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:

- the court should consider whether the usual standards of care should apply where if they are so applied it may prevent a desirable activity from being undertaken; or
- discourage persons from organising and taking part in them;
- an apology or offer of treatment or other redress shall not in itself amount to an admission of negligence.

The Act also sets up the office of regulator of claims management services. These must be authorised by the regulator who will then supervise their conduct.

It has already been noted that the Act deals with the decision in *Barker* v *Corus (UK) plc* [2006] 2 WLR 1027 by restoring the joint and several liability ruling in *Fairchild* v *Glenhaven Funeral Services Ltd* [2003] 1 AC 32.

Negligence – product liability

Here we shall consider the liability of a manufacturer for defective goods where in the absence of a contract between the parties liability is based on the common law of negligence and to some extent now on statute law.

Physical injury

Where the goods are purchased from a retailer, no action can be brought under the Sale of Goods Act by the purchaser against the manufacturer. The doctrine of privity of contract applies (see Chapter 10) with the result that there is no contract between them into which the warranties and conditions set out in the Act can be implied. However, the purchaser may have an action in negligence against the manufacturer in respect of *physical* injury caused by defects in the goods (see *Donoghue* v *Stevenson* (1932)). The rule arrived at in *Donoghue* v *Stevenson* has been widened since 1932, and now applies to defective chattels generally which cause injuries to purchasers (see *Grant* v *Australian Knitting Mills Ltd* (1936), in Chapter 14). However, although the *Donoghue* case shows that the manufacturer has a duty to take care, evidence may show that he was not in breach of that duty because he took proper precautions.

In addition, liability in negligence is not strict as it is under the Sale of Goods Act. The claimant must prove negligence in the process of manufacture. However, assistance is given by the plea of *res ipsa loquitur* (the thing speaks for itself). If this plea is accepted by the court the defendant must as we have seen show he was not negligent or explain how the matter could have come about without his negligence. If he fails to do this the claimant wins the case.

In this regard, the decision of the Court of Appeal in *Carroll* v *Fearon* [1998] PIQR P416 is of interest. In that case one of the tyres on a car suffered a sudden and complete failure resulting in tread strip while on a motorway, and causing a collision with one fatality and a number of serious injuries. The makers of the tyre defended a claim for negligence by saying that the claimants must prove what act(s) of theirs made the tyre defective. However, the court ruled that the manufacturers were negligent and liable and it was not necessary to identify specific acts of negligence in the process of manufacture of the tyre. The facts themselves spoke of negligence by the maker, which was enough.

In certain of the cases mentioned above the question of inspection of the goods was raised. It was an important fact in the decision in *Donoghue* v *Stevenson* (1932) that the bottle was made of dark glass, so that the snail could not be seen on external inspection of the bottle, and that normally no inspection of goods would take place until they reached the consumer. It is not thought that in the developing law of negligence a manufacturer can rely on an

inspection revealing the defects in his product, except perhaps in a special case where it is known that an expert inspection normally takes place. If such an inspection does not take place, or fails to find the defect which it should have found, the manufacturer may regard this as a *novus actus interveniens* (a new act intervening) breaking the chain of causation between his negligence and the injury so that the claimant's claim will fail.

The purchaser of goods from a retailer may have a right to sue in contract under the Sale of Goods Act conditions and warranties if third-party rights have been conferred on him (or implied) under the Contracts (Rights of Third Parties) Act 1999.

Economic loss

Product liability in negligence has, up to recent times, been confined to defective chattels which cause *physical* injury to purchasers as in *Donoghue* and *Grant*. The law seemed to have taken a step forward in the *Junior Books* case by extending product liability in negligence to complaints relating to defects in goods which had caused economic loss rather than physical injury. This seems unlikely to develop at the present time for the reasons given in the comment to the case.

Contributory negligence

Even though the claimant has managed to prove negligence in the manufacturer the latter may still be able to obtain a reduction in the damages or even defeat the claim by proving that the claimant was guilty of contributory negligence as where he contributed to the damage or was even entirely responsible for it by, for example, failing to observe operating instructions or using the product after knowledge that it was defective. As we have seen, the Law Reform (Contributory Negligence) Act 1945 applies. Under it the court may, for example, assess damages at £20,000 but decide that the claimant was 50 per cent to blame and reduce the damages to £10,000. In an extreme case the court may decide that the claimant was 100 per cent to blame so that he recovers nothing.

Third-party proceedings

Strict liability under the Act of 1979 can, in effect, be imposed on a manufacturer by means of third- (or fourth-)party proceedings. Thus, if the seller is sued by the buyer for breach of an implied condition under the Act, the seller may claim an indemnity from his own supplier which may be the manufacturer. If the retailer has purchased from a wholesaler, the retailer may claim an indemnity from the wholesaler who may in turn claim an indemnity from the manufacturer who supplied the goods. In this way the manufacturer can be made to pay for defects affecting the quality or fitness of the goods. *Godley* v *Perry* (1960) (see Chapter 14) provides an example of joinder of parties in a civil action. In connection with third-party proceedings, it should be borne in mind that the retailer may be unable to make a successful claim because of a 'reasonable' exclusion clause in the contract between him and his previous suppliers. In addition, the retailer's claim will be ineffective if one or more of the previous suppliers is insolvent.

Collateral contracts with the manufacturer

The manufacturer may also be liable for defects in quality or fitness under a collateral contract. Thus in *Shanklin Pier Ltd* v *Detel Products Ltd* [1951] 2 All ER 471 Shanklin entered into a contract with A to paint the pier and asked A to use paint made by Detel, the suitability of which had been communicated to Shanklin by Detel's agent. The paint was

not suitable and Shanklin recovered damages against Detel for breach of a contract which the court held was collateral to the main contract with A. This applies, however, only where a specific and express undertaking has been given by the manufacturer to the seller, and it is doubtful whether such a claim could be based on statements made in a manufacturer's public advertisements. There are no firm illustrations of this in English law, though *Carlill* v *Carbolic Smoke Ball Co* (1893) (see Chapter 9) could perhaps be developed. The court did not in fact go for the collateral contract solution in *Lambert* v *Lewis* (1981) (see Chapter 14). The action against the manufacturer in that case was framed in negligence.

The Law Commission has recognised the need to provide some *general* form of action against the manufacturer but has determined that this cannot be done by a simple amendment to the Sale of Goods Act 1979. The Commission, therefore, recommends that a wider study of the problem be made before embarking upon legislative measures (*Exemption Clauses, First Report*, para 63).

Manufacturers' guarantees

A manufacturer's guarantee (or warranty, as it is sometimes called) normally amounts to a warranty to repair or replace during a specified time with the addition in the case of vehicles of a mileage limit. Such guarantees are presumably enforceable by the buyer as a collateral contract as in *Carlill* v *Carbolic Smoke Ball Co* (1893) (see Chapter 9 and also Chapter 14 in connection with guarantees under the provisions of the Sale and Supply of Goods to Consumers Regulations 2002).

They cannot affect the purchaser's right to sue upon the implied conditions and warranties set out in the Sale of Goods Act 1979 or at common law for negligence because under s 5 of the Unfair Contract Terms Act 1977 a clause in a manufacturer's or distributor's guarantee cannot operate to exclude or restrict the manufacturer's or distributor's liability to the customer, provided the goods are of a type ordinarily supplied for private use or consumption and prove defective while in consumer use, i.e. not used exclusively for the purposes of a business.

It should be noted, of course, that in addition to the above three procedures which overcome the privity rule, there is also now the possibility that third-party rights have been conferred on the claimant (or implied) by the Contracts (Rights of Third Parties) Act 1999.

This Act does not confer a *general* right on a purchaser against the manufacturer. It will only do so if the parties to the original contract (say, between the manufacturer and the retailer) confers such a right or if it can be implied that such rights exist in the circumstances of the case.

Statutory product liability – claims against the manufacturer

The Consumer Protection Act 1987 now provides a statutory basis for a claim against the manufacturer.

Part I of the Consumer Protection Act 1987

This brings into law strict product liability so that the consumer will no longer have to prove negligence when claiming compensation for damage or injury caused by products which are defective or unsafe. Civil liability will arise if damage is caused by a defective product. The

Act is by no means a 'cure-all' because the claimant will still have to prove that the product *caused* the injury – not always an easy matter.

Damage is described as death, personal injury, or loss of or damage to *private* property. Thus, damage to business property is not included. Furthermore, damage to property cannot be recovered unless it exceeds £275. If it does then the whole amount is recoverable, including the first £275. This is to prevent trivial claims for damage to property.

In assessing whether the product is unsafe, the court must have regard to any warnings as to its use in advertising and marketing in general, instructions for use, how long ago the goods were supplied, and whether the product was put to what might be described as a reasonable use.

The following may be liable under the Act: the manufacturer of the product; a person who puts his name on the product thus holding himself out to be the manufacturer, i.e. a supermarket 'own brand' which is made for it by another manufacturer; an importer and a supplier if that supplier will not respond to a request to identify the person who supplied the product to him.

It is a defence to show that: (*a*) the product was not supplied in the course of a business; (*b*) the defect did not exist when the product was supplied; (*c*) technical knowledge was such that the defect could not have been known (called the 'development risk defence'). Hence, the manufacturers of the drug Thalidomide may well have had a defence under the Act. However, manufacturers pressed for the retention of the development risk defence so as not to inhibit the development of new products.

The Act provides that any attempt to exclude liability by a term of a contract or notice will be ineffective. An injured party has three years in which to commence an action after the injury and discovery of the producer. There is a time bar on claims in any event 10 years from when the product was supplied.

The Act did not impose liability on the producer of game or agricultural produce provided it has not undergone an industrial process. SI 2000/2771 now extends Part I to do so.

Abouzaid v *Mothercare* (*UK*) *Ltd*, 2000 – Older products (**412a**)
Bogle v *McDonald's Restaurants Ltd*, 2002 – The hot drinks (**412b**)

Part II of the Consumer Protection Act 1987

This repeals the Consumer Safety Act 1978 and the Consumer Safety (Amendment) Act 1986 and provides a better legal framework to give the public protection from unsafe goods. The main provisions are as follows:

(a) A person is guilty of an offence if he supplies any *consumer* goods which fail to comply with the general safety requirement. Section 10 of the 1987 Act which contained the general safety requirements is disapplied by the General Product Safety Regulations 1994 (SI 1994/2328). The Regulations now contain the general safety requirements for goods and these are expanded so that producers of consumer goods and those involved in the supply chain, e.g. distributors, will have to ensure among other things that their internal systems are equipped to supply the consumer with information required by the Regulations, e.g. warning of any risks in use and precautions to be taken, and that product recall procedures are adequate. The goods must be ordinarily intended for private use or consumption.

(b) The government may make safety regulations for the purpose of defining the general safety requirement set out in (*a*) above.

(c) The Department of Trade and Industry may serve upon a supplier a 'prohibition notice' prohibiting him from supplying goods which are considered unsafe or a 'notice to warn' requiring him to publish a warning about the goods at his own expense.

(d) A suspension notice may also be served by enforcement authorities, e.g. weights and measures authorities, prohibiting a supplier from supplying specified goods where the authority has reasonable grounds for suspecting that there has been a contravention of the general safety requirement, any safety regulations or any prohibition notice.

Part II is primarily enforced by criminal sanctions. However, the duties laid down in Part II can assist a claimant in a civil claim which is why reference has been made to them. A claimant injured by goods which infringe the safety requirements of the Act will be able to bring a claim for damages in negligence on the basis that the manufacturer is in breach of his statutory duty under the Act. This will make the claimant's suit much easier since he or she will not have to show a duty of care at common law. In this respect the Act is available to those who have no contractual claim against the seller as where they have received the goods as a gift.

Part III of the Act is concerned with misleading price indications but here again the sanctions are criminal not civil, and since they do not have relevance to civil claims Part III is not considered further.

Negligence – professional liability

We have considered the scope of a manufacturer's liability for defective products which he puts into circulation and the way in which a consumer can take direct action against a manufacturer in negligence. The law of negligence also applies to the provision of services. In particular, we are concerned with the position of those whose work involves giving professional business advice. The law has developed mainly in cases against accountants but the principles apply also to e.g. lawyers and valuers and surveyors.

The background and development

Liability for negligent statements is an important area of the law, and the number of claims continues to increase. Negligent *statements* are now a more potent cause of actions at law than negligent *acts*. This state of affairs has had, and will continue to have, a major influence on the cost of indemnity insurance arrangements.

It was not always so. For example, in *Candler* v *Crane, Christmas* [1951] 2 KB 164 Mr Ogilvie, the owner of a number of companies, was anxious to obtain an investment in them from Mr Candler. The defendants, a firm of accountants, prepared financial statements for Mr Ogilvie, *knowing* that they were to be shown to Mr Candler as a basis for his investment decision. Mr Candler did invest some money but a liquidation followed and he lost it.

He sued the defendants for damages, alleging negligent preparation of the financial statements. It was claimed that the defendants included freehold cottages and leasehold buildings as corporate assets without obtaining ownership evidence.

It was further claimed that the cottages were, in fact, owned by Mr Ogilvie, and that the title deeds were deposited with his bank to secure a personal overdraft. The leasehold buildings, it was alleged, did not belong to the company, but to Mr Ogilvie, and in any case, they had been forfeited, it was said, for non-payment of rent.

To succeed Mr Candler had first to establish, *as a matter of law*, that the defendants owed him a duty of care. If they had indeed been negligent in the preparation of the accounts this could then give rise to liability. The majority of the Court of Appeal decided that there was no duty of care in such circumstances, and so the accountants were not liable to Mr Candler, and would not have been, even if it had been proved that the financial statements were prepared negligently. There was no further appeal.

However, Lord Denning dissented from the majority view, being of the opinion that the accountants did owe a duty to Mr Candler, even though he was not a client. In his judgment, he said:

> I think the law would fail to serve the best interests of the community if it should hold that accountants and auditors owe a duty to no one but their client. There is a great difference between the lawyer and the accountant. The lawyer is never called on to express his personal belief in the truth of his client's case, whereas the accountant, who certifies the accounts of his client, is always called on to express his personal opinion whether the accounts exhibit a true and correct view of his client's affairs, and he is required to do this not so much for the satisfaction of his own client, but more for the guidance of shareholders, investors, revenue authorities and others who may have to rely on the accounts in serious matters of business. In my opinion, accountants owe a duty of care not only to their own clients, but also to all those whom they know will rely on their accounts in the transactions for which those accounts are prepared.

However, although Lord Denning was prepared to widen the liability of accountants to encompass a person who was not a client, he does appear to have restricted that liability to persons who it is *known* will rely on the accounts, as the last sentence of the above extract from his judgment clearly reveals. But he was alone in his view of the case, and the expansion of the liability of accountants (and others) for negligent statements had to wait for more than a decade.

In *Hedley Byrne & Co Ltd* v *Heller & Partners* (1963) (see Chapter 13), the House of Lords overruled the majority judgment of the Court of Appeal in *Candler*, and approved the dissenting judgment of Lord Denning.

The decision in *Hedley Byrne* widened the liability of all professionals (including, of course, accountants), but the House of Lords refrained, as a matter of public policy, from imposing the even wider test of *foresight* formulated by Lord Atkin in *Donoghue* v *Stevenson* (1932). That case, as we have seen, related to negligence actions for *physical injury* arising from negligent *acts*, e.g. liability for a negligently manufactured product which causes physical injury to a consumer. Liability under that test extended to anyone who might reasonably be foreseen as suffering injury.

The need for a special relationship – knowledge of victim

Instead the House of Lords decided that in the negligent *statement* cases, there had to be a 'special relationship' between the maker of the statement and the person injured by it. Obviously, this need not be a contractual client relationship. Although their Lordships did not draw up a list of special relationships, comments made by them in their judgments suggest that the duty in regard to a negligent statement would be owed only to those persons whom the maker of the statement *knows* will rely on it, and not beyond that to those whom he might *foresee* relying on it. Thus, the test for negligent statements causing monetary loss (knowledge) was narrower than that for negligent acts causing physical injury (foresight), though, in all honesty, it was difficult to see why liability as such should depend upon the nature of the damage.

Indeed, during the decade following *Hedley Byrne* there were a number of judicial decisions which suggested that the foresight test propounded in *Donoghue* v *Stevenson* could be appropriate in the negligent statement situation thus potentially widening liability (see below). This development was of course encouraged by the judgment of Lord Wilberforce in *Anns* v *London Borough of Merton* (1977), already referred to.

From knowledge to foresight

Lord Wilberforce's view that judges should consider broad principle rather than slavishly follow relevant previous decisions enabled Mr Justice Woolf to break out of the *Hedley Byrne* strait-jacket of 'special relationships' in *JEB Fasteners Ltd* v *Marks, Bloom & Co* [1981] 3 All ER 289. In April 1975, the defendants, a firm of accountants, prepared an audited set of accounts for a company called BG Fasteners Ltd for the year ended 31 October 1974. The company's stock, which had been bought for some £11,000, was shown as being worth £23,080, that figure being based on the company's own valuation of the net realisable value of the stock.

The accountants nevertheless described the stock in the accounts as being 'valued at lower of cost and net realisable value'. On the basis of the inflated stock figure, the accounts showed a profit of £11.25. If the stock had been shown at cost, with a discount for possible errors, the accounts would have shown a loss of more than £13,000.

The defendant auditors were aware when they prepared the accounts that the company faced liquidity problems, and was looking for outside financial support from, amongst other people, the claimants, JEB Fasteners, who manufactured similar products and were anxious to expand their business. The accounts which the defendants had prepared were made available by the directors of BG to the claimants, who, although they had some reservations about the stock valuation, decided that they would take the company over in June 1975 for a nominal amount, because they would in so doing obtain the services of the company's two directors who had considerable experience in the type of manufacturing which the claimants, JEB, carried on.

There were discussions between the claimants and the defendant auditors during the takeover, but the auditors did not inform the claimants that the stock had been put into the accounts at an inflated figure. The merger of the companies was not a financial success, and the claimants brought an action for damages against the defendants.

The claimants alleged that the defendants had prepared the company's accounts negligently, and that they relied on the accounts when buying BG Fasteners, and would not have bought the company had they been aware of its true financial position. It was contended on behalf of JEB that an auditor when preparing a set of accounts owes a duty to all persons whom he ought reasonably to have foreseen would rely on the accounts. The defendant auditors argued that if a duty of care existed, it could only be to persons who had made a specific request for information.

Woolf, J decided that the defendant auditors did owe a duty of care to the claimants, but that they were not liable in damages, since their alleged negligence was not the cause of the loss. The overriding reason for the takeover had been to obtain the services of two of BG's directors. On the balance of probabilities, the takeover would have gone ahead even if the accounts had shown the true position.

The judge said that, but for the statement of Lord Wilberforce in *Anns* (as mentioned), Marks, Bloom would not have owed a duty of care to those who took over BG because the foresight test could not have been applied, and a 'special relationship' would not have existed (it was admitted that at the time the accounts in question were audited, Marks, Bloom did not know that they would be relied on by the claimants, or even that any takeover was contemplated).

Furthermore, Woolf, J, having found a duty of care, said that following the Wilberforce test in *Anns*, he could find no considerations which he felt ought to exclude it in the circumstances of the *JEB* case.

As regards the foreseeability issue, the judge said:

> As Mr Marks was aware of the financial difficulties of BG Fasteners Ltd, and the fact that they were going to need financial support from outside of some sort, I am satisfied that Mr Marks, whom I can treat as being synonymous with the defendants, ought to have realized the accounts could be relied on until the time that a further audit was carried out by the commercial concerns to whom BG Fasteners were bound to look for financial assistance. When he audited the accounts, Mr Marks would not know precisely who would provide the financial support, or what form the financial support would take, and he certainly had no reason to know that it would be by way of takeover by the [claimants].
>
> However, this was certainly one foreseeable method, and it does not seem to me that it would be right to exclude the duty of care merely because it was not possible to say with precision what machinery would be used to achieve the necessary financial support. Clearly, any form of loan would have been foreseeable, including the raising of money by way of debenture and, while some methods of raising money were more obvious than others, and a takeover was not the most obvious method, it was certainly one method which was within the contemplation of Mr Marks.

The judge went on to decide that the events leading to the takeover of BG were therefore foreseeable.

There was an appeal by JEB to the Court of Appeal, which upheld Woolf, J's finding that there was a lack of causal connection between JEB's loss and the auditors' alleged negligence. Thus they were not liable.

However, the Court of Appeal went on to say that it was not necessary in order to decide the appeal to determine the scope of an auditor's liability for professional negligence.

From foresight back to knowledge

In more recent times the courts have made it clear that mere foresight is not enough. There must be some 'relationship' or 'proximity' or 'neighbourhood' between the parties. This is likely to restrict liability to within reasonable bounds and close the floodgates to a wide variety of claims by claimants *unless they are known to be the users of professional statements and, further, that the professional concerned knows of the use to which they will be put*. Given such a situation a duty of care will exist.

This development was taking place before the *Anns* case was overruled by the decision of the House of Lords in *Murphy* v *Brentwood District Council* (1990) as the case law below shows.

Caparo Industries plc v *Dickman*, 1990 – Accountants' liability (**413**)
Morgan Crucible Co plc v *Hill Samuel*, 1990 – Accountants' liability in a takeover (**414**)

Current trends in liability

A case which appears to widen the liability of auditors beyond statements to mere omissions is *Coulthard* v *Neville Russell* (1997) *The Times*, 18 December, where the Court of Appeal held that, as a matter of principle, auditors have a duty of care to advise that a transaction which the

company and its directors intend to carry out might be a breach of the financial assistance provisions of the Companies Act 1985. The High Court has also ruled that two companies which invested venture capital in a shopfitting company that later went into receivership were entitled to damages from the shopfitters' auditors on the basis of negligent misstatements by the auditors in the company's accounts and in letters sent by the auditors to the investing companies. The auditors owed those companies a duty of care. (See *Yorkshire Enterprise Ltd* v *Robson Rhodes, New Law Online*, 17 June 1998, Transcript Case No 2980610103, approved judgment.) A main problem had been that the provision for bad debts was inadequate. The court was saying, in summary, that had the auditors carried out the audit work thoroughly, they would have found certain bookkeeping errors and would have made a greater and more appropriate provision for bad debts. In consequence, the auditors were liable in damages. The facts of the case showed that the auditors were aware of the user of their statements and the use to which they would be put.

In *Abbot* v *Strong* (1998) *The Times*, 9 July, the High Court decided that a circular issued by a company to its shareholders in connection with a rights issue – allegedly containing misleading profit forecasts by the directors – together with an allegedly negligent letter from the company's accountants and management consultants confirming that the forecast statement was properly compiled and in accordance with the company's accounting policies did not lead to the accountants having a duty of care in negligence to the shareholders who acquired shares in the rights issue. Their attempt to claim against the accountants failed. Once again, the court has decided that those advising companies owe no duty of care to the individual shareholders of those companies. This maintains the *Caparo* line. Notably, there were 200 potential claimants in this case, so the court may also have been concerned not to open the floodgates of liability in the public interest, bearing in mind that it is already difficult for professionals to get adequate indemnity insurance.

Also of interest is the decision of the High Court in *Sayers* v *Clarke-Walker (a Firm)* [2002] 2 BCLC 16. It was decided that where a piece of professional work carried out by accounting practitioners can be regarded as within the competence of general practitioners they cannot absolve themselves from liability in negligence by advising the client that he/she should consult also a higher specialist. In the case the issue was the tax consequences of a contract of purchase of a company on which negligent advice was given with the advice also that the client should consult tax counsel. The firm was liable. It should have done the work competently and not required the client to spend more money on a further adviser.

An illustration of professional negligence liability in terms of solicitors and barristers is to be found in *Griffin* v *Kingsmill* [2001] Lloyd's Rep PN 716. The claimant's claim, following personal injury in a road accident, was settled on the basis of written advice from a barrister to her solicitors which resulted in the conclusion that she had no real prospects of success. The settlement was for £50,000 whereas the claim would have been worth at least £500,000. The essence of the claimant's case was that both her former lawyers had been negligent in taking it that her prospects were so poor. There was an acute conflict of evidence as to fault but the claimant alleged that her lawyers had wrongly evaluated it. The barrister had failed to give logical and sensible reasons for his view of the conflict of evidence. The solicitor did not try to hide behind counsel's opinion, rightly so in the view of the Court of Appeal. Notwithstanding that opinion she ought to have weighed up the evidence and formed an independent view. The claimant's action succeeded.

Avoiding and excluding liability

The most practical suggestion that can be made in terms of avoiding liability is for professionals to follow strictly the recommendations of their professional bodies, e.g. the many

financial reporting standards and other published material. If this is done the professional will at least have the advantage of the judgment of McNair, J in *Bolam* v *Friern Hospital Management Committee* [1957] 2 All ER 118. He said in connection with doctors: 'A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art . . . merely because there is a body of opinion who would take a contrary view.' The statement is, of course, equally applicable to other professions.

On the other hand, as we have seen in discussing medical negligence, the above case does rather suggest that accountants and lawyers and other professionals can set their own standards. Doubt was thrown on the applicability of *Bolam* in *Newell* v *Goldenberg* [1995] 6 Med LR 371 which is considered earlier in this chapter.

However, it is worth noting that the view taken in *Bolam* was reinforced so far as accountants are concerned in *Lloyd Cheyham & Co* v *Littlejohn & Co* [1987] BCLC 303 where the judge said SSAPs (i.e. Statements of Standard Accounting Practice, more recent ones known as Financial Reporting Standards) 'are very strong evidence as to what is the proper standard which should be adopted and unless there is some justification a departure . . . will be regarded as constituting a breach of duty.' Nevertheless, these statements are also put in some doubt by the *Newell* case.

There is also the case of *Bolitho* v *City and Hackney Health Authority* (1997) to consider, that continues the development of the theme that professional persons cannot be the sole judges of their own liability. The case was considered in that context earlier in this chapter.

As regards ability to exclude liability by notice under s 2(2) of the Unfair Contract Terms Act 1977 (see Chapter 15), this will work only if the clause is reasonable. It would seem that there are two factors of major importance in deciding the reasonableness or otherwise of limitations or exclusion of liability for professional negligence and these are: (*a*) insurance, and (*b*) the operation of a two-tier service.

As regards insurance, it would seem unreasonable for a professional person to try to exclude total liability for negligence because that can hardly be regarded as best professional practice. On the other hand, it would probably be reasonable for him to limit his liability to a specified sum. In fact s 11(4) of the 1977 Act states that if a person seeks to restrict his liability in this way the court must have regard to the resources which he would expect to be available to him for the purposes of meeting the liability and also how far it was possible for him to cover himself by insurance. It is thought, therefore, that a firm which takes out the maximum insurance cover which is reasonable in the circumstances, being one where the cover is not so great that the effect could be greatly to inflate the fees charged by the firm, then to limit liability to that sum would satisfy the requirement of reasonableness. There is judicial support for this argument in a number of cases, particularly *George Mitchell* v *Finney Lock Seeds* (1983) (see Chapter 15).

As regards a two-tier service, a professional person could offer a full service at a full price and a reduced service at a lower price. Again, it would seem so long as the user of the service is aware that the two-tier service is available and that he is accepting a reduced service at a reduced price without full liability, then the exclusion clause in a lower-tier service ought to be regarded as reasonable.

It is, of course, worth bearing in mind in all of this that a limitation of liability for professional negligence is much more likely to be regarded as reasonable in a contract with a non-consumer, i.e. a business, than it is in a consumer contract. In fact we have already seen in *Smith* v *Eric S Bush* (1987) that a disclaimer used by a professional person in a consumer situation was not effective. However, as we have seen in *McCullagh* v *Lane Fox* (1995) a more sophisticated consumer of a high-priced property may have to accept a disclaimer.