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.

This theme was followed in *Omega Trust Co Ltd* v *Wright Son and Pepper* (1997) 73 P & CR D39 where the Court of Appeal ruled that an exclusion clause under the Unfair Contract Terms Act 1977 applied to exclude the liability of valuers to a lending bank for a negligent valuation of three leases of small supermarkets. This, said the court, was a commercial transaction in which the parties where able to look after themselves. The identity of the bank was not disclosed to the valuers when they made the valuation for the owners, so there is an element of 'unknown user' in the case which, as we have seen, can prevent a duty of care arising even in the absence of an exclusion clause.

It is also worth noting that as regards auditors engaged by a company to carry out a Companies Act audit, s 310 of the Companies Act 1985 makes void any provision in a contract of engagement of the auditors which purports to exclude them from liability for negligence or breach of duty to the company, though the company can now pay the premiums on an insurance policy both for auditors and directors.

Accountants: developments in exclusion of liability

The case of *Royal Bank of Scotland plc* v *Bannerman Johnstone Maclay (a firm)* 2003 SLT 181 has raised issues in regard to accountants' liability and also their ability to exclude that liability. The bank lent money to a company APC Ltd on the strength of accounts audited by the defendants. It was alleged by the claimant that the audited accounts were less than adequately informative in terms, e.g., of the going concern factor. The bank had later to appoint a receiver to the company which was insolvent.

The auditors had notice that under overdraft facility letters the bank was entitled to see management accounts and annual audited accounts. However, they contended that the claimant had to prove that as auditors they *intended* the bank to rely on the accounts to make further loans or advances. The auditors said in effect 'when auditing the accounts our only intention was to carry out Companies Act duties to audit the accounts'. The Scottish Court of Session (Outer House) in this case, equally applicable in England and Wales, ruled that the case law did not support a requirement of intention. The compelling effect of the authorities was that knowledge of user and use formed the basis of a duty of care for those making information or advice available. The auditors had the requisite knowledge and therefore owed a duty of care.

The bank had yet to prove that the accounts were prepared negligently. These duty of care cases are decided without proof of the allegations of negligence. A major matter relating to this case was that *the auditors had not disclaimed liability to third parties such as the bank*. In this connection, the Institute of Chartered Accountants in England and Wales has stated that it is clear that auditors assume reponsibility for the contents of the audit report to shareholders as a body under s 235 of the Companies Act 1985 (now s 509 of the Companies Act 2006). It also states that the absence of a disclaimer may in some cases enable a court to draw an inference that the auditors have assumed responsibility for the audit report to a third party such as the bank in this case. *The ICAEW recommends* that auditors include the following wording in audit reports to clarify their duty of care to third parties by indicating that no such duty is owed.

> This report is made solely to the company's members as a body, in accordance with s 235 of the Companies Act 1985 (now s 509 of the Companies Act 2006). Our audit work has been undertaken so that we might state to the company's members those matters we are required to state to them in an auditor's report and for no other purpose. To the fullest extent permitted by law, we do not accept or assume responsibility to anyone other than the company and the company's members as a body, for our audit work, for this report, or for the opinions we have formed.

Professional negligence insurance

Professional indemnity policies are available for a whole range of professional persons and experts, e.g. accountants, solicitors, company directors and insurance brokers. These policies carry an excess clause under which the insured bears the first part of the claim up to a fixed amount. The risk covered is variously described but there is now a tendency to cover 'full civil liability' followed by exclusions from cover of things such as libel. The policies usually cover loss caused to a client (i.e. by breach of contract), and to a non-client (i.e. in the tort of negligence).

Companies Act 2006

Insofar as a number of the illustrations of professional liability concern auditors of companies, the provisions of the Companies Act 2006 are worth noting. Section 548 allows the company and its auditors to enter into a liability limitation agreement to limit the liability of the auditor in regard to damage caused to the company and occurring in the course of auditing the accounts. The agreement must be approved by the members and can only limit liability in terms of what is fair and reasonable in regard to the responsibilities of an auditor. Disclosure of the existence of the agreement must be made in a note to the company's accounts or in the directors' report.

Reform

The rule of joint and several liability of partners in a number of areas including professional negligence has produced what might be regarded as unfairness, particularly with accountants in the audit situation. Suppose that there is a major fraud by an employee of a company which the auditors fail negligently to detect. The person primarily liable to replace the funds fraudulently abstracted is the employee but even if he is caught the funds may have been used up or impossible to find. Others responsible may be the directors who have not put in place internal controls to prevent fraud. However, the directors will not in all cases have insurance or at least not much and the best defendant will be the auditors (as by their having the larger 'pocket') and the loss may well rest with them. Obviously the auditors will have a contribution against other wrongdoers but they may not be able to contribute much or may be insolvent and not contribute anything.

New limited liability partnerships

Parliament has passed the Limited Liability Partnerships Act 2000, which means that a new limited liability partnership is available as a business organisation. These partnerships are registered with the Registrar of Companies and, so far as liability is concerned, the liability of the firm is limited to the capital provided by the partners, and the personal liability of the partners individually is limited in the sense that if in a firm Bloggs, Snooks and Co, Snooks prepares a set of accounts in a negligent fashion knowing that an outsider, say, a takeover bidder, will rely on them, the firm is then liable up to the total of its assets and so are the private assets of Snooks. Bloggs' personal assets are not liable. They would be if the negligent accounts were jointly prepared.

However, the private assets of persons such as Snooks should not often be at risk because it will normally be made clear that he acts for the firm as its agent on all documents and letters issued in connection with the preparation of the accounts. The assets of the firm will be at risk but not the private assets of the partners. Where agency is not made clear there may be liability in Snooks.

The present position regarding duty of care – a summary

As we have seen, the duty of care in regard to negligent misstatements by auditors has been considered in a number of cases since the early 1950s. However, the present position has been the subject of comprehensive analysis by the House of Lords in *Caparo Industries* v *Dickman* [1990] 1 All ER 568.

From this decision and two important later ones the position would appear to be as follows:

(a) Auditors do not owe a duty of care to potential investors in the company, e.g. those who reply on the audited accounts when contemplating a takeover bid. The fact that the accounts and auditors' report might foreseeably come into their hands and be relied on is not enough to create a duty of care. In addition, it was decided in *James McNaughton Paper Group* v *Hicks Anderson* [1991] 1 All ER 134 that even if an auditor knew that the audited accounts would be used by a bidder as the basis of a bid, he would not be liable if he reasonably believed and was entitled to assume that the bidder would also seek the advice of his own accountant.

(b) Auditors do not owe a duty of care to potential investors even if they already hold shares in the company since, although they are shareholders and auditors are under a statutory duty to report to shareholders, the duty of the auditors is to the shareholders as a whole and not to shareholders as individuals.

(c) Even where the auditors are aware of the person or persons who will rely upon the accounts, they are not liable unless they also know what the person or persons concerned will use them for, e.g. as the basis for a takeover.

(d) Where there is knowledge of user and use, then in that restricted situation the Court of Appeal held in *Morgan Crucible Co plc* v *Hill Samuel Bank Ltd* [1991] 1 All ER 142 that a duty of care would exist in regard to the user. However, even in such a situation the auditor will not be liable if, in the circumstances, he was entitled to assume that the user would also seek the advice of his own accountant and not rely solely on the audited accounts (see the *McNaughton* case, above). It is not necessary to prove *intention* in the auditors that a third-party should rely on the audit report provided there is knowledge in the auditors of user and use (*Royal Bank of Scotland plc* v *Bannerman Johnstone Maclay (a firm)* 2003 SLT 181).

(e) *Coulthard* v *Neville Russell* (1997) would seem to extend liability to mere omissions.

Negligence – occupiers' liability

The question of the liability of occupiers of premises to persons suffering injury thereon may be regarded as a further aspect of negligence. The occupier is the person who has *de facto* control of the premises or the possession of them; it is a question of fact in each case and does not depend entirely on title. It should also be noted that occupation may be *shared* between two or more persons, and that an employer may be vicariously liable for the torts of an employee who is acting within the scope of his employment. Thus in *Stone* v *Taffe* [1974] 3 All ER 1016, the owner of a hotel was liable when the manager failed to ensure that there was adequate lighting on the premises so that a guest fell and was killed.

Wheat v *Lacon & Co Ltd*, 1966 – When two persons occupy (**415**)

The Occupiers' Liability Act 1957

A common duty of care is owed to all lawful visitors to premises, 'visitor' being a term which includes anyone to whom the occupier has given, or is deemed to have given, an invitation or permission to use the premises. It includes some persons who enter the premises by right of law, such as inspectors, but not those who cross land in pursuance of a public or private right of way. A person using a public or private right of way (the latter as an easement, see Chapter 22) does so by right and cannot therefore be the visitor of the owner of the land over which the way passes (*McGeown* v *Northern Ireland Housing Executive* [1994] 3 WLR 187) and see now the Occupiers' Liability Act 1984 where rights other than those of a visitor were created (see below).

Implied permission to enter premises is a matter of fact to be decided in the circumstances of each case, and the burden of proof is upon the person who claims implied permission. However, persons who enter upon premises for purposes of business which they believe will be of interest to the occupier, as where they wish to sell him a product, have implied permission to enter even though their presence is distasteful to the occupier.

Under the Act, an occupier of premises owes to all visitors the duty to take such care as, in the circumstances of the case, is necessary to see that the visitor will be reasonably safe in using the premises for the purpose for which he is invited or permitted to be there. If the visitor uses the premises for some other purpose, the occupier does not owe him the same duty; such a person is in effect a trespasser, and liability to him falls to be decided on that basis (see below).

Under s 2(1) of the 1957 Act the occupier may restrict or exclude his liability, by giving adequate warning or by contract. However, this section must be looked at in the light of the Unfair Contract Terms Act 1977, which states that the common-law duty of care in regard to liability for death or personal injury cannot be excluded in relation to business premises. In addition, liability for other loss or damage occurring on such premises can only be excluded where it is reasonable to do so. However, the owner of a path adjacent to self-evidently dangerous cliffs is not under a duty to put up a notice giving warning that the cliffs are dangerous (Court of Appeal in *Cotton* v *Derbyshire Dales District Council* (1994) *The Times*, 20 June). Furthermore, the Court of Appeal ruled in *Darby* v *National Trust* (2002) 3 LGLR 29 that there was no need to warn against swimming in a pond in the grounds of a stately home which was under the control of the trust. The relevant pond was no more hazardous than any other. The claim that there should have been a warning notice relating to the possibility of contracting Weil's disease from swimming in the pond was also turned down because the claim was for causing death by negligence and there was therefore no causative loss in regard to Weil's disease.

Where the accident has arisen through the defective work of an independent contractor, the occupier can avoid liability by showing that he behaved reasonably in the selection of the contractor.

The defence of *volenti non fit injuria* is available to the occupier, though he must show that the entrant assented to the risk, not that he merely knew of it: the entrant's knowledge is no longer a defence.

The occupier may also raise the defence of *contributory negligence* by the entrant which, though not defeating his claim, may reduce damages.

Cook v *Broderip*, 1968 – Faulty work of an independent contractor (**416**)
Bunker v *Charles Brand*, 1969 – Knowledge is not assent (**417**)

Trespassers

The main case on an occupier's liability to a trespasser was *British Railways Board* v *Herrington* [1972] 1 All ER 749 in which the House of Lords was unanimous in deciding that there could be liability to a trespasser. Unfortunately the five judges concerned reached that decision in different ways and the matter was referred to the Law Commission. Eventually Parliament passed the Occupiers' Liability Act 1984 which now governs the position of trespassers and certain other non-visitors.

Section 1 deals with the duty of an occupier to persons other than his visitors – this includes trespassers and persons entering land without the consent of the owner, but in exercise of a private right of way or public access. In these cases the occupier owes a duty, if he is aware of the danger which exists, or has reasonable grounds to believe that it exists. He must also know, or have reasonable grounds to believe, that the non-visitor concerned is in the vicinity of the danger – whether he has lawful authority for being in that vicinity or not. Furthermore, the risk must be one which in all the circumstances of the case it is reasonable to expect the occupier to offer the non-visitor some protection against. It was held, for example, in *Proffit* v *British Railways Board* (1984) *The Times*, 4 February that British Rail had no *general* duty to erect or maintain fences sufficient to keep trespassers out.

The duty is to take such care as is reasonable in all the circumstances of the case to see that the non-visitor does not suffer injury because of the danger concerned. The duty may be discharged by giving warning of the danger or taking steps to discourage persons from incurring risk. Thus the defence of *volenti* is preserved.

A case in point is *Ratcliff* v *McConnell* [1999] 1 WLR 670 where the claimant sued for tetraplegic injuries sustained by diving into the shallow end of a college swimming pool when the pool was closed for the winter. He had climbed over a locked gate in the early hours of the morning. There were warning notices and notices prohibiting use. The claimant, who was an adult, did not recover any damages against the college (represented by a defendant governor). He willingly accepted the risk, said the Court of Appeal.

The Court of Appeal reached a similar conclusion in *Donoghue* v *Folkestone Properties* [2003] All ER (D) 382 where the claimant was rendered tetraplegic when after an evening drinking with friends the claimant trespassed on to a slipway in Folkestone harbour, dived into the water and struck his head on an underwater obstruction. The defendants had no duty of care towards him. They would only have been liable if they knew that someone was likely to swim from the slipway in the middle of the night in the depth of winter.

Again, in *Tomlinson* v *Congleton BC* [2003] 3 All ER 1122 the Court of Appeal refused the claim of an 18-year-old who ignored a notice at a country park lake which said 'Dangerous Water: No Swimming'. He waded into the water and dived from a standing position striking his head on the bottom of the lake. Once again, he became tetraplegic. The House of Lords affirmed the decision of the Court of Appeal (see the above reference).

While these injuries are tragic the cases do seem to provide an injection of balance into liability in tort at a time when there is a prevailing compensation culture. The decisions indicate that there is a place for personal responsibility in these matters: something that can be overlooked in an increasingly litigious society encouraged by the 'no-win, no-fee' litigation arrangements.

Access to the countryside

Section 2 of the Occupiers' Liability Act 1984 is designed to encourage access to the countryside. The Unfair Contract Terms Act 1977 had discouraged landowners with, say, a mountain crag, or potholes on their land, from admitting the public thereto because of the difficulty of excluding liability which might result. Under the 1984 Act they can exclude liability, e.g. by

notice, for the dangerous state of the land provided they are prepared to allow the public to come on to it for nothing. So long as the actual letting in of the public is not part of a business, as where access for recreational or educational purposes is charged for, the letting in of the public for nothing will not constitute running a business for the purposes of the 1977 Act.

The provisions of the Countryside and Rights of Way Act 2000 are considered in Chapter 21 but the 'right to roam', as it is called, created under certain conditions does not increase the liability of landowners.

Children on premises

Dealings with children always demand a high degree of care, whether a person is sued in the capacity of an occupier of premises or not. However, in the case of an occupier of premises, the duty towards children was rather different from the corresponding duty to adults. If, with knowledge of the trespass of children on his land, the occupier made no reasonable attempt to prevent such trespass, e.g. by repairing fences, and a child was injured by something on the land which was especially alluring to children, e.g. turntables, escalators, bright and poisonous berries, then the occupier in general was liable, even though the child was on the face of it a trespasser. The difference owed to child trespassers is no longer so great in view of the broader rules laid down in the Occupiers' Liability Act 1984. However, it should be noted that what is adequate warning to an adult might not be so to a child. These rules will presumably apply to the warnings which the 1984 Act allows the occupier to give.

Yachuk v *Oliver Blais & Co Ltd*, 1949 – Negligence liability and children (**418**)
Gough v *National Coal Board*, 1954 – Occupiers' liability and children (**419**)
Mourton v *Poulter*, 1930 – Warning children (**420**)
Pannett v *McGuinness & Co*, 1972 – An alluring bonfire (**421**)

Landlord and tenant

As regards landlord and tenant, s 4 of the Occupiers' Liability Act 1957 provided that a landlord would be liable to his tenants' visitors who were injured or whose goods were damaged on the leased premises because of some defect which resulted from his failure to repair. However, s 4 only applied where the landlord was under an obligation express, implied or statutory to repair, but the Defective Premises Act 1972 repeals s 4 and places liability on a landlord who has merely reserved a right to enter and repair. A landlord who does not repair where he has no obligation to do so, nor a power of entry, has no liability, under the Act or at common law.

Thus, now that s 4 of the 1957 Act is repealed, the landlord's liability is similar to his liability in nuisance. Of course, only an occupier can sue in nuisance, but under the Defective Premises Act 1972 the landlord is liable to all persons who might reasonably be expected to be affected by defects in the state of the premises. This covers not only the tenant, his family and his visitors, but also neighbours, passers-by and trespassers.

Furthermore, under the 1957 Act it became established that a landlord was only liable to his tenants' visitors if he had been notified of the defect by the tenant. However, s 4(2) of the 1972 Act provides that the duty is owed where the landlord knew or ought to have known of the relevant defect, so notice given by the tenant is no longer essential. Where the lease or tenancy expressly imposes on the tenant a duty to inform the lessor of defects but the tenant fails to do so with the consequence that a third party is injured, then the landlord can still be sued provided it can be shown that he ought to have known of the defect but in this case he will have a right of indemnity against the tenant for what that may be worth.

However, there are still gaps in the law because the duties imposed upon a landlord by s 4 relate only to the *maintenance* of a property which was satisfactory when let. If an owner knows of a defect – not created by him – in the premises *before he either sells or lets the premises* but does not repair it or warn about it the 1972 Act imposes no liability on him for harm caused after the property is let or sold. Furthermore there is no liability at common law (*Cavalier* v *Pope* [1906] AC 428, affirmed in *McNerny* v *Lambeth Borough Council* (1989) 139 NLJ 114).

Where the person injured is the tenant himself the 1972 Act allows a tenant to sue his landlord for breach of his statutory duty but then the lessor would be able to allege contributory negligence in that the tenant failed to notify him of the defect. Where, however, the defect was due to a tenant failing to carry out an obligation expressly imposed on him by the lease or tenancy, the landlord does not owe the tenant any duty, although he would still owe a duty to third parties if they were injured, but in these circumstances could recover an indemnity or contribution from the tenant who would be a joint tortfeasor. There is little a landlord can do to exclude or restrict his liability. Section 6(3) of the 1972 Act renders void any exclusion clause in a lease or tenancy agreement.

Highway authorities

A highway authority is liable for damage which is caused by its *active misfeasance* and, under the Highways Act 1980, for damage which arises from its failure to repair.

In an action for damages against a highway authority based upon its *failure to repair*, it is a defence to prove that the authority has in all the circumstances taken reasonable care to ensure that the highway was not dangerous by reason of its failure to *repair*.

Griffiths v *Liverpool Corporation*, 1966 – Failure to repair a flagstone (**422**)

Defective Premises Act 1972

This Act brought about three major changes. In the first place a landlord's liability for defects in leased premises was increased. This has already been dealt with in occupiers' liability. Second, much of the common-law immunity of a vendor or landlord for negligence was abolished. Third, there is a statutory duty on those concerned with providing dwellings to do the work properly. Section 1 places a duty on builders and developers, sub-contractors, architects and local authorities to see that building contracts are carried out in a workmanlike, or where appropriate, professional manner with proper materials so that the dwelling is fit for habitation. It should be noted that this statutory duty is owed not merely to the immediate client but to everyone who acquires a legal or equitable interest in the dwelling. The liability does not, of course, last for ever. It is subject to the Limitation Act, though s 1(5) of the 1972 Act provides that a cause of action accrues at the time when the dwelling was completed, but where further work has to be done to put right a fault then the cause of action accrues only when the further work is completed. This means that from that date a claimant has six years to start an action or three years where the defect has caused death or personal injury. Section 6(3) of the 1972 Act renders void any term of an agreement which purports to exclude or restrict this statutory duty.

Under s 1(3) a mere agreement by a client to a particular design or specification being used does not discharge the builder or other persons involved from this statutory duty. Section 2 offers an alternative by providing that no action can be brought where a state-approved scheme has conferred rights on the first sale or letting to those who have or will have an interest in the property in respect of defects in the state of the dwelling. Such schemes can be approved or withdrawn by the Secretary of State by statutory instrument.

The National Housebuilders Registration Council scheme is approved under these arrangements and where an NHRC scheme is in operation it applies rather than the Act. The advantage of an NHRC scheme over the Act is that if the builder becomes bankrupt the Council compensates the claimant. Section 3 of the Act sweeps away most of the old common-law immunity from liability for negligence which was formerly enjoyed by sellers of property and lessors of property; they are now liable within the wider rule of *Donoghue* v *Stevenson* (1932). Thus, under the 1972 Act, the maxim *caveat emptor* no longer provides a defence to a claim of negligence against a vendor or lessor in respect of defects in the premises sold or let and this liability extends beyond the immediate purchaser or lessee and can be brought by others who buy or rent the property within the constraints of the Limitation Act 1980 and s 1(5) of the 1972 Act. Thus, there is now a law against building or letting tumbledown properties.

It should be carefully noted, however, that s 3 has gaps. The defects have to be caused by *works* of construction, repair, maintenance or demolition or other works. The section does not apply at all to negligent *omissions to repair* and the common law provides in general no redress (see *McNerny* v *Lambeth Borough Council* (1989) above).

Negligence – of employers

Where an employee's case is based on his employer's negligence at *common law*, he will have to prove that his injury was the result of the employer's breach of a duty of care. The employee is assisted in this task because certain specific duties of an employer were laid down by the House of Lords in the leading case of *Wilsons and Clyde Coal Co* v *English* [1938] AC 57, and an employer must take reasonable care to provide:

(*a*) *proper and safe plant and appliances* for the work;
(*b*) *a safe system of work* with adequate supervision and instruction;
(*c*) *safe premises*; and
(*d*) *a competent staff* of fellow employees.

The employer's duty is a personal one so that he remains liable even though he has delegated the performance of the duty to a competent independent contractor. Thus in *Paine* v *Colne Valley Electricity Supply Co Ltd* [1938] 4 All ER 803, an employer was held liable for injuries to his employee caused by the failure of contractors to install sufficient insulation in an electrical kiosk.

However, in *Davie* v *New Merton Board Mills* [1958] 1 All ER 67, the House of Lords decided that an employer was not liable for damage caused by a defective implement purchased from a reputable manufacturer. The employee was thus left to sue the manufacturer and this could prove difficult where the manufacturer had left the country or gone out of business or could not for any other reason be identified. Now the Employers' Liability (Defective Equipment) Act 1969, provides that an employee who is injured because of a defect in his employer's equipment can recover damages from the employer if he can show that the defect is due to the fault of some person, e.g. the manufacturer, but if no one is at fault damages are not

recoverable. Agreements by employees to contract out are void, and rights under the Act are *in addition* to common-law rights. Thus, an injured employee can sue a third party such as a manufacturer if he wishes, e.g. as where the employer is insolvent, though the Employer's Liability (Compulsory Insurance) Act 1969, requires employers to insure against their liability for personal injury to their employees. The injury must result from equipment provided for the employer's *business*. Thus, domestic servants injured by household equipment would not be covered.

As regards a safe system of work, there is no duty on the employer to set up a system for a 'one-off' operation where the employee uses his own initiative. The Court of Appeal so ruled in *Chalk* v *Devises Reclamation Co Ltd* (1999) *The Times*, 2 April, where a large piece of lead fell from a wagon during unloading and, on his own initiative, Mr Chalk picked it up causing himself back injuries. His claim for damages failed. An employee's claim may also fail under what is known as the 'nursemaid' school of negligence. In *Makepeace* v *Evans Bros (Reading)* (2000) *The Times*, 13 June a painter and decorator was using a tower scaffold which fell over while he was working on it. The Court of Appeal dismissed his claim because on the facts it appeared that a tower scaffold was an ordinary piece of equipment used frequently by painters on building sites, so that the claimant should have known that it might be dangerous to use such equipment in certain situations instead of, e.g., ladders. The employer had no duty to ask him whether he knew how to use the scaffold safely.

Liability for stress-related injury

Over the years the employer's duty to provide a safe system of work has almost exclusively involved cases of physical injury. However, in *Walker* v *Northumberland County Council* (1994) *The Times*, 24 November the High Court decided that psychiatric damage caused by overwork, in this case as a social worker, was also included.

Another modern example of safe system requirements is in the field of repetitive strain injury caused amongst other things by the operation of keyboards of one sort or another. The Court of Appeal has held that an employer has a duty to instruct employees on the risk of repetitive strain injury and the need to take breaks (see *Pickford* v *ICI plc* [1996] IRLR 622). Breach of this duty by the employer can result in a successful action for damages by the employee. Ann Pickford's injury was caused by long periods of typing without adequate rest breaks, on the need for which she had received no instruction, though typists in other departments of the business had been given such instructions.

Employers have been facing an ever increasing number of claims for psychiatric damage caused by stress at work. High awards of damages have been made but the Court of Appeal in *Hatton* v *Sutherland and Other Appeals* [2002] 2 All ER 1 gave a ruling that gives some relief to employers in terms of claims for occupational stress. The ruling was given in regard to four test cases where the Court of Appeal gave a single unanimous judgment. The claimants were two teachers, a local authority administrative assistant and a factory worker. The court overturned awards of damages totalling £208,000 but upheld an award of £150,000 to the administrative worker but 'not without some hesitation'.

The Court of Appeal also gave important guidance on this type of claim as follows:

- there are no special controls that an employer must put into place in regard to stress;
- the ordinary principles of employers' liability apply;
- stress must like other harm be foreseeable and attributable to stress at work as distinct from other factors;
- an employer is normally entitled to assume that the employee can stand the normal pressures of the job unless he or she knows of some particular vulnerability or problem;

- the test is the same whatever the employment;
- there are no occupations that should be regarded as intrinsically dangerous to mental health;
- finally where dismissal or demotion is the only reasonable and effective procedure open to an employer but the employee wishes to work on and the employer lets him or her do so he or she will not normally be liable if injury results.

It is worth noting that a differently constituted Court of Appeal threw some doubt on this last statement at least so far as physical injury is concerned. In *Coxall* v *Goodyear GB Ltd* [2003] 1 WLR 536 the danger arose from a new paint put into use by the employer, the claimant was allergic to it and in spite of using protective equipment provided by the employer he still suffered from asthma. The employee wanted to go on working and the employer allowed him to do so. The claimant became too ill to work and left his employment. He then claimed damages for his employer's negligence. The Court of Appeal ruled that his claim succeeded. If there was no alternative to the claimant working with the paint the employer should have dismissed him (even though the employee wanted to go on working) and could be in breach of his duty as an employer if he did not. The only sensible resolution of these decisions is to dismiss in mental and physical injury cases. The employer should have a good defence in either case if there is no alternative employment. If the claim is for disability discrimination as it might be the defence would apply with the difference that the employer is required to consider and make if possible adjustments to the workplace to enable the disabled person to do the job. There would appear to have been no such adjustments that could have been made in the *Coxall* scenario.

Stress-related injury: the House of Lords rules

The House of Lords has now ruled on the liability of an employer for the occupational stress injury of an employee. While the House of Lords finds *Hatton* to be a valuable contribution, their Lordships depart in a significant way from certain parts of the *Hatton* judgment.

In *Barber* v *Somerset County Council* [2004] 2 All ER 385, it appeared that Mr Barber was an experienced teacher. He had two jobs: one as head of maths and the other to market his school. Between 1995 and 1996 he was working between 61 and 70 hours per week. This workload caught up with him and he had three weeks off sick during the summer term. His medical certificates referred to 'stress' and 'depression'. He subsequently returned to work but nothing was done to deal with his workload. The headmistress and senior staff were unsympathetic and eventually he left work. The only advice from the deputy headmaster was to prioritise his workload. The House of Lords found this to be a totally inadequate response and affirmed the trial judge's award of damages against the employer.

Their Lordships considered in particular the ruling of the Court of Appeal in *Hatton*, which was to the effect that an employer is normally entitled to assume that an employee can stand the pressures of the job unless he or she knows of some particular vulnerability or problem. This carries the suggestion that the onus is on the employee to complain about stress problems. The House of Lords rejected this ruling and stated that employers must be proactive by giving positive thought to the safety of the workforce in the light of what they know or ought to know. The senior management team should have made enquiries about the claimant's problems and have discovered what they could have done to ease them in both Mr Barber's case and throughout the school. Their Lordships placed the onus on the employer to develop a knowledge of occupational stress and to keep up to date with effective precautions that can be taken to alleviate it. **This is a significant change of emphasis**.