was alleged by J that faulty work by V left J with an unserviceable building and high maintenance costs so that J's business became unprofitable. The House of Lords decided in favour of J on the basis that there was a duty of care. V were in breach of a duty owed to J to take reasonable care to avoid acts or omissions, including laying an allegedly defective floor, which they ought to have known would be likely to cause the owners economic loss of profits caused by the high cost of maintaining the allegedly defective floor and, so far as J were required to mitigate the loss by replacing the floor itself, the cost of replacement was the appropriate measure of liability so far as this loss was concerned. The standard of care required is apparently the contractual duty, and so long as the work is up to contract standard, the defendant in a case such as this cannot be in breach of his duty. Lord Fraser of Tullybelton said:

> Where a building is erected under a contract with a purchaser, then provided the building, or part of it, is not dangerous to persons or to other property and subject to the law against misrepresentation, I can see no reason why the builder should not be free to make with the purchaser whatever contractual arrangements about the quality of the product the purchaser wishes. However jerry-built the product, the purchaser would not be entitled to damages from the builder if it came up to the contractual standards.

Comment (i) The effect of the decision in *Junior Books* was whittled away in *Simaan General Contracting Co* v *Pilkington Glass Ltd* [1988] 1 All ER 345. The claimant (S Ltd) was the main contractor to construct a building in Abu Dhabi for a sheikh. The erection of glass walling together with supplying the glass was subcontracted to an Italian company (Feal). Feal bought the glass from the defendant (P Ltd). The glass units should have been a uniform shade of green but some were various shades of green and some were red. The sheikh did not pay S Ltd. It chose to sue P Ltd in tort rather than Feal in contract for its loss, i.e. the money the sheikh was withholding.

Held – by the Court of Appeal – since there was no physical damage, this was purely a claim for economic loss and P Ltd had no duty of care. S Ltd's claim failed. Feal would have been liable under the Supply of Goods and Services Act 1982 (see Chapter 14) but for some reason was not sued. Economic loss can be recovered in contract.

Dillon, LJ said of *Junior Books* that it had 'been the subject of so much analysis and discussion that it cannot now be regarded as a useful pointer to any development of the law. It is difficult to see that future citation from *Junior Books* can ever serve any useful purpose.'

(ii) It is now possible to use the law of contract to deal with third-party claims under the Contracts (Rights of Third Parties) Act 1999. There is no problem about recovering economic loss in contract claims. A great many of them are precisely for that (see further Chapter 10).

Negligence: breach of duty; behaviour as a reasonable man

397 *Daniels* v *R White and Sons Ltd* [1938] 4 All ER 258

The claimants, who were husband and wife, sued the first defendants, who were manufacturers of mineral waters, in negligence. The claimants had been injured because a bottle of the first defendants' lemonade, which they had purchased from a public house in Battersea, contained carbolic acid, presumably from the bottle-washing plant. Evidence showed that the manufacturers took all possible care to see that no injurious matter got into the lemonade. It was *held* that the manufacturers were not liable in negligence because the duty was not one to ensure that the goods were in perfect condition but only to take reasonable care to see that no injury was caused to the eventual consumer. This duty had been fulfilled.

398 *Hill* v *J Crowe (Cases)*, *The Times*, 19 May 1977

The claimant was injured when he stood on a packing case whose boards collapsed causing him to fall. It was *held* – by MacKenna, J – that the case had been badly made and the manufacturers owed a duty of care to the claimant. They could not escape liability by showing that they had a good system of work and proper supervision. *Daniels* v *White and Sons* (1938), above, was not followed.

399 *Greaves & Co (Contractors)* v *Baynham Meikle & Partners* [1974] 3 All ER 666

The claimant, a builder, was instructed to build a warehouse and sub-contracted its structural design to the defendant firm of consultant structural engineers. B knew or, by reason of the relevant British Standard Code of Practice, ought to have known, that as the warehouse was to carry loaded trucks there was a danger of vibration. The design was competent but inadequate for the purpose of carrying the trucks and it was *held* – by Kilner Brown, J, allowing the claimant's claim for breach of duty of care and breach of an implied term of the contract – that the duty of the defendant firm was not simply to exercise the care and skill of a competent engineer which it had done, but to design a building fit for its purpose in the light of the knowledge which the firm had as to its proposed use.

400 ***Paris* v *Stepney Borough Council*** [1951] AC 367

The claimant was employed by the defendant on vehicle maintenance. He had the use of only one eye and the defendant was aware of this. The claimant was endeavouring to remove a bolt from the chassis of a vehicle, and was using a hammer for the purpose, when a chip of metal flew into his good eye so that he became totally blind. The claimant sued for damages from his employer for negligence in that he had not been supplied with goggles. The defendant showed in evidence that it was not the usual practice in trades of this nature to supply goggles, at least where the employees were men with two good eyes. The trial judge found for the claimant, but the Court of Appeal reversed the decision on the ground that the claimant's disability could be relevant only if it increased the risk, i.e. if a one-eyed man was more likely to get a splinter in his eye than a two-eyed man. Having found that the risk was not increased, it allowed the appeal. The House of Lords reversed the judgment of the Court of Appeal, holding that the gravity of the harm likely to be caused would influence a reasonable employer, so that the duty of care to a one-eyed employee required the supply of goggles, and Paris, therefore, succeeded.

401 ***Haley* v *London Electricity Board*** [1964] 3 All ER 185

The appellant, Haley, a blind man who was on his way to his work as a telephonist, tripped over an obstacle placed by servants of the London Electricity Board near the end of a trench excavated in the pavement of a street in Woolwich. He fell and suffered an injury which rendered him deaf, and brought about his premature retirement from his employment. The guard was sufficient warning for sighted people but was by its nature inadequate to protect or warn the blind. It consisted of a hammer hooked in the railings and resting on the pavement at an angle of 30 degrees, and Haley's white stick, which he was properly using as a guide, did not encounter the obstacle with the result that instead of being warned by it he fell over it. Evidence was given that about one in 500 people were blind and there were 258 registered blind people in Woolwich, many of whom were capable of walking in the streets alone, taking the normal precautions that such blind persons were accustomed to take. The House of Lords *held*, reversing the decision of the Court of Appeal, that the London Electricity Board was liable in negligence. Those engaged in operations on the pavement or a highway must act reasonably to prevent danger to passers-by including blind people who must, however, also take reasonable care of themselves. The Board had not fulfilled this duty and was liable in damages for negligence which were assessed at £3,000 general damages, and £2,250 special damages, Haley's retirement being accelerated by four years.

402 ***Watt* v *Hertfordshire County Council*** [1954] 2 All ER 368

A fireman was injured by a heavy jack which slipped while being carried in a lorry which was going to the scene of an accident. The lorry was not equipped to carry such a heavy jack but it was required to free a woman who had been trapped in the wreckage. No proper vehicle was available and it was *held* that the fire authority was not liable.

403 ***Latimer* v *AEC Ltd*** [1953] 2 All ER 449

A heavy rainstorm flooded a factory and made the floor slippery. The occupiers of the factory did all they could to get rid of the water and make the factory safe, but the claimant fell and was injured. He alleged negligence in that the occupiers did not close down the factory.

Held – the occupiers of the factory were not liable. The risk of injury did not justify the closing down of the factory.

Negligence: *res ipsa loquitur*

404 ***Easson* v *LNE Railway Co*** [1944] 1 All ER 246

The claimant, a boy aged four years, fell through the open door of a corridor train seven miles from its last stopping place. It was *held* that the defendants did not have sufficient control over the doors for *res ipsa loquitur* to apply. In the course of his judgment, Goddard, LJ said:

> It is impossible to say that the doors of an express corridor train travelling from Edinburgh to London are continuously under the sole control of the railway company . . . passengers are walking up and down the corridors during the journey and get in and out at stopping places. The fact that the door came open could as well have been due to interference by a passenger as to the negligence of the defendants' servants.

405 ***Roe* v *Minister of Health*** [1954] 2 QB 66

Two patients in a hospital had operations on the same day. Both operations were of a minor character and in each case nupercaine, a spinal anaesthetic, was injected by means of a lumbar puncture. The

injections were given by a specialist anaesthetist, assisted by the theatre staff of the hospital. The nupercaine had been contained in sealed glass ampoules, stored in a solution of phenol. After the operations both patients developed symptoms of spastic paraplegia caused by the phenol, which had contaminated the nupercaine by penetrating almost invisible cracks in the ampoules. In the event, both patients became permanently paralysed from the waist down, and they now sued the defendants for negligence.

Held – the defendants were vicariously liable for the negligence (if any) of those concerned with the operations, but on the standard of medical knowledge in 1947, when the operations took place, those concerned were not negligent. The cracks in the ampoules were not visible on ordinary examination, and could not be reproduced even by deliberate experiment. It was true that in 1954, when the case was brought, phenol used for disinfectant purposes was tinted so that it might be seen on examination, but the case must be decided on medical knowledge at the time when the operations were carried out. It was also suggested that once the accident has been explained, there is no question of *res ipsa loquitur* applying. Nor does the maxim apply when many persons might have been negligent. Denning, LJ suggested that every surgical operation is attended by risks. Doctors, like the rest of us, have to learn by experience. Further, one must not condemn as negligence that which is only misadventure.

Comment Although it is not certain what effect it would have had on the above case, it is worth noting the more modern standard of care put forward in *Newell* v *Goldenberg* (1995) and *Bolitho* (1997) (see p 558).

406 *Byrne* v *Boadle* (1863) 2 H & C 722

The claimant brought an action in negligence alleging that, as he was walking past the defendant's shop, a barrel of flour fell from a window above the shop and injured him. The defendant was a dealer in flour, but there was no evidence that the defendant or any of his servants were engaged in lowering the barrel of flour at the time. The defendant submitted that there was no evidence of negligence to go to the jury, but it was *held* that the occurrence was of itself evidence of negligence sufficient to entitle the jury to find for the claimant in the absence of an explanation by the defendant.

407 *Scott* v *London and St Katherine Docks Co* (1865) 3 H & C 596

The claimant, a Customs officer, proved that when he was passing in front of the defendant's warehouse six bags of sugar fell upon him. It was *held* that the maxim *res ipsa loquitur* applied. In the course of his judgment, Erle, CJ said: 'Where the thing is shown to be under the management of the defendant, or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.'

Comment This case was followed in *Ward* v *Tesco Stores* [1976] 1 All ER 219, where the Court of Appeal held that an accident which had occurred due to a spillage of yoghurt on a shop floor put an evidential burden upon the defendant shopowner to show that the accident did not occur through any want of care on its part. The defendant was not able to satisfy that burden and the claimant succeeded.

408 *Pearson* v *North Western Gas Board* [1968] 2 All ER 669

The claimant's husband was killed by an explosion of gas which also destroyed her house. It appeared from the evidence that a gas main had fractured due to a movement of earth caused by a severe frost. When the weather was very cold the defendants had men standing by ready to deal with reports of gas leaks, but unless they received reports there was no way of predicting or preventing a leak which might lead to an explosion.

Held – by Rees, J – assuming the principle of *res ipsa loquitur* applied, the defendants had rebutted the presumption of negligence and the claimant's case failed.

Contributory negligence

409 *Jones* v *Lawrence* [1969] 3 All ER 267

A boy aged seven years and three months ran out from behind a parked van across a road apparently without looking in order to get to a fun-fair. He was knocked down by Lawrence who was travelling on his motor cycle at 50 miles per hour in a built-up area. The boy's injuries adversely affected his school work and he subsequently failed his eleven-plus examination. In an action on his behalf for damages it was *held* – by Cumming-Bruce, J – that:

(*a*) his conduct was only that to be expected of a seven-year-old child and could not amount to contributory negligence;
(*b*) the failure to obtain a grammar-school place and the permanent impairing of his powers of concentration affected his job attainment potential and were factors to be taken into account in assessing damages.

Comment The matter is, however, one of fact in each case. Thus, in *Minter* v *D & H Contractors (Cambridge) Ltd, The Times*, 30 June 1983, the defendants had been negligent in leaving a pile of hard core in the road, into which the claimant, aged nine, rode his cycle. He was found to be guilty of contributory negligence to the extent of 20 per cent. The judge said that this claimant, who on the evidence was a 'good rider', could not be said to come into the category of minors who were incapable of any contributory negligence.

410 ***Oliver* v *Birmingham Bus Co*** [1932] 1 KB 35

A grandfather was walking with his grandchild aged four, when a bus approached quickly and without warning. The grandfather, being startled, let go of the child's hand and the bus struck the child. It was *held* that the damages awarded to the child should not be reduced to take account of the grandfather's negligence.

Negligence: actions based on breach of statutory duty

411 ***Atkinson* v *Newcastle and Gateshead Waterworks Co*** (1877) LR 2 Ex D 441

The claimant's timber yard caught fire and was destroyed, there being insufficient water in the mains to put it out. The defendant was required by the Waterworks Clauses Act 1874, to maintain a certain pressure of water in its water pipes, and the Act provided a penalty of £10 for failure to keep the required pressure and 40s for each day during which the neglect continued, the sums being payable to aggrieved ratepayers. The claimant sued the defendant for loss caused by the fire on the ground that it was in breach of a statutory duty regarding the pressure in the pipes.

Held – that the defendant was not liable. The statute did not disclose a cause of action by individuals for damage of this kind. It was most improbable that the legislature intended the company to be a gratuitous insurer against fire of all the buildings in Newcastle.

412 ***Gorris* v *Scott*** (1874) LR 9 Exch 125

A statutory order placed a duty on the defendant to supply pens of a specified size in those parts of a ship's deck occupied by animals. The defendant did not supply the pens, and sheep belonging to the claimant were swept overboard. The claimant sued for damages from the defendant for breach of statutory duty.

Held – the claimant could not recover for his loss under breach of statutory duty, because the object of the statutory order was to prevent the spread of disease, not to prevent animals from being drowned.

Comment A similar point is raised in *Lane* v *London Electricity Board* (1955) (see Chapter 6).

Product liability: illustrative case law

412a ***Abouzaid* v *Mothercare (UK) Ltd*** [2000] All ER (D) 2436

This case is of interest because it deals with product liability for older products. The claim related to a fleecy-lined sleeping bag for a child's pushchair sold by the defendant company in 1990. While helping to fix the bag on to his brother's pushchair, one of the elasticated straps flew out of the claimant's hand and caught the claimant in the eye so that he ended up with no central vision. The claimant was 12 years old at the time. When the matter eventually reached the Court of Appeal it was decided that the defendant was not negligent at common law. There was no knowledge of the defect at the time of sale. Nevertheless, the product was defective under s 3 of the Consumer Protection Act 1987 in that it did not provide the level of safety that persons are generally entitled to expect in all the circumstances. This liability is strict and does not depend on negligence. There is, however, the possibility of raising the development risk defence. This was done by the defendant in this case. It stated in particular that there had been no accidents reported to the relevant government agencies on the use of the straps. This certainly went to showing it was not negligent. However, the s 3 defence being strict was not affected by this. In addition, the Court of Appeal did not accept the development risk defence. There had been no developments between 1990 and the present day in regard to tests and the defendant could have tested the product in 1990 in exactly the same way as currently. In the view of the court, the defendant had not used the available methods in 1990 to test the product and so was not able to plead the defence successfully. The claimant succeeded.

412b ***Bogle and Others* v *McDonald's Restaurants Ltd*** [2002] unreported

A group of claimants sued for personal injury caused by the spillage of hot drinks served to them by the defendant. The claim was by way of a group litigation order. The majority of claimants were children. The issues before the High Court were whether the defendant was negligent in dispensing and serving hot drinks at the temperature it did and whether the defendant was in breach of the Consumer Protection Act 1987. The most significant part of the claimants' case was that the thermal cups in which the drinks

were served masked the actual temperature of the drink so that it was not allowed to cool and the drink container had to be opened to add sugar and creamer before it could be consumed. There was also the contention that the drinks being served at between 75°C and 95°C were served too hot and that a temperature of 70°C would have been more appropriate. The High Court did not find the defendant negligent. There was no evidence to show that serving the drinks at a lower temperature of 70°C would have caused less injury. The range of temperatures used by the defendant was normal in the catering industry. Customers would be assumed by the defendant to know that drinks would be served hot and the cups and lids were adequately designed and made.

On the matter of liability under the 1987 Act, the judge ruled that the safety of the hot drinks involved met the public's legitimate expectations as to safety generally. The public would expect the drinks to be served hot. The public would expect scalding to result if there was a spillage. Therefore, serving the drinks in the way the defendant had did not constitute a breach of the 1987 Act.

Negligence: professional liability

413 *Caparo Industries plc* v *Dickman and Others* [1990] 2 WLR 358

The facts were, briefly, that Caparo, which already held shares in Fidelity plc, eventually acquired the controlling interest in the company. The group later alleged that certain purchases of Fidelity shares and the final bid were made after relying on Fidelity's accounts, which had been prepared by Touche Ross & Co, the third defendants.

The accounts, Caparo alleged, were inaccurate and misleading in that an apparent pre-tax profit of some £1.3 million should in fact have been shown as a loss of £400,000. It was also alleged that, if the supposed true facts had been known, Caparo would not have made a bid at the price it did and might not have made a bid at all.

The Court of Appeal decided that while Touche Ross did not have a duty of care towards members of the public in regard to the Fidelity accounts, it did owe a duty of care to Caparo because Caparo was already a shareholder in Fidelity when it made the final purchase of shares and the bid.

The two main judgments in the House of Lords provide an interesting contrast: Lord Bridge concentrates more on the case law and in particular on the dissenting judgment of Lord Denning in *Candler* v *Crane, Christmas* [1951] 1 All ER 426, where Lord Denning thought that the defendant accountants should have a duty of care to Candler because they had prepared allegedly negligent financial statements on the basis of which they knew Mr Candler might invest in the company concerned; and the judgment of the House of Lords in *Hedley Byrne & Co Ltd* v *Heller & Partners Ltd* [1963] 2 All ER 575, where a bank supplied an allegedly negligent reference as to the creditworthiness of a company called Easipower which it knew would be used by Hedley Byrne as a basis for extending credit to the company, which then went into liquidation.

A salient feature of both those cases, said Lord Bridge, was that the defendant giving advice on information was fully aware of the nature of the transaction the claimant was contemplating, knew that the advice or information would be communicated to him, and knew that it was likely that the claimant would rely on that advice or information in deciding whether or not to engage in the transaction in contemplation.

The situation was quite different where the statement was put into more or less general circulation and might foreseeably be relied on by strangers for any one of a variety of different purposes which the maker of the statement had no specific reason to anticipate.

Lord Bridge felt that it was one thing to owe a possibly wider duty of care to avoid causing injury to the person or property of others, but quite another to owe a similar duty to avoid causing others to suffer purely economic loss.

His Lordship concluded that auditors of a public company's accounts owed no duty of care to members of the public at large who relied on the accounts in deciding to buy shares in the company. And as a purchaser of additional shares in reliance on the auditors' report, the shareholder stood in no different position from any other investing member of the public to whom the auditor owed no duty.

Lord Oliver was concerned with establishing the purpose of an audit under the Companies Act 1985. He went on to say that in enacting the statutory provisions Parliament did not have in mind the provision of information for the assistance of purchasers of shares in the market, whether they were already the holders of shares or other securities or people with no previous proprietary interest in the company.

The purpose for which the auditors' certificate was made and published was that of providing those entitled to receive the report with information to enable them to exercise the powers which their respective proprietary rights in the company conferred on them and not for the purposes of individual speculation with a view to profit.

The duty of care was one owed to the shareholders as a body and not to individual shareholders.

Comment (i) The decision represents a further retreat from the judgment of Lord Wilberforce in *Anns* v *Merton London Borough Council* [1977] 2 All ER 492. There was a view taken of that judgment that a person should owe a duty of care in negligence to anyone allegedly injured by his conduct, including those suffering economic loss, unless there was any good reason or ground of public policy to prevent the duty being imposed. More recently, and particularly in this case, the courts have shown that there is a real need for proximity and so have gone a long way to reducing the fear of ever increasing potential professional liability.

It now seems that knowledge as to the user of the statement concerned and, seemingly, also as to the purpose or probable purpose for which it will be used, is required to establish the necessary proximity in these cases where allegedly careless misstatements result in economic loss. It seems unlikely that there will now be any further movement towards foresight of the user and use which had begun to show itself in *JEB Fasteners* v *Marks Bloom & Co* [1983] 1 All ER 583.

(ii) Problems of causation continue to arise. In *Galoo Ltd and Others* v *Bright Grahame Murray*, *The Times*, 14 January 1994, there were unproved allegations of negligence by the auditors in terms of the accounts of two companies. These accounts, it was alleged, gave too optimistic a view of the companies' financial position, thus allowing them to trade on to insolvency, causing loss to various parties. The Court of Appeal held that even if it were to be assumed that the unproven allegations were true the claim against the auditors would fail. The accounts may have allowed the companies to exist and trade but a company's existence is not the cause of its trading losses nor, for that matter, its profits. These depend upon many things including market forces for which the auditors are obviously not responsible.

(iii) The *Caparo* judgment has angered some in the business world because investors have, in a sense, lost their right to make investment judgments on the basis of the annual audited accounts. This is not really surprising because the annual accounts are in essence stewardship statements, i.e. how the directors have conducted the company's business during the year covered by the accounts. They are, by their nature, backward-looking and not a suitable vehicle to help speculators to predict a future which is uncertain, nor are they intended to be. 'Decision-usefulness' is not the primary purpose of annual accounts. The accounting statements in *Morgan* (see below) went much further.

414 *Morgan Crucible Co plc* v *Hill Samuel Bank Ltd and Others*, *Financial Times Law Reports*, 30 October 1990

The crucial events in the case were as follows. On 6 December 1985, Morgan Crucible (MC) announced a proposed unsolicited offer to acquire the entire share capital of First Castle Electronics plc (FC). When the announcement was made, FC's most recent published financial statements were the reports and audited accounts for the years ended 31 January 1984 and 1985.

On 17 December 1985, MC published a formal offer document which was addressed to FC shareholders. Morgan Grenfell advised MC and Hill Samuel advised FC. The directors of FC, acting on its behalf, sent their shareholders a number of circulars. They were also issued as press releases by Hill Samuel and copies were supplied to MC's advisers.

Two days later, a circular was sent out by the directors of FC, comparing MC's profit record unfavourably with FC's and recommending refusal of the bid. In subsequent circulars reference was made to the published financial statements, and one circular of 31 December 1985 stated that they could be inspected.

An FC circular to its shareholders, issued on 24 January 1986, forecast an increase in profits before tax in the year to 31 January 1986 of 38 per cent. A letter from the auditors, Judkins, was included, saying that the profit forecast had been properly compiled. Included also was a letter from Hill Samuel stating that in its opinion the profit forecast had been prepared after due and careful inquiry.

On 29 January, MC increased its bid; on 31 January, FC's board sent another letter to shareholders recommending acceptance of that increased bid; on 14 February, the bid was declared unconditional; and on 27 February, a further recommendation to accept the bid was sent by FC to its shareholders.

Later, MC alleged that the financial statements (audited and unaudited) issued prior to the bid, the profit forecast of 24 January, and the financial material contained in the circulars and recommendation documents were prepared negligently and were misleading. MC asserted that if the true facts had been known the bid would not have been made or completed. MC issued a writ (now claim form) on 6 May 1987 joining as defendants Hill Samuel, Judkins, and FC's chairman and board. It alleged that the board and the auditors were responsible for circulating the financial statements; that they and Hill Samuel were responsible for the profit forecast; that all of them owed a duty of care to MC as a person who could foreseeably rely on them; that the statements and forecasts were negligently prepared; and that MC relied on them in making and increasing its offer and thereby suffered heavy loss.

In dealing with the allegations and the House of Lords judgment in *Caparo*, Lord Justice Slade said, first, that in *Caparo* all of the representations relied on

had been made before an identified bidder had come forward, whereas in this case some of the representations had been made after a bidder had emerged and indeed because a bid had been made. They were clearly made with an identified bidder in mind, i.e. MC. MC had, therefore, applied for leave to amend its statement of claim (now statement of case) to representations made after the bid and as part of the takeover battle. This could then distinguish MC's case from the situation in *Caparo*.

The issue before the court was whether MC's allegations disclosed a reasonable cause of action. On the assumption that the allegations were true, was there a duty of care to MC? The judge went on to say, on the assumed facts, that the defendants could have foreseen that MC would or might suffer financial loss if the representations were incorrect; but that foreseeability in itself was not enough for liability to arise – there had to be a sufficient relationship of proximity between the claimant and defendant. In addition, it must be just and reasonable to impose liability on the defendant.

The fatal weakness in the *Caparo* case, the judge said, was that the auditors' statement, i.e. the annual accounts, had not been prepared for the purpose for which the claimant relied on it. It was, therefore, arguable that this case could be distinguished from *Caparo*.

On the assumed facts, the directors of FC, when making the relevant representations, were aware that MC would rely on them for the purpose of deciding to make an increased bid and, indeed, intended that they should. MC did rely on them for that purpose. It was, therefore, arguable that there was a sufficient proximity between the directors of FC and MC to give rise to a duty of care.

For the same reasons, it could be argued that Hill Samuel and Judkins owed MC a duty of care in terms of their representations involving the profit forecast and the audited accounts.

Leave was given to amend the statement of claim (now statement of case). MC's amended case should be permitted to go forward to trial.

Comment (i) So, some reliance can be placed on financial statements and other representations in a takeover after all. If, during the conduct of a contested takeover and after an identified bidder has emerged, the directors and financial advisers of the target company make express representations with a view to influencing the conduct of the bidder, then they owe him a duty of care not to mislead him negligently as was alleged.

(ii) Liability in negligence can extend to a wide variety of professionals, e.g. those who value property and, of course, solicitors. In regard to the latter it was held in *White* v *Jones* [1993] 3 All ER 481 by the Court of Appeal that a solicitor who was instructed to prepare a will but failed to do so was liable to a disappointed beneficiary because the testator died before a will in the new form was signed. There was sufficient proximity between the solicitor and the beneficiary, and financial loss was reasonably foreseeable.

(iii) The *White* case was distinguished in *Carr-Glynn* v *Freasons (a firm)* [1997] 2 All ER 614 where Lloyd, J held that where a solicitor's breach of his duty of care to a testator in preparing his will resulted in loss to the estate – in this case failure to sever a joint tenancy in land – so that on death the whole interest passed to the other joint owner (see Chapter 22), the solicitor owed no duty of care to an intended beneficiary under the will whose gift of the testatrix's part was lost since it was unacceptable that the solicitor should be at risk of two separate claims for identical loss, one by the personal representatives on behalf of loss to the estate and one by the disappointed beneficiary. Since there was only one claim in *White*, i.e. that of the beneficiary, it probably survived. It seems that in any case there was no breach of any duty. The solicitors warned that there might be a joint tenancy but the testatrix did not pursue the matter by providing the solicitors with the relevant deeds. This decision was reversed by the Court of Appeal (see [1998] 4 All ER 225). The court stated that it was consistent with the reasoning in *White* that the assumption of responsibility by a solicitor towards a client be extended in favour of a beneficiary who as a result of the negligence of the testatrix's solictors in carrying out the testamentary instructions suffered a loss of expectation.

Occupiers' liability: two or more occupiers

415 *Wheat* v *E Lacon & Co Ltd* [1966] 1 All ER 582

The manager of a public house was permitted by the owners, Lacon & Co, to take paying visitors who were accommodated in a part of the premises labelled 'Private'. The claimant's husband, while a paying visitor, was killed by a fall from a staircase in the private part of the premises. Lacon & Co denied liability on the ground that they were not occupiers of the private part of the premises.

Held – by the House of Lords – that:

(*a*) the defendants retained occupation and control together with the manager;
(*b*) the deceased was a visitor to whom the defendants owed a common duty of care;
(*c*) on the facts the staircase, though not lit, was not dangerous if used with proper care.

Wheat's claim, therefore, failed because there was no breach of the duty of care.

Comment A not dissimilar case is *Manning* v *Hope (t/a Priory), The Times*, 18 February 2000. M fell down some steps and injured her ankle whilst on property belonging to H. She recovered damages on the basis that a hand rail should have been fitted. The Court of Appeal reversed this decision. There was no finding that the steps were unsafe without a hand rail and H had no duty to fit one.

Occupiers' liability: defective work of an independent contractor

416 ***Cook* v *Broderip*** (1968) 112 SJ 193

The owner of a flat employed an apparently competent contractor to put in a new socket. Mrs Cook, who was a cleaner, received an electric shock caused because the socket was faulty. It appeared that the contractor had negligently failed to test the socket for reversed polarity.

Held – by O'Connor, J – Major Broderip, the owner of the flat, was not vicariously liable for the contractor's negligence and was not in breach of duty under the Occupiers' Liability Act 1957. Damages of £3,081 were awarded against the contractor who was the second defendant.

Comment (i) On the issue of inspection of the work done, the House of Lords stated in *Ferguson* v *Welsh*, *The Times*, 30 October 1987 that it would not ordinarily be reasonable to expect an occupier, having engaged a contractor, whom he believed on reasonable grounds to be competent, to supervise the contractor's activities. If he knew, however, that an unsafe system was being used it might be reasonable for the occupier to take steps to see that things were made safe. If not, he might be liable.

(ii) The occupier may be liable where although work on the premises is done by an independent contractor the occupier does not check to see whether the contractor has adequate insurance to meet a claim for injury caused by his negligent work. This will be particularly likely where the work consists of something involving some risk, e.g. the setting up of a ride at a fête (see *Gwilliam* v *West Hertfordshire Hospital NHS Trust*, *The Times*, 7 August 2000).

Occupiers' liability: effect of claimant's knowledge of danger

417 ***Bunker* v *Charles Brand & Sons*** [1969] 2 All ER 59

The claimant's employers were engaged as subcontractors by the defendants who were the main contractors for tunnelling in connection with the Victoria Line. The claimant was required to carry out modifications to a digging machine. He had seen the machine *in situ* and was taken to have appreciated the danger in crossing its rollers when in operation. He was injured while attempting to cross the rollers in the course of his work and sued for damages.

Held – by O'Connor, J – the defendants having retained control of the tunnel and the machine were the occupiers. They were not absolved from liability under the Act of 1957 merely because of the claimant's knowledge of the danger. Knowledge was not assent. However, the claimant's damages were reduced by 50 per cent on the ground of his contributory negligence.

Comment It was held in *Salmon* v *Seafarer Restaurants Ltd* [1983] 3 All ER 729 that an occupier owes a duty to firemen attending his premises to put out a fire. A fire occurred in the defendants' fish and chip shop because of the negligence of an employee. The employee failed to turn off a gas heater prior to closing the shop. The claimant fireman was injured when attending the fire. The court said that the defendants were vicariously liable. It was foreseeable that a fireman might be injured following the employee's negligence.

Occupiers' liability and negligence liability: the special case of children

418 ***Yachuk* v *Oliver Blais & Co Ltd*** [1949] AC 386

In this appeal from the Supreme Court of Canada to the Judicial Committee of the Privy Council the facts were as follows: a servant of Oliver Blais & Co Ltd had supplied five cents' worth of gasoline in an open lard pail to certain boys, aged nine and seven, who told him that they needed it for their mother's car, which had run out of petrol down the road. In fact, they wanted it for a game of Red Indians. The boys dipped a bullrush into the pail and lit it. This set fire to the petrol in the pail and the boy Yachuk was seriously injured. The Judicial Committee *held* that the company was liable for the negligence of its servant in allowing the boys to take away the gasoline. The question of contributory negligence did not arise, because there was no evidence that the minors appreciated the dangerous quality of gasoline. The company was fully responsible even though the boys had resorted to deceit to overcome the supplier's scruples.

419 ***Gough* v *National Coal Board*** [1954] 1 QB 191

The defendant Board was the owner of a colliery which included a small railway which was constantly in use. The railway lines were not fenced or guarded, although there were houses on both sides. The public had for a long time been permitted to cross the lines, and children often played on the wagons, although

the defendant's servants had been told to keep children off. The claimant, a boy aged six-and-a-half, was seriously injured when he jumped off a wagon on which he had been riding. At the trial the boy admitted that he knew he was not supposed to ride on the wagons, and that his father had threatened to punish him if he did. Nevertheless, it was *held* that the defendant was liable. The fact that children had for many years played near the railway made them licensees, and although the boy was, strictly speaking, a trespasser as regards the wagon, he was allured by the slow-moving wagons which the defendants knew were an attraction to children.

Comment Although the reference in these cases is to 'children', the rules extend also to young persons. Thus, in *Adams* v *Southern Electricity Board*, *The Times*, 21 October 1993, the Court of Appeal decided that the electricity board owed a duty of care to a boy of 15 who was electrocuted and injured by being able to climb on to apparatus consisting of a pole-mounted transformer because of a defective anti-climbing device. The boy had climbed the pole before and had become insensitive to the danger. His damages were reduced by two-thirds for contributory negligence. Nevertheless, the Court of Appeal held that the Board was in breach of its common law duty to take reasonable care for the safety of the boy.

420 ***Mourton* v *Poulter*** [1930] 2 KB 183

The owner of certain land wished to carry out building operations on it, but before he could so do, it was necessary to fell a large elm tree. The land was unfenced, and children of the locality were in the habit of using it as a playground. During the process of felling, a large number of children gathered near the tree and Poulter, who had been employed to fell the tree, warned the children of the danger likely to arise when the tree came down. He failed to repeat the warning when the tree was about to fall, and the claimant, a boy of 10, was crushed by the falling tree.

Held – the defendant was liable. Even though the children were trespassers, he owed them a duty to give adequate warning.

421 ***Pannett* v *McGuinness & Co*** [1972] 3 All ER 137

The defendants were demolishing a warehouse in a heavily populated area near a park where children played. Three workmen were specially appointed to make a bonfire of rubbish and to keep a look-out for children and to see that they came to no harm. The claimant, a boy of five, got in while the three men were away and was severely burned. The men had frequently chased children away in the past and in particular the claimant on a number of occasions. The contractors contended that the claimant was a trespasser, that he had been warned off and that they were under no duty.

Held – the contractors were in breach of the duty of care owed to the child; their workmen had failed to keep a proper look-out.

Comment *Penny* v *Northampton Borough Council* (1974) 72 LGR 733 provides a contrast. In that case a child trespasser was not successful in recovering damages following injury from an aerosol can which exploded when it was thrown into a fire by another child. The accident took place in a discarded rubbish tip some 50 acres in an area which resembled a rough field. The children had often been warned off the land by the Council's workmen. The court considered the authority had behaved with common sense and humanity and could not have known of the danger on the land so that it had discharged its duty of care. However, in *Harris* v *Birkenhead Corporation* [1975] 1 All ER 1001, a local authority was not successful in showing that it had discharged its duty of care to a child trespasser who had entered a derelict house which the Corporation had purchased under a compulsory purchase order. The child fell from an upstairs window and the authority was held to be the occupier since the previous owner had got out of the premises in view of the order. The authority was fixed with knowledge of the relevant facts and Kilner Brown, J found for the claimant.

Highways Act, 1980: no defence unless authority has done what was reasonably required

422 ***Griffiths* v *Liverpool Corporation*** [1966] 2 All ER 1015

The claimant tripped and fell on a flagstone which rocked on its centre. In this action against the highway authority for breach of s 1(1) of the Highways (Miscellaneous Provisions) Act 1961 (see now Highways Act 1980), it appeared that a regular system of inspection was desirable but was not carried out because the authority could not get tradesmen to put right faults discovered. The present fault could, however, have been put right by a labourer and no shortage of labourers was alleged.

Held – by the Court of Appeal – the authority had not brought itself within the statutory defence in s 1(2) and damages should be awarded.

Comment (i) In *Pridham* v *Hemel Hempstead Corporation* (1970) 69 LGR 525, the authority proved that it had inspected the footpath of a minor residential road every three months and had kept a complaints book. The Court of Appeal held that this excluded the authority from liability for injury caused by a defect in the footpath.

(ii) Highway authorities which cause accidents by their failure to remove ice and snow from the carriageway are not liable for accidents caused. The House of Lords so ruled in *Goodes* v *East Sussex County Council, The Times*, 16 June 2000. Such removal is not within their duty to repair. The claimant who suffered injuries which left him almost entirely paralysed when his car skidded on black ice and crashed into the parapet of a bridge recovered no damages. There was no suggestion that there was a duty at common law, although the case was based upon the Highways Act 1980.

It is to be hoped that our injuries, if we must have them, are caused by potholes!

(iii) In *Goodes* v *East Sussex CC* [2000] 1 WLR 1356 the House of Lords ruled that *highway legislation* did not require a local authority to spread salt and thus neutralise icy road conditions. The claimant had sustained serious injuries when he skidded on ice on an untreated road. Lord Hoffmann in his judgment said that the statutory duty of a highway authority was to repair and although in modern road conditions it might be reasonable to expect that a local authority should compensate a person who suffered serious injuries after skidding on ice which could have been removed by the local authority it was clear from *the legislation* that such a remedy was not yet available under that legislation.

However, in *Sandhar* v *Department of the Environment, Transport and the Regions* [2001] All ER (D) 245 a claim at common law for negligence was allowed to proceed.

(iv) In *Calderdale MBC* v *Gorringe* [2002] RTR 27 the Court of Appeal ruled that there was no statutory duty to paint warning signs such as 'slow' on the surface of the road arising under highways legislation. The claimant claimed damages for an accident that occurred on the crest of a hill of a road. The statutory duty did not cover the erection of warning signs either. However, there could be liability at common law for not painting road signs and erecting signs at an accident blackspot. That was not the case here, however, and the claimant's case failed.

Employers' negligence: effect of statutory duties of care

423 *Millard* v *Serck Tubes Ltd* [1969] 1 All ER 598

The claimant operated a power drill during the course of his employment. The drill was fenced, but the guard was not complete in that there was a gap in it through which the operator's hand could be drawn. While the claimant's hand was resting on the guard a piece of swarf thrown out from the drill wound itself around the claimant's hand and drew it into the drill causing injury to the claimant. The defendant employers conceded that the drill had not been properly fenced but contended that they were not liable because the accident itself was unforeseeable. This defence was rejected by the Court of Appeal and the claimant succeeded in his pursuit of damages. Where a defendant has failed to fence dangerous machinery, as here, in breach of s 14 of the Factories Act 1961, he cannot escape liability for injury on the ground that such injury occurred in a way that was not reasonably foreseeable. Thus, a claimant might succeed when suing on a statutory duty and fail if suing on a common-law one.

Comment Of course, an employer will not breach his statutory duties where an employee makes equipment unsafe by deliberately misusing it. Thus in *Horton* v *Taplin Contracts Ltd*, *The Times*, 25 November 2003 the claimant was injured when working on a scaffolding tower that was deliberately toppled by another employee. The claimant alleged that the employer had failed to stabilise the tower as required by health and safety regulations. The case reached the Court of Appeal which ruled that it was only necessary to stabilise equipment where the behaviour to be guarded against was reasonably foreseeable. This did not include the 'extraneous, deliberate, unpredictable and violent act of a third party'. The claimant's action failed.

Torts against business interests: inducing a breach of contract

424 *Lumley* v *Gye* (1853) 2 E & Bl 216

The claimant, who was the manager of an opera house, made a contract with a *prima donna* Johanna Wagner for her exclusive services for a period of time. Gye induced Johanna Wagner to break her operatic engagement with the claimant and sing for him. It was *held* that whatever might have been the origin of the right to sue in such cases as this, it was not now confined to actions by masters for the enticement of their servants but extended to wrongful interference with any contract of personal service.

425 *Daily Mirror Newspapers* v *Gardner* [1968] 2 All ER 163

The executive committee of the retailers' federation recommended their members to boycott the *Daily Mirror* for one week after that newspaper had announced that the retailers' discount rate was to be reduced when the price of the newspaper was increased. The newspaper asked for interlocutory injunctions requiring the committee to communicate with their members and withdraw the recommendation on the grounds that:

(*a*) it was an unlawful interference with the newspaper's contracts with the wholesalers because the

wholesalers would not want to take copies of the *Daily Mirror* if the retailers would not take it; and

(*b*) it was equivalent to an agreement contrary to the public interest within s 21(1) of the Restrictive Trade Practices Act 1956 (see now the Competition Act 1998).

Held – by the Court of Appeal – a sufficient *prima facie* case had been made out on both grounds and the injunctions would be granted.

Comment The essential difference between the *Lumley* and *Gardner* cases is that the interference in *Lumley* was aimed at the other party to the contract, i.e. *direct* interference, whereas in *Gardner* the interference was indirect, i.e. the retailers were not trying directly to persuade the wholesalers not to take the *Daily Mirror* but the inevitable result would be that they would not. If in indirect interference it is unclear from the evidence what effect the interference will have, the court may refuse to grant a remedy.

Thus, in *Middlebrook Mushrooms Ltd* v *TGWU* [1993] IRLR 232, women who were sacked from a mushroom farm, after refusing new contracts that they said had made cuts in their pay, proposed to carry out a leaflet campaign to persuade customers at supermarkets not to buy the farm's produce. The Court of Appeal refused to grant an injunction to prevent this because it was indirect interference and it was not clear from the evidence what effect it would have. Customers might ignore it; they were not like the wholesalers in the *Gardner* case who clearly could not ignore the retailers' ban. Also, to grant an injunction would be contrary to Art 10 of the European Convention on Human Rights and Fundamental Freedoms because it would affect the right of free speech (see now also the UK Human Rights Act 1998).

Civil conspiracy: the principles illustrated

426 *Crofter Hand Woven Harris Tweed Co Ltd* v *Veitch* [1942] AC 435

Veitch and the other defendants were officials of the Transport and General Workers Union. The dockers at Stornoway on the island of Lewis were all members of the union and so were most of the employees in the spinning mills on the island. The yarn when spun in the mills was woven into tweed cloth by crofters working at home, the woven cloth being finished in the mills. The tweed thus produced was sold by the owners of the mill as Harris Tweed. The Crofter Company also produced tweed cloth but its yarn was not spun on the island but instead was obtained more cheaply on the mainland. This cloth was sold as Harris Tweed but did not bear the trade mark in the form of a special stamp. The mill owners making the genuine Harris Tweed were being pressed by the union to increase wages but they said that they could not accede to union requests because of the damaging competition of the Crofter Company. Consequently, Veitch and others acting in combination placed an embargo on the Crofter Company's imported yarn and exported tweed by instructing dockers at Stornoway to refuse to handle these goods. The dockers obeyed these instructions but were not on strike or in breach of contract. The Crofter Company sought an interdict (or injunction) against the embargo. The House of Lords *held* that the union officials were not liable in conspiracy because their purpose was to benefit the members of the union and the means employed were not unlawful.

Defamation: what is?

427 *Byrne* v *Deane* [1937] 1 KB 818

The claimant was a member of a golf club in which there had been some gaming machines. The defendants, Mr and Mrs Deane, were proprietors of the club. As a result of a complaint being made to the police, the machines were removed. Shortly afterwards, the following typewritten lampoon was placed on the wall of the clubhouse near to the place where the machines had stood:

> For many years upon this spot
> You heard the sound of the merry bell
> Those who were rash and those who were not,
> Lost and made a spot of cash
> But he who gave the game away,
> May he Byrne in hell and rue the day.
> Diddleramus

The claimant brought this action for libel alleging that the defendants were responsible for exhibiting the lampoon, and that the lampoon was defamatory in that it suggested that he was disloyal to his fellow club members.

Held – the words were not defamatory because the standard was the view which would be taken by right-thinking members of society, and, in the view of the court, right-thinking persons would not think less of a person who put the law into motion against wrongdoers.

Defamation: libel or slander: form of publication

428 *Youssoupoff* v *Metro-Goldwyn-Mayer Pictures Ltd* (1934) 50 TLR 571

The claimant was a member of the Russian royal house. The defendants produced in England a film dealing with the life of Rasputin who had been the adviser of the Tsarina of Russia. The film also dealt