He suffered mental injury and had to give up the tenancy of the pub. The Court of Appeal held that he was entitled to damages and no rule of public policy prevented this.

In *Vowles* v *Evans* [2003] 1 WLR 1607 the Court of Appeal ruled that a rugby referee owed a duty of care to his players. The claimant was injured and became confined to a wheelchair when two front rows failed to engage cleanly in the final set scrum of the match. The incident occurred because the referee allowed the substitution of an inexperienced and untrained player to play in the front row without making any inquiry of his captain or the player as to his suitability for the front row.

The duty of care – economic loss

An area of some difficulty, and in which there has been much development, is in the field of economic loss. Is there a duty to avoid causing foreseeable economic loss? The position is as follows:

(a) Careless misstatements. These are considered in greater depth later in this chapter. However, broadly speaking, a person who makes a careless statement which causes economic loss to a claimant within the area of his *foresight* may be liable to compensate that claimant for economic loss.

(b) Physical injury – parasitical damages. Damages for economic loss may be awarded if there is foreseeable physical injury to the claimant or his property, though issues of public policy still govern where the line is to be drawn.

> *Weller & Co* v *Foot and Mouth Disease Research Institute*, 1965 – Where economic loss is irrecoverable (**393**)
>
> *SCM (UK) Ltd* v *W J Whittall & Son Ltd*, 1970 – Where economic loss is not a consequence of physical damage (**394**)
>
> *Spartan Steel and Alloys Ltd* v *Martin & Co Ltd*, 1972 – Economic loss following from physical damage (**395**)

(c) The *Junior Books* case. In *Junior Books Ltd* v *Veitchi Co Ltd* [1982] 3 All ER 201 the House of Lords decided that the claimants could recover economic loss which was not parasitical because in that case there was no physical injury to the claimant or his property, but merely faulty work.

However, it would be unwise to assume that injury to person or property is now never necessary. There was a very close proximity in terms of foresight of injury between the parties in *Junior Books* and as a matter of public policy it may still be necessary to restrict liability in cases such as *Weller* where liability was potentially endless. There have, in more recent times, been a considerable number of restrictions placed on *Junior Books* almost confining it to its own facts (see below).

> *Junior Books Ltd* v *Veitchi Co Ltd*, 1982 – A rare recovery of economic loss (**396**)

Breach of the duty

If a duty of care is established as a matter of law, whether or not the defendant was in breach of that duty is a matter to be decided by the judge on the facts of the case, though the standard required, i.e. that of acting as a reasonable man, is a *legal standard*.

Here we are concerned with how much care the defendant must take. It is obvious that if motorists did not take out their cars many lives would be saved, and yet it is not negligent to drive a car. Once again, the test is to place the 'reasonable man' in the defendant's position. It is an objective test and was thus stated by Baron Alderson in *Blyth* v *Birmingham Waterworks Co* (1856) 11 Ex 781:

> Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do.

The standard required is not that of a particularly conscientious person but that of the average prudent person in the eyes of the court. It has been said that the reasonable person is to be found on the Clapham omnibus, but it should not be thought that the average prudent person has a low standard of care. Most of us behave unreasonably from time to time, and if during one of these lapses a person suffers injury, it will be no good our pleading that we are usually reasonable people.

Daniels v *R White and Sons Ltd*, 1938 – Duty to take reasonable care (**397**)
Hill v *J Crowe*, 1977 – A packing case collapses (**398**)

Causation

It is also necessary for the claimant to prove causation, i.e. that the negligent act in breach of duty actually caused the situation for which he claims.

Thus in *Gregg* v *Scott* [2005] 2 AC 176 the claimant, Mr Gregg, developed a lump under his arm. He went to see Dr Scott, who told him that it was a collection of fatty tissues. One year later another doctor discovered it was cancer of a lymph gland. By this time the claimant's chances of surviving for 10 years or more if treated promptly had fallen, it was said, from 42 per cent to 27 per cent. The tumour had spread to his chest. The treatment temporarily destroyed the tumour but the claimant had a relapse and was left with a poor prospect of survival.

He claimed against Dr Scott in negligence for the loss of a chance of medium term recovery. The House of Lords ruled against him. The reason was, basically, that the court will not move on damages unless the claimant can prove causation. Nobody could say that the claimant's chances of recovery had been reduced. Nobody had actual knowledge of that. When a court is faced with lack of knowledge of the facts of a case it deals with it by burden of proof. The claimant must prove causation. Sadly, neither Mr Gregg nor anyone else could. Even medical science cannot prove a result in cases such as this. Many treatments work, but not all do on all persons. In such a situation the rule of proof of causation will defeat the claim.

Objective standards – professionals

When a person has undertaken a duty which requires extraordinary skill, a higher standard of care will be expected. For example, one would expect from a builder the degree of skill appropriate to a reasonably competent member of his trade and from an accountant or solicitor also an objective standard of competence. Such persons may, therefore, be negligent even though they do their best.

Greaves v *Baynham Meikle*, 1974 – An objective standard (**399**)

Medical practitioners

In the case of medical practitioners, it seems that because allegations of negligence in the medical context are more frequent and serious, a high standard of proof of negligence is required so that an error of clinical judgement does not of itself amount to negligence. Thus in *Whitehouse* v *Jordan* [1981] 1 All ER 267 the claimant was born with severe brain damage following a difficult birth and sued the defendant, a senior hospital registrar, for damages. The defendant had used forceps to assist delivery of the claimant and it was alleged that he

pulled too hard and too long. It was held by the Court of Appeal and later by the House of Lords that if the damage had indeed been caused by the defendant's use of forceps the most that could be said with the benefit of hindsight was that he had made an error of clinical judgement which did not of itself amount to negligence, so that the claimant's claim failed.

However, the standard of care in cases of medical negligence is changing. The necessary standard of care required of a doctor towards his patient was laid down in *Bolam* v *Friern Hospital Management Committee* [1957] 2 All ER 118. It was to the effect that a doctor is not liable in negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men and women skilled in the particular procedure. This meant that doctors could between them set their own standards of care. In more recent times the *Bolam* case has not been followed. An example is provided by *Newell* v *Goldenberg* [1995] 6 Med LR 371. The claimant complained that he had not been warned of the small risk (1 in 2,300) of a possible failure of his vasectomy. The defendant produced evidence to show that at the relevant time it was not usual for surgeons to give such warning. However, Mantel J held that there was liability and that doctors who did not warn could not be regarded as acting responsibly.

Of even greater importance is the decision of the House of Lords in *Bolitho* v *City and Hackney Health Authority* [1997] 4 All ER 771 where their Lordships qualified the long-established principle outlined in *Bolam*. A court was not bound they said 'to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are generally of the opinion that the defendant's treatment or diagnosis accorded with sound medical practice . . . The court has to be satisfied that the exponents of the body of opinion relied on can demonstrate that such an opinion has a logical basis'. The ruling goes wider than medical practitioners in that accountants may not be able to rebut a charge of negligence merely by showing that they have followed standards, e.g. Financial Reporting Standards, issued by the profession. In fact, the Court of Appeal of British Columbia in *Kripps* v *Touche Ross* (1992) 94 DLR (4th) 284 held against Touche Ross on the ground that the accountants had known that a simple application of a Canadian accounting standard would omit material information in the particular case. However, the courts, which lack expertise in these matters, will not often depart from good professional practice, but since *Bolitho* may do so in an appropriate case.

Advocates

Advocates provided an exception to the above rule because no action lay against them for negligence in conducting a case (see *Rondel* v *Worsley* (1967), in Chapter 3) though it did (and does) in respect of preparatory work or advice unless it was pre-trial work intimately connected with the trial itself.

This immunity was removed by the House of Lords in *Hall* v *Simons* (2000) *The Times*, 2 July. The immunity in civil disputes and criminal cases has gone and claims may now be made against barristers and solicitor advocates even in regard to the way in which the trial was conducted in court. In the view of the House of Lords, it was not in the public interest nor in the interest of members of other professions that the advocate's immunity should continue.

Standard set by public policy

In other cases public policy may also require a higher standard of care than the defendant possesses so that again he may be negligent even though he does his best (see *Nettleship* v *Weston* (1971), in Chapter 20).

Other special cases

It should be noted that if precautions are taken which would have been reasonable in the case of persons possessed of the usual faculties of sight and hearing, this will be sufficient to absolve a person who does injury to those not possessed of such faculties, so long as he was not aware of their infirmity. However, persons engaged on operations on the *highway* must act reasonably so as not to cause damage to those who are using the highway, including blind people. Furthermore, the court will take into account the importance of the object which the defendant was trying to achieve and whether it was practicable and necessary for the defendant to have taken the precautions which the claimant alleged should have been taken.

Paris v *Stepney Borough Council*, 1951 – Those with infirmities (**400**)
Haley v *LEB*, 1964 – Works on the highway (**401**)
Watt v *Hertfordshire County Council*, 1954 – The importance of the objective (**402**)
Latimer v *AEC Ltd*, 1953 – What could the defendant reasonably do? (**403**)

Resulting damage to the claimant

It is necessary for the claimant to show that he has suffered some loss, since negligence is not actionable *per se* (in itself). A breach of contract with no loss will at least give an action for nominal damages but not so in tort. The major problem arising here is the question of remoteness of damage which was dealt with earlier in the chapter. The judge decides the measure of general damages.

Res ipsa loquitur

Although the burden of proof in negligence normally lies on the claimant, there is a principle known as *res ipsa loquitur* (the thing speaks for itself), and where the principle applies the court is prepared to lighten his burden. The principle applies wherever it is so unlikely that such an accident would have happened without the negligence of the defendant that the court could find, without further evidence, that it was so caused. It seems also to be a commonsense rule in that there is no point in asking the claimant to prove negligence because he has no view of what happened. If two cars collide on a public road, at least the drivers have a view of what happened prior to the crash but when, for example, a barrel falls out of a warehouse on to A he has no view at all of the happenings leading to the impact.

However, two conditions must be satisfied:

(*a*) the thing or activity causing the harm must be wholly under the control of the defendant or his servants; and
(*b*) the accident must be one which would not have happened if proper care had been exercised.

Easson v *LNE Railway*, 1944 – No exclusive control (**404**)
Roe v *Minister of Health*, 1954 – A defective ampoule (**405**)
Byrne v *Boadle*, 1863 – A falling barrel (**406**)
Scott v *London and St Katherine Docks*, 1865 – Falling bags of sugar (**407**)

It should be noted that just because the principle *res ipsa loquitur* applies, it is not certain that the claimant will succeed; the court is not bound to find the defendant negligent. The defendant may be able to prove how the accident happened and that he was not negligent. He may not know how the accident happened but he may be able to prove that it could not have arisen from his negligence. Finally, he may suggest ways in which the accident could have happened without his negligence, and the court may find his explanations convincing. If a tile falls off Y's roof and injures X who is lawfully on the highway below, this would probably be a situation in which *res ipsa loquitur* would apply. But if Y can show that at the time an explosion had occurred nearby and this had probably dislodged the tile, and the court is impressed by this explanation of the event, the burden of proof reverts to X. However, it is not enough to offer purely hypothetical explanations (*Moore* v *R Fox and Sons* [1956] 1 All ER 182), nor is it sufficient to explain how the accident happened unless the explanation also shows that the defendant was not negligent (*Colvilles* v *Devine* [1969] 2 All ER 53).

Pearson v *North-Western Gas Board*, 1968 – Rebutting a presumption of negligence (**408**)

If the defendant successfully rebuts the presumption of *res ipsa loquitur* the claimant has to establish his case by positive evidence. He will probably be unable to do this by the very nature and cause of the accident and the chances are that he may lose his claim. If he had had such positive evidence he would probably have adduced it in the first place and not relied on the maxim at all.

Contributory negligence

Sometimes when an accident occurs, both parties have been negligent and this raises the doctrine of *contributory negligence*. At one time a claimant guilty of contributory negligence could not recover any damages unless the defendant could, with reasonable care, have avoided the consequences of the claimant's contributory want of care. Thus the courts were often concerned to find out who had the last chance of avoiding the accident, and this led to some unsatisfactory decisions.

Now, however, under the Law Reform (Contributory Negligence) Act 1945, liability is apportionable between claimant and defendant. The claim is not defeated but damages may be reduced according to the degree of fault of the claimant. A person may contribute to the *damage* he suffers although he is not to *blame* for the accident. Thus failure by a claimant to wear a crash helmet on a motor cycle or moped may reduce the damages he obtains on the ground of contributory negligence (*O'Connell* v *Jackson* [1971] 3 All ER 129). Similarly, failure by a claimant to wear a seat belt in a motor car *may* also reduce damages on the grounds of contributory negligence (*Froom* v *Butcher* [1975] 3 All ER 520 (see below)). The defence of contributory negligence also applies to an action brought under the Fatal Accidents Act. Thus a wife whose husband failed to wear a seat belt and was thrown out of the van he was driving and killed had her damages reduced by one-fifth (*Purnell* v *Shields* [1973] RTR 414).

Where a defendant is insured against the injury he has caused, which is often the case, the effect of a finding of contributory negligence is in a sense to punish the claimant. There have been suggestions in case law that the rule should be abolished where the defendant is insured since the doctrine merely saves the insurance company money. However, in *Froom* v *Butcher* [1975] 3 All ER 520, Lord Denning disapproved of these cases and held that where injuries resulting from a road accident would have been prevented or lessened if a fitted seat belt had been worn, the failure to wear a seat belt amounted to contributory negligence on the part of the

claimant and damages awarded should therefore be reduced. In consequence, Lord Denning has produced an additional definition of contributory negligence so that there are two:

(*a*) to contribute to the accident, which is the old view of contributory negligence; and
(*b*) to contribute to the resulting damage, which is a new concept.

Furthermore, in *Froom* Lord Denning laid down a rather precise formula for contributory negligence in order to introduce as much certainty as possible in road traffic cases and reduce the number of trials, by saying that if failure to wear a seat belt by a front-seat passenger or driver would have made no difference, then nothing should be taken off the damages. If it would have prevented the accident altogether the damages should be reduced by 25 per cent, and if the accident would have been less severe the damages should be reduced by 15 per cent, though exemptions would be made, said Lord Denning, for pregnant women and those who were very fat.

Since 1983 it has been a criminal offence for the driver and front-seat passenger not to wear seat belts. The courts may therefore reduce still further the damages where a seat belt is not worn. It is thought unlikely that they will refuse to give damages altogether because the claimant is breaking the law, i.e. the defence will probably not be able to raise *ex turpi causa* (see Chapter 16) as a complete defence.

Since the rules relating to the wearing of seat belts are now extended in many cases to rear seat passengers no doubt their damages will be reduced if they are injured while not wearing a belt.

It should be noted that the rules laid down by Lord Denning do not prevent the courts from looking at all the circumstances of the case. For example, in *Jones* v *Morgan* (1994) Current Law, Week No 26, the damages awarded to a taxi-driver as a result of the injuries caused by the negligent driving of the defendant were not reduced because he was not wearing a seat belt. The court took into account the fact that a taxi-driver may be attacked by a passenger and a seat belt if attached would inhibit his ability to defend himself.

It should be mentioned that a young child will not normally be guilty of contributory negligence but it is a matter of fact in each case. Furthermore, the contributory negligence of an adult who happened to be with the child is no defence to an action brought by the child.

Jones v *Lawrence*, 1969 – Contributory negligence and children (**409**)
Oliver v *Birmingham Bus Co*, 1932 – A grandfather's negligence (**410**)

Furthermore, it was held in *Yianni* v *Edwin Evans & Sons* [1981] 3 All ER 592 that a house buyer who relies on a valuation of the property he is buying prepared by a building society surveyor is not contributorily negligent because he has not had the property surveyed by another independent surveyor employed by himself.

The victim's contributory negligence is no defence where the victim's claim is for deceit (fraud). Thus if an employer, A, is made vicariously liable for damage caused by an employee's fraud in overvaluing properties in order to obtain higher mortgages, it is no defence for A to say that C, the victim, did not use usual procedures to check on the fraudulent valuations (*Alliance & Leicester Building Society* v *Edgetop Ltd* [1994] 2 All ER 38). (For other non-fraudulent situations, see below.)

It was also held in *Corporation Nacional del Cobre de Chile* v *Sogemin Metals Ltd* [1997] 2 All ER 917 that the defence of contributory negligence was not available to the defendant where he had bribed the claimant's employee to act contrary to its interests in making futures contracts, i.e. contracts made for the future delivery of goods at a price fixed at the time of the contract which price may rise or fall by the time of delivery.

Contributory negligence in property valuation

One of the most difficult areas in terms of contributory negligence in business has been the use of the concept where a lender, such as a building society, bank or other mortgage lender, lends money on a property that valuers have in the event and by negligence overvalued. If the borrower cannot repay the loan and the lender repossesses the property and sells it, but because of the negligent valuation (and not because of a falling market) fails to recover what was lent and sues the valuer, what happens if the valuer puts in a defence of contributory negligence on the basis that the lender is partly to blame in that the inability of the borrower to repay is in part due to the lender's failure to properly vet his financial circumstances? If this is a cause of the sale, then a defence of contributory negligence is relevant.

In these cases the first step is to establish what is the basic loss of the lender. This will be the difference betwen the amount of the loan and the sale price. This must be reduced by a percentage for contributory negligence by the lender (see *Platform Home Loans Ltd* v *Oyston Shipways Ltd* [2000] 2 AC 190).

The second step is to see whether the basic loss now exceeds the amount of the overvaluation (see *Banque Bruxelles Lambert SA* v *Eagle Star Insurance* [1997] 1 WLR 1627). If it does, the lender's right of recovery from the valuer is limited to the extent of the overvaluation.

Thus, if the overvaluation was £3,000 and the lender's loss on re-sale was after deduction of contributory negligence £2,000, the lender would recover £2,000. If, however, the lender's loss was £4,000 after deduction for contributory negligence, he would recover only £3,000. In the absence of contributory negligence, he would recover the actual loss.

Contributory negligence and deceit

In *Standard Chartered Bank* v *Pakistan National Shipping Corp (Reduction of Damages)* [2001] QB 167 the Court of Appeal affirmed that a defendant who has been found liable for deceit, as in a fraudulent misrepresentation, cannot successfully establish a defence based upon the contributory fault of the claimant. The defendants had fraudulently issued a bill of lading to the bank giving a false shipping date for goods which they knew would cause the bank to make payment of a letter of credit. The defendants tried to defend the claim against them by alleging the bank's contributory negligence in failing to notice certain discrepancies in the bill of lading. This defence failed.

Contributory negligence – warning the victim

The fact that the victim of negligence received a warning of possible harm will not mean that the damages will be totally eliminated. In *Brannan* v *Airtours plc* (1999) *The Times*, 1 February the defendants put on a party with unlimited free wine, as part of a package holiday. Guests were told not to stand on tables because of danger from overhead fans. The claimant climbed on to a table and was injured by a fan. The trial judge reduced his damages by 75 per cent, but the Court of Appeal said the defendants could have avoided the damage by ensuring that tables were not under fans, and so assessed contributory negligence at 50 per cent.

The effect of warnings was also raised in one of the first reported cases on the subject of whether the smoking of tobacco constituted contributory negligence in terms of a death from cancer of the lung.

The matter was raised in *Badger* v *Ministry of Defence* [2005] 3 All ER 173. The claimant's husband died of lung cancer. The primary responsibility for this rested with, and was admitted by, his employer because he had been exposed to asbestos dust and fibres in his work as a boiler maker. However, his employer asked for a reduction in the damages because he had smoked from 1955 onwards and this was a cause also of lung cancer.

The High Court did not regard the early years of his smoking as contributory negligence because the connection between smoking and ill-health was not widely accepted. However, he continued to smoke after 1971 when warnings were put on cigarette packets and this began the process of contributory negligence. The damages were reduced by 20 per cent.

The doctrine of alternative danger or the 'dilemma principle'

It sometimes happens that a person is injured in anticipating negligence. If a passenger jumps off a bus which he believes to be out of control, and breaks his leg in so doing, he is not prejudiced by the fact that the driver later regains control and the anticipated accident is averted. He is not deprived of his remedy. This is sometimes referred to as the *doctrine of alternative danger*, and an act done in the agony of the moment cannot be treated as contributory negligence. Thus in *Jones* v *Boyce* (1816) 1 Starkie 493, in a coach accident, the claimant was placed by the negligence of the defendant in a perilous alternative either to jump or not to jump. He jumped off the coach and was injured and it transpired that had he kept his seat he would have escaped. However, he was able to recover from the defendant because he had acted reasonably and in the apprehension of danger.

Statutory duties

Sometimes a particular duty of care is laid upon a person by statute, e.g. the duty laid on an employer as to guarding machinery under safety legislation. Such duties are high and very often absolute, though the employer can plead contributory negligence as a defence. In addition, where there is a breach of a statutory duty, it must be shown that the duty is owed to the claimant personally and not to the public as a whole.

> ***Atkinson* v *Newcastle Waterworks Co***, 1877 – Where the duty is owed to the public (**411**)

A conditional statutory power saying that the person upon whom it is conferred may act cannot be converted into a statutory duty which says he must act. Thus in *East Suffolk Rivers Catchment Board* v *Kent* [1940] 4 All ER 527, a river catchment board, which had a power to repair river banks, could not be sued successfully for failing to do so on the grounds that a statutory duty had been breached.

However, where a statute prescribes provision to prevent damage, if an action is brought, the harm resulting from the breach of duty must be of the type contemplated by the statute.

> ***Gorris* v *Scott***, 1874 – Is the damage of the type contemplated? (**412**)

Compensation Act 2006

Before leaving negligence generally, note should be taken of the Compensation Act 2006. This Act is designed to overcome some of the problems created by claims management companies encouraging persons who have suffered injury where there might be negligence to 'have a go' under the 'no-win, no-fee' arrangements. The problems are that desirable activities such as school trips and school camps etc. abroad have been reduced and stifled by fear of litigation if anything goes wrong. The Act deals with this as follows: