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Negligent valuations – passing the buck

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Abstract

For more than a decade, legal actions alleging negligence by valuers have assumed a high degree of prominence as mortgage lenders, often those caught by an unexpected fall in the property market, have sought to recoup their losses. One feature of this litigation has been the attempts by valuers, not merely to refute the basic allegation of negligence, but to find other legal mechanisms by which liability may be avoided or reduced. Valuers and their legal advisers in Australia, New Zealand and the United Kingdom have identified a range of defences and quasi-defences and these have been utilised with varying degrees of success. The best known and most widely used of these mechanisms is the defence of contributory negligence, whereby the valuer alleges that the lender, through its imprudent conduct, is partly to blame for its own losses and should therefore lose a proportion of its damages. This defence was first run in New Zealand in 1986, and its use in UK cases was examined in an earlier paper by Crosby, Lavers and Murdoch (1998). Since then, the reported case law in the UK and Australasia has displayed interesting and important differences in the applicability and scope of the defence, leading to the use of litigation tactics which have little to do with the merits of any particular claim.
This paper compares and contrasts the legislative provisions and reported case law in Australia, New Zealand and the UK dealing with issues surrounding the defence of contributory negligence, and reviews the resulting literature. It concludes that the legal divergences between the jurisdictions, while significantly affecting the risks borne by their respective valuers, do not result from any belief that valuation practice is different in each country, but rather from the views of legislative drafters and judges on more general questions of liability.

1. Introduction

In 1955, in a Foreword to a book on professional negligence (Denning 1955), Lord Denning could say: "The courts have no hesitation in holding that mistakes by car drivers or employers are visited by damages; but they make allowances for the mistakes of professional men. They realise that a finding of negligence against a professional man is a serious matter." By 1991, in stark contrast, we find a much more pessimistic view expressed by John Powell QC: "Today society and indeed the law are more demanding in the standards required of professionals and are less tolerant when the service provided falls short of these standards. Professionals are then fair game." (Powell 1991)

There is universal agreement (though actual statistics are hard to come by) that professional negligence claims have increased dramatically in recent years. However, a UK Government Report in 1989 concluded that this was as a result of clients' increasingly litigious tendencies, rather than a serious decline in professional standards or widespread lack of competence (Likierman 1989).

One striking feature of the new professional negligence landscape is the number of claims brought, not by lay people, but by corporate clients who are knowledgeable, experienced and well aware of the commercial risks inherent in their business. There is an inevitable suspicion that, sometimes at least, such clients seek professional advice as a form of insurance in case their contemplated transaction proves to be an expensive mistake. Thus, for example, when a borrower defaults, the mortgage lender may be tempted to turn on the lawyers and valuers who handled the loan transaction, comforted by the knowledge that, if negligence can be established, the lender's losses will be laid off to the advisers and their professional indemnity insurers.

Feeling increasingly vulnerable to attack, professionals have sought to utilise various legal mechanisms to avoid or minimise their liability. The main focus of this paper is on one of those mechanisms, the defence of contributory negligence, under which a court is asked to reduce an award of damages to take account of the plaintiff's own share of the responsibility for the losses which he or she has suffered. Before turning to that defence, however, we may briefly describe a number of other arguments commonly adopted by beleaguered professionals, especially in cases brought against them by more worldly clients.

1.1 No duty of care to the plaintiff

Most professionals feel comfortable enough with the knowledge that, in return for their fees, they owe a duty to their client to carry out their tasks with an appropriate degree of care and skill. Such a duty may arise as an implied term of the contract between adviser and client, or it may be imposed (concurrently) by the tort of negligence. However, what professionals find less easy to accept is the idea that they may owe an equivalent duty to certain third parties (who, by definition, are not paying for their services). Nevertheless, the courts in many common law countries have ruled that, despite the absence of a contractual relationship, a duty of care will exist wherever there is a relationship of sufficient "proximity" between a professional adviser and a person who relies on his or her advice.

A professional who seeks to argue that he or she owed no duty of care to a particular plaintiff is most likely to succeed where there has been no individual communication between them, that is where the plaintiff is merely a member of a general class of persons who may be in a

position to make use of a piece of advice. Thus, for example, the UK courts have rejected negligence claims against accountants who audited the accounts of a public company, brought by persons who have relied on the accounts in deciding to invest in the company (*Caparo Industries plc v Dickman* [1990] 2 AC 605) or lend money to it (*Al Saudi Banque v Clarke Pixley* [1990] 1 Ch 313).

Where the plaintiff is an individual, whose likely reliance was known to the adviser when the professional work was carried out, a duty of care is less easy to resist. Thus, for example, the courts have made it clear that a surveyor who inspects a house or flat for mortgage purposes will owe a duty of care, not only to the lender who commissions the inspection, but also to the purchaser who, indirectly at least, pays for it (*Smith v Eric S Bush; Harris v Wyre Forest DC* [1990] 1 AC 831). However, the House of Lords in *Smith v Bush* suggested strongly that a lender's surveyor would owe no duty to the purchaser of large commercial property (and possibly even very expensive residential property), on the ground that it would be reasonable to expect such a person to protect their own interests by obtaining, paying for and relying on professional advice, rather than seeking to "free load" on advice commissioned by another party.

A particular limitation on a professional adviser's duty of care, at least in the UK, was recognised by the House of Lords in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191. Lord Hoffmann there stated that anyone who provided information, on which someone else would base a decision, should not be liable for more than what he described as "the consequences of the information being wrong". In the particular context of the *SAAMCO* case itself (a claim for negligence by a mortgage lender against a valuer), this meant in effect that the valuer's liability for the lender's losses could not exceed the amount by which the defendant had over-valued the property in question. Although highly influential in the UK, this decision has proved highly controversial elsewhere; it has received support from the New Zealand Court of Appeal (*Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664), but the High Court of Australia has declined to follow it (*Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 163 ALR 611).

1.2 No breach of duty

The knowledge, experience and sophistication of a client may be relevant to the question of whether or not a professional adviser has acted with reasonable care and skill. In *Yager v Fishman* [1944] 1 All ER 552, for instance, Goddard LJ said that the advice a solicitor would be expected to give to "a person wholly unacquainted with business life may differ very materially from what he would offer to an experienced businessman who would naturally decide for himself the course he thought it in his interest to take".

This principle has been applied in many cases involving solicitors. For example, in the Canadian case of *Duncan v Cuelenaere* [1987] 2 WWR 379, a client gave his solicitor the wrong date on which a hailstorm had damaged his property and, as a result, his claim became time-barred. It was held that the solicitor had not been negligent in failing to double check the information; in the judge's view, the solicitor could legitimately assume that an experienced business person such as his client would take care in instructing his lawyers, and would also check important legal documents which they sent to him.

Examples of this principle being applied to valuers are less common, but one such is the case of *PK Finans International (UK) Ltd v Andrew Downs & Co Ltd* [1992] 1 EGLR 172. The defendants there based their valuation of a nursing home upon certain planning assumptions, without warning their clients of the need to verify these assumptions. It was held that, while a valuer who failed to give such a warning to a lay client might well be held negligent, the same could not be said where, as here, the client was a financial institution and a licensed deposit-taker.

1.3 No reliance by the plaintiff on the defendant

In order to recover damages for negligence in respect of professional advice, the plaintiff must show that the loss or damage which he or she has suffered was caused by the negligence. In practice, this frequently turns on whether or not the plaintiff relied on the defendant's advice in deciding to enter into a particular transaction.

Where the plaintiff has acted unreasonably in placing reliance on the advice, this may lead to a finding of contributory negligence and a consequent reduction in the damages recoverable (see section 2.3.2 below). However, this is not the only possible consequence. In *Argy v Blunts* (1990) 94 ALR 719 at 744, Hill J suggested:

> A case may perhaps be imagined where an applicant is so negligent in protecting his own interests that there will be a finding of fact that the representation complained of was not in the circumstances a real inducement to his entering a contract.

An example of such a finding may be found in the case of *Clonard Developments Ltd* v. *Humberts* [1999] EGCS 7. A property development company there failed to convince the court that it had relied on the defendant's valuation in deciding to purchase a property and convert it into holiday cottages, since the company had received a lower valuation from another valuer. However, the facts of *Argy v Blunts* suggest that courts will not be quick to come to such a conclusion; a solicitor there did not make the normal and appropriate checks when purchasing a waterfront property, but was held still to have relied on the representation of which he complained.

1.4 Plaintiff's failure to mitigate loss

It is a well established principle of law that a plaintiff is not entitled to recover damages for any part of the loss which he or she could have avoided by taking reasonable steps. There are at least two respects in which this principle resembles the defence of contributory negligence: first, the onus of proof lies firmly on the defendant, and second, if the defendant is successful, the result is not a complete avoidance of liability but a reduction in the damages payable. However, it is significantly different from contributory negligence in an important respect: whereas contributory negligence holds *both* parties jointly responsible for *all* the plaintiff's losses, mitigation depends on identifying a *particular part* of the loss that the plaintiff could and should have avoided and for which the plaintiff is therefore *solely* responsible.

Mitigation has not played a leading part in professional negligence actions, but valuers have occasionally raised this defence and have, even more occasionally, been successful. In doing so, they have identified two particular accusations which may be levelled at a plaintiff. The first is that the plaintiff, whether lender (as in *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143) or purchaser (as in *Patel v Hooper & Jackson* [1999]

1 All ER 992), should have sold the property in question at an earlier date, if necessary after first repossessing it. Where the court agrees with the valuer on this issue, the result will be to exclude from the recoverable damages any extra loss suffered after the date by which the property should have been sold.

The second ground on which valuers have raised the issue of mitigation against mortgage lenders is a failure to sue the defaulting borrower for the outstanding debt. There seems no reason in principle why a successful defence should not be based upon such an allegation; however, the courts have shown no great eagerness to uphold a defence on such a ground, whether the borrower in question is a private individual (as in *London & South of England Building Society v Stone* [1983] 3 All ER 105) or a property company, at least one which is "engulfed in debt with no significant assets" (as in *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd* (1 October 1993, unreported)).

2. Contributory negligence: the legal context

The defence of contributory negligence, as it originated at common law, arose where the defendant (on whom the burden of proof lay) could prove a failure by the plaintiff to take reasonable care for the protection of his or her person or property. The defence was not, and is not, based on the idea that the plaintiff owes a duty *to the defendant*; the law expects everyone to take care of themselves at all times and in all circumstances.

The common law had no concept of proportional liability in this context; where contributory negligence was established, it operated to defeat the plaintiff's claim altogether. Hence, a comparatively minor piece of imprudence by a plaintiff might enable a careless defendant to evade responsibility for the consequences of his much more serious negligence. Not surprisingly, the courts in such cases would strive to avoid a finding of contributory negligence, sometimes reaching decisions which appeared to fly in the face of the evidence.

2.1 The principles of proportional responsibility

The common law rule that contributory negligence was an absolute defence has been altered by statute in the UK, Australia and New Zealand. The relevant provisions are: UK, *Law Reform (Contributory Negligence) Act 1945*; New Zealand, *Contributory Negligence Act 1947*; South Australia, *Wrongs Act 1936*; Western Australia, *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act 1947*; ACT, *Law Reform (Miscellaneous Provisions) Act 1955*; Northern Territory, *Law Reform (Miscellaneous Provisions) Act 1955*; Queensland, *Law Reform (Tortfeasors and Contributory Negligence) Act 1954*; Victoria, *Wrongs Act 1958*; New South Wales, *Law Reform (Miscellaneous Provisions) Act 1965*.

The UK statute, the Law Reform (Contributory Negligence) Act 1945, forms the pattern. According to section 1 of that Act:

> Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage."

The keyword here is "fault", which is defined in section 4 as:

> "Negligence, breach of statutory duty or other act or omission which gives rise to liability in tort or would, apart from this Act, give rise to the defence of contributory negligence".

Under the statutory regime which now operates in all three countries, courts are directed to allocate responsibility between plaintiff and defendant on a "just and equitable" basis, according to each party's degree of responsibility. Hence, a plaintiff who is held to be 25% to blame will recover only 75% of the loss which he or she has suffered.

2.2 Contributory negligence in professional negligence cases

Many claims brought against professional advisers have little or nothing to do with "advice" in the strict sense of the word. It may be said that the client "relies" on his or her adviser, but this "reliance" is often no more than an expectation that the professional will carry out some allotted task on the client's behalf and, moreover, that he will carry it out properly and on time. If the defence of contributory negligence is raised in such a case, it will normally consist in effect of an allegation that the client, having instructed the professional to carry out a task, should then have checked to ensure that it had been properly done. The generally unconvincing nature of such an allegation is neatly summarised by Jackson & Powell (Jackson 2001):

> If the defendant makes a mistake, it can seldom be said that the client was negligent not to spot it or correct its effect, unless the client is expected to be wiser than his own professional advisers.

The view expressed appears to command general acceptance among the judiciary. The following remarks by Judge Bowsher, Official Referee, in *EH Cardy & Sons Ltd v Paul Roberts & Associates* (1994) 38 Con LR 79 (a case concerning architects) are not untypical:

> It is common ground that the plaintiffs had the ability to make a survey. The question is whether they were guilty of contributory negligence in failing to do so or in failing to ask whether the third party had done so. I find that they were not … You do not hire a dog and bark yourself … there is little point in hiring a professional to do work if it is to be said that the client has a duty to check the professional's work.

An earlier expression of similar sentiments may be found in the judgment of Atkin J in *Dickson & Co v Devitt* (1916) 86 LJKB 315:

> Business could not be carried on if, when a person has been employed to use skill and care with regard to a matter, the employer is bound to use his own care and skill to see whether the person employed had done what he was employed to do.

Australian judges, too, have clearly felt uncomfortable about allowing professionals to raise the defence of contributory negligence. In *Pacific Acceptance Corporation v Forsythe* (1970) 92 WN (NSW) 29, Moffitt J said:

> I do not find merit in a submission which in effect is that, although the auditors were negligent, they should be excused because the directors were also negligent. To excuse an auditor because the directors or management were also at fault, and in particular to excuse him when he failed to perform his duty with independence and to check on management and the board would be to apply section 365 (of the NSW Companies Act) to negate a fundamental reason for the appointment of the auditor.

More recently in *Craig v Troy* (1997) 16 WAR 96, the Craigs had engaged Troy, an expert in the field of hotel development and management, to advise on the restoration of their hotel. The undertaking was not a success, and the Full Court found that Troy had been negligent in not doing any market research. The Full Court rejected Troy's defence of contributory negligence because, in the words of Malcolm CJ:

> In these circumstances it would require the Craigs to exercise expertise they did not have to question this advice and insist on a proper market survey as a part of the feasibility studies later carried out on their behalf.

Notwithstanding the strength with which such views have been expressed, there is a counter-argument, graphically expressed by Marshall and Beltrami (Marshall 1990):

> Just because there is a watchdog on the premises, it does not follow that the occupants can safely forget to bolt the doors and omit to switch on the burglar alarm.

In *Astley v Austrust Ltd* (1999) 197 CLR 1, a firm of solicitors was sued for breach of contract and negligence in giving bad advice to its client, a trustee company, in relation the trading trust of a piggery. The trial judge concluded that there had been contributory negligence on the part of Austrust, and that therefore the responsibility for the damages should be apportioned equally between the parties. The Full Court in South Australia reversed this decision, on the ground that contributory negligence could not arise where the loss sustained was "the very kind of loss" against which the defendant should have protected the plaintiff.

On appeal to the High Court, the majority concluded:

> There is no rule that apportionment legislation does not operate in respect of the contributory negligence of a plaintiff where the defendant, in breach of its duty, has failed to protect the plaintiff from damage in respect of the very event which gave rise to the defendant's employment. A plaintiff may be guilty of contributory negligence, therefore, even if the "very purpose" of the duty owed by the defendant is to protect the plaintiff's property. Thus, a plaintiff who carelessly leaves valuables lying about may be guilty of contributory negligence, calling for apportionment of loss, even if the defendant was employed to protect the plaintiff's valuables.
>
> A finding of contributory negligence turns on a factual investigation of whether the plaintiff contributed to his or her own loss by failing to take reasonable car of his or her person or property. What is reasonable care depends on the circumstances of the case. In many cases, it may be proper for a plaintiff to rely on the defendant to perform its duty. But there is no absolute rule....Contributory negligence focuses on the conduct of the plaintiff. The duty owed by the defendant, although relevant, is one only of the many factors that must be weighed in determining whether the plaintiff so conducted itself that it failed to take reasonable care for the safety of its person or property.

As "Austrust did practically nothing to determine the viability of the venture", it was guilty of contributory negligence as far as the claim in tort was concerned.

2.3 The types of contributory fault

Cases where a person claims to have suffered loss as a result from relying on negligent professional advice may conveniently be divided into three categories, depending on the kind of conduct by the plaintiff which is alleged to constitute contributory negligence. It should be pointed out that the courts have not yet explicitly treated these categories as producing any different legal results; nevertheless, it is suggested below that they may give rise to different considerations.

The three categories are:

1. An act or omission by the client which contributes to the incorrectness of the advice given by the professional.
2. Failure by the client to realise that the advice given by the professional is incorrect.
3. A decision by the client to enter into some transaction, partly in reliance on the professional's advice and partly for other reasons which are themselves imprudent.

2.3.1 Contribution to incorrect advice

Although this type of contributory negligence is the one most rarely encountered in practice, it is not difficult to envisage circumstances in which it might arise. An obvious point is that opinions or advice are only as good as the facts on which they are based, and a professional adviser is often dependent on the client for those facts. As noted by Richardson J in the New Zealand case of *Mouat v Clark-Boyce* [1992] 2 NZLR 559:

> In conducting business affairs, as in other areas of life, failure to provide adequate information to an adviser and inflexibility in responding to the advice received may be one of the causes of damage.

An example of this type of contributory negligence is provided by *McLellan v Fletcher* (1987) 3 PN 202. The defendant solicitor was there held negligent for failing to check that his client's mortgage endowment insurance policy was in force. However, the client was held 75 per cent responsible for wrongly informing the defendant that he had paid the first premium.

2.3.2 Blind reliance on advice

The idea that a client has a duty to second-guess an expert adviser, always an unattractive proposition, is at its weakest in cases where the recipient of that advice is a layman. In a number of actions brought by house purchasers against surveyors and valuers, defendants have raised the defence of contributory negligence, but with conspicuous lack of success. The following extract from the judgment of from Park J in *Yianni v Edwin Evans & Sons* [1982] 2 QB 438 is typical:

> [Counsel] says that the plaintiffs should be held guilty of contributory negligence, because they failed to have an independent survey; made no inquiries with the object of discovering what had been done to the house before they decided to buy it; also failed to read the literature provided by the building society, and generally took no steps to discover the true condition of the house. It is true that the plaintiffs failed in all these respects, but that failure was due to the fact that they relied on the defendants to make a competent valuation of the house. I have been given no reason why they were unwise to do so.

What might be regarded as a rather paternalistic view of lay clients (also to be seen in *Davies v Parry* [1988] 1 EGLR 147 and *Whalley v Roberts & Roberts* [1990] 1 EGLR 164) reached its apogee in *Allen v Ellis* [1990] 1 EGLR 170, where the plaintiff, a year after purchasing a house

on the basis of a report which he had commissioned from the defendant surveyors, fell through the asbestos roof of the garage in the course of investigating a leak. In holding that the defendants were liable for their client's injuries, on the ground that their report had given him a misleading impression as to the condition of the roof, Garland J rejected the defendants' argument that, since asbestos roofs are notoriously lacking in strength, anyone who steps out on to one without support is guilty of contributory negligence. As the judge noted:

> The plaintiff is a layman. He knows nothing, or virtually nothing, about building or property ... I find it impossible to hold him contributorily negligent. If he were unaware of the risk - and I accept his evidence that he was unaware of the risk - then it cannot be said that he was negligent in failing to comprehend it.

Such protective attitudes, though prevalent, are not universal, and judges have occasionally made it clear that paying a professional adviser does not entitle a layman to lay aside common sense altogether. In *Reid v McCleave* (16 October, 1979, unreported), for example, a motorist relied on an assurance from his brokers that he was insured to drive, notwithstanding that the only cover note which they had issued had clearly expired. The motorist was held 25 per cent responsible for his resulting losses, since he ought reasonably to have realised the possibility that the brokers had made a mistake. Similarly, in *Edwards v Lee* (1991) 141 NLJ 1517, where a solicitor gave a negligent reference to the plaintiff on behalf of a dishonest client, it was held that the plaintiff was 50 per cent to blame for relying on this reference, since the evidence showed that he had been very uneasy about the honesty of the client concerned but had made no further inquiries.

Needless to say, if a private client can be held contributorily negligent for failing to appreciate the flaws in professional advice, the argument applies with even greater force in respect of a plaintiff who is more worldly and experienced.

2.3.3 Independent negligence in decision-making

The possibility that a client may quite reasonably believe the professional advice which he or she receives, but be negligent for other reasons in the decision made on the basis of that advice, has been accepted in a considerable number of cases. As pointed out by Judge Fawcus in *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143:

> [T]here is clearly a distinction between a finding that a person reasonably relies on a valuation, and a consideration of whether that person is then at fault in lending a particular sum of money in the light of that valuation.

A more explicit explanation was given by Clarke J in the Australian case of *Trade Credits Ltd v Baillieu Knight Frank* (1985) Aust Torts Reports 80-757:

> A party induced to enter into a commercial transaction because there is belief in Facts A and B. If his belief in the truth of Fact A is induced by the negligent representation of another party and his belief in the truth of Fact B is induced by his own carelessness, it would seem difficult to deny that his loss was brought about in part by his own negligence.

3. Contributory negligence in valuation cases

The first reported instance of a valuer pleading contributory negligence against a plaintiff occurred in the New Zealand case of *Kendall-Wilson Securities v Barraclough* [1986] 1 NZLR 576, where the negligent defendant succeeded in obtaining a 30% reduction in the

damages payable to a mortgage lender. The defence rapidly gained popularity in the UK; between 1991, when it was first raised in a lender-valuer action, and 1998, it featured in more than one-half of all such cases, with rough equality between successes and failures (Crosby 1998).

3.1 The defence in operation

In showing how valuers have sought to utilise the defence of contributory negligence, it is convenient to follow the threefold categorisation adopted earlier.

3.1.1 Contribution to incorrect advice

In *Craneheath Securities Ltd v York Montague Ltd* [1994] 1 EGLR 159, it was alleged by the plaintiff lenders that the defendants had been guilty of negligence in valuing a restaurant business, since they had based their valuation on an unrealistic view of the turnover. In the course of the trial it emerged, not only that the defendants had not been shown any recent accounts of the business, but that the plaintiffs themselves had obtained a recent set of accounts which they had not shown to the defendants. It was held by Jacob J that the defendants had not been negligent and were thus not liable at all, but his lordship had something more to say about the conduct of the plaintiffs:

> Where a valuation has been given to a man, and that man has, and knows he has, more information affecting the valuation than the valuer had, he is very likely to find himself at least partly at fault if he seeks to place reliance on the valuation without first giving the valuer that information for comment.

A variation on the "inaccurate information" theme concerns instructions from the client which are inadequate or misleading. In *South Australia Asset Management Corporation v York Montague Ltd* [1995] 2 EGLR 219, the plaintiff lenders alleged that a valuation by the defendants of a major development site in London Docklands had been negligently carried out. It became apparent during the trial that the parties had been confused, if not at cross-purposes, as to the precise nature of the valuation which was to be provided. May J concluded that the plaintiffs, by failing to provide direct and explicit instructions to the defendants, had made a significant contribution to this muddle and must accordingly bear a share of the legal responsibility for the resulting losses. A similar decision was reached by the Court of Appeal in *Western Trust & Savings Ltd v Strutt & Parker* [1998] 3 EGLR 89, where valuers' negligent failure to discover that a development of holiday cottages was affected by a planning problem resulted in part from the way in which the lenders had permitted them to be instructed.

3.1.2 Blind reliance on advice

As noted earlier, the idea that a client, having paid an expert for advice on some matter, should then have to adopt a sceptical attitude to that advice appears at first sight to be a somewhat unattractive proposition. As pointed out by Phillips J in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769:

> No court will lightly hold a plaintiff at fault for relying on advice given by a professional adviser who owes a duty of care to the plaintiff.

Judge Fawcus, in *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143, was more specific:

> It lies ill in the mouth of a professional valuer, who is giving a valuation for mortgage lending purposes, to say that it was unreasonable for the party to whom such valuation was given to rely on it.

That Australian judges feel the same way may be seen from the case of *I & L Securities v Lambert* [1998] QSC 153, where one of the allegations of contributory negligence was that the plaintiff had failed to give adequate regard to the fact that the property was a specialised industrial one. The judge said:

> It is, in my view, no easy matter for a defendant who had negligently prepared a valuation to assert that his valuation, the result of his negligence, should not be relied on by those to whom he gave it without any warning that it was latently defective.

Similar comments were made in *ABCOS v Griffith Morgan Jones* [1997] 1405 FCA, where there was a complex syndication of bloodstock based on a negligent valuation. The defence of contributory negligence was raised, alleging that the investors were themselves at fault in not reviewing the documentation and paperwork. The Full Court of the Federal Court said firmly:

> To accept, as a general proposition, that a person who has suffered loss because of a failure of duty by a professional adviser is negligent if he or she fails to read and understand complex legal documents would be to introduce an unfair notion into the law.

Notwithstanding such sentiments, however, the UK courts have in recent years proved increasingly receptive to the argument that a lender faced with evidence to suggest a possible over-valuation should probe further, and that failure to do so may constitute contributory negligence. There is of course a certain irony in this approach, since it necessarily implies that, the greater and more obvious the valuer's error, the more likely it is that the client will be adjudged contributorily negligent for failing to detect it! Nevertheless, one-half of the cases in which a valuer has successfully pleaded contributory negligence against a lender fall within this category.

A plea of this kind was first accepted in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd (BBL)* [1995] 2 All ER 769, where the basis of a lender's action against valuers was that they had valued certain commercial properties at up to 70% more than the prices at which those properties had just been acquired, without offering any kind of explanation as to how the purchasers had been able to negotiate such wonderful deals. Phillips J held that this clearly constituted negligence by the valuers. However, on finding that the lenders were as aware as the valuers of these very substantial discrepancies, his lordship held that their failure to demand an explanation from the valuers amounted to contributory negligence and justified a reduction of 30% in the damages to which they were entitled.

The *BBL* view that uncritical reliance, in circumstances which should raise a lender's suspicions, may be treated as contributory negligence, was followed by Judge Fawcus in *Nyckeln Finance Co Ltd v Stumpbrook Continuation Ltd* [1994] 2 EGLR 143. On that occasion, however, the appropriate reduction was held to be only 20%, since the plaintiffs had made at least a token attempt to require the defendants to justify their apparently excessive valuation. And in *Barclays Bank plc v William H Brown Ltd* [1996] NPC 184, the

plaintiffs were held 25% responsible for failing to question a valuation which suggested that the value of property had increased by no less than 130% in less than a year!

Of more significance is the decision of the Court of Appeal in *Cavendish Funding Ltd v Henry Spencer & Sons Ltd* [1998] 1 EGLR 104, since this was the first occasion on which the *BBL* principle (or indeed the general availability of the defence of contributory negligence in lender-valuer cases) was considered by an appellate court in the UK. The plaintiffs there were a secondary bank which specialised in short term or "bridging" mortgage loans on a self-certification basis (ie they did not subject the borrower's statement of his financial condition to any independent scrutiny). Given the risks inherent in such a practice, the plaintiffs had a rule that, before agreeing to lend on the security of residential property whose value appeared to exceed a certain level, they would obtain two independent valuations of that property. When negotiating a loan in respect of a Grade I listed country house in Yorkshire, the plaintiffs inexplicably decided to lend on the basis of a valuation provided by the defendants, in spite of the fact that this exceeded by more than 50% the valuation provided by the second valuer. The Court of Appeal, reversing the decision of Evans-Lombe J, held that the plaintiffs' failure to investigate the discrepancy between the two valuations amounted to contributory negligence, and that their damages accordingly fell to be reduced by 25%.

The requirement of client scepticism inherent in these decisions was raised to a new level by the ruling of Thomas J in *Interallianz Finanz AG v Independent Insurance Co Ltd* [1997] EGCS 91. The plaintiffs in that case were aware that the property on which they were proposing to lend had recently changed hands, although they had no knowledge of the purchase price. The judge held that the plaintiffs' failure to ask the borrowers about the price so that they could consider any difference between that price and the defendants' valuation, amounted to contributory negligence for which they must bear 15% responsibility. As he put it:

> Even if it were prudent for a banker in general not to ask questions about a valuation (which I doubt), such a practice would not be relevant in circumstances where the bank knew of a recent transaction. A prudent banker would want to know what the price of the recent transaction was so as to form a proper view of his ability to realise the security and to satisfy himself as to the prudent amount of the margin between the valuation and the amount of the loan.

If this is correct, it means that a client may in certain circumstances be expected to check the advice for which he has paid, even though there is nothing in the advice itself which would lead a reasonable person to doubt its accuracy. It is submitted that such an obligation of scepticism is something which should be reserved for exceptional cases; to impose it as a matter of routine would produce a fundamental alteration in the balance of risks and responsibilities hitherto associated with the relationship between client and professional adviser.

It is perhaps not without significance that, of all the Australian and New Zealand cases in which a valuer has successfully raised the defence of contributory negligence, very few have been based on "unreasonable reliance". In the Australian case of *Cash Resources Australian Pty Ltd v Ken Gaetjens Real Estate Pty Ltd* (1994) Aust Torts Reports 81-276, a meat processing factory which had been valued as a going concern at $2.2 million was subsequently sold for $715,000. One of the reasons for what was clearly a considerable over-valuation was that the valuer had negligently included, in the going concern valuation, plant and equipment which was not in fact owned by the meat processing factory. It was found that the plaintiff knew or should have known that this plant and machinery was not part of the security, and damages

were accordingly reduced by 25%. In the New Zealand case of *Mirage Entertainments Corporation v Arthur Young* (1992) 6 NZCLC 96-577, the plaintiff's damages were reduced by 40% because it had failed to give sufficient consideration to assumptions in a valuation report which had been prepared by a firm of accountants. The court made it clear that, if the wording of the qualification made in the report had been stronger, damages would have been reduced by 50%.

2.3.3 Independent negligence in decision-making

The third type of contributory negligence allegation is intuitively the most acceptable. This is that, while the plaintiff has been quite reasonable in relying on the defendant's advice, he or she has been guilty of some "independent" imprudence in reaching the decision to enter into the transaction in question. In relation to mortgage lenders, the most fundamental accusation which has been levelled is that their basic lending policy is one which no prudent and reasonable lender would adopt.

In dealing with such claims, a UK court in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1995] 2 All ER 769 refused to hold a lender guilty of negligence, merely on the basis that it had agreed to lend 90% of the defendants' valuation of the mortgage property. The top 20 per cent of the loan was in fact covered by a mortgage indemnity guarantee insurance policy, but Phillips J held that, since the presence of this insurance was to be ignored in computing the lender's damages, it must also be ignored in deciding whether the lenders were guilty of contributory negligence. Having so ruled, his lordship decided that even an uninsured lender might reasonably regard a 10% margin as sufficient security, so that there was no contributory negligence on this ground.

The court in *Governor and Company of the Bank of Scotland v WG Edwards* (1995) 44 Con LR 77 also declined to treat a lender as negligent merely for adopting the practice of "non-status" or "self-certification" loans (ie those based upon the borrower's own statement of financial resources). However, a combination of a high loan-to-value ratio and a non-status loan has resulted in a finding of contributory negligence (in *Platform Home Loans Ltd v Oyston Shipways Ltd* [1996] 2 EGLR 110; *Coventry Building Society v William Martin & Partners* [1997] EGCS 106).

The most common allegation of contributory negligence against a lender (featuring in more than one-half of the case in which contributory negligence has been pleaded) is that it has failed to take reasonable steps to investigate the financial position of the proposed borrower. Surprisingly, perhaps, some judges have appeared to doubt whether this is even capable of amounting to contributory negligence, on the basis that a lender is entitled to look exclusively to the mortgaged property as security for the loan and to regard the borrower as a virtual irrelevance. Such a view of the mortgage lending business may be seen most clearly in the judgment of Wright J in the first English case in which a valuer pleaded contributory negligence against a lender, *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231. While accepting that "a prudent lender must not shut his eyes to any obvious lack of integrity or substance in his borrower", the judge insisted:

> The 'cushion' apparently provided by the property on the basis of the defendants' valuation was accordingly £660,000. In such circumstances, even if the borrowers turned out to be complete men of straw, the lenders were entitled to regard themselves as being more than adequately covered not merely in respect of the capital sum lent,

> but also any likely loss of interest, and indeed all the costs and expenses likely to be incurred in foreclosing upon and realising the security. In such circumstances, although the hypothetical lender might not unreasonably feel irritated at being put to the trouble of having to realise his security rather than enjoying the fruits of his investment in a peaceful manner and in accordance with the terms of his contract, it is very difficult to see how such a lender could properly be characterised as 'imprudent'.

This approach appeared at odds with the somewhat similar New Zealand case of *Kendall Wilson Securities v Barraclough* [1986] 1 NZLR 576. However, Wright J distinguished that case on the ground that the lender there, a solicitors' nominee company, was acting as a trustee of clients' money and was accordingly subject to extra obligations of prudence and caution.

Though plausible, the view expressed by Wright J has not achieved universal acceptance among the UK judiciary. In several recent cases, lenders have been found contributorily negligent for failing to carry out a more detailed enquiry into the borrower's financial status, in circumstances where evidence in the lender's possession suggested that this might be less than satisfactory (*Chelsea Building Society v Goddard & Smith* [1996] EGCS 157 (lender 25% responsible); *Halifax Mortgage Services Ltd v Robert Holmes & Co* [1997] 7 CL 459 (25%); *Midland Bank plc v Douglas Allen* [1997] EGCS 112 (30%)). And in *Interallianz Finanz AG v Independent Insurance Co Ltd* [1997] EGCS 91 it was held that, in the light of doubts as to financial status of a guarantor, a prudent lender would have insisted on a cash deposit to sufficient cover six months' interest.

In *HIT Finance Ltd v Lewis & Tucker Ltd* [1993] 2 EGLR 231 and *Axa Equity & Law Home Loans Ltd v Goldsack & Freeman* [1994] 1 EGLR 175 it was suggested, albeit obiter, that knowledge of the lender's solicitors may be attributed to the lender for this purpose, so that, if the solicitors are aware of something about the borrower which would merit further examination, the lender may be held contributorily negligent on the ground that no such examination has taken place. It is suggested, however, that this represents an unwarranted and undesirable extension of established principles, and that the better view (expressed in *BFG Bank AG v Brown & Mumford Ltd* [1995] EGCS 21) is that a finding of contributory negligence should only ever be based upon a party's actual knowledge.

As in the UK, so in Australasia, "independent" criticisms of lender conduct have been the most fruitful ground of contributory negligence defences. In *Challenge Bank Ltd v VL Cooper* [1996] 1 VR 220, for example, where the valuation on which a loan had been made was negligent, it was held that the bank had neither investigated the borrower's capacity to repay nor assessed the risks properly and must accordingly bear 25% of its losses.

One ground of contributory negligence raised in *I & L Securities v Lamberts* [1998] QSC 153 was that the plaintiff did not investigate the borrower's ability to repay properly. The court considered a number of other cases where valuers had successfully raised the question of contributory negligence (notably *Kendall Wilson Securities Ltd v Barraclough* [1986] 1 NZLR 576, *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1994] 2 EGLR 108 and C*hallenge Bank Ltd v VL Cooper and Associates* (1996) 1 VR 220) but concluded that, in each of those cases, the lender had notice that the valuation might be unreliable or that the borrower would have difficulty in repaying the money. Each involved more than a credit risk that turned out to be wrong and each lender had information which the revealed the

distinct possibility of a problem in recovering the money lent. This was not the case in *I & L Securities*, and contributory negligence was accordingly not established.

A second case involving the same lenders (*I & L Securities v HTW Valuers (Brisbane) Pty Ltd* [1999] QSC 320) went to the Court of Appeal in relation to a claim under the Trade Practices Act (see section 4.2 below). The valuation was admittedly negligent; however, the defence of contributory negligence was raised. Williams J concluded that the lender was of ordinary prudence, and that its directors were solicitors experienced in first mortgage lending. However, it had failed to act as a reasonably prudent lender and therefore the damages were reduced by one-third.

In *National Australia Bank Ltd v Hann Nominees Pty Ltd* [1999] FCA 1262, where a lending bank's damages were reduced by 20%, Ryan J said:

> What amounts to reasonable care by an applicant to safeguard its own interests has to be determined according to the factual circumstances surrounding the transaction and the degree of skill or astuteness which can reasonably be imputed to the lender.

The defence of contributory negligence by failing to make further enquiries was raised at first instance in *MGICA (1992) Ltd v Kenny & Good* (1996) 140 ALR 313, but failed on the facts.

In *Oz Finance Pty Ltd v JLW (Queensland) Pty Ltd* [1998] QSC 155, Williams J said that a lender had been grossly negligent in having relied on only a part of the valuation report, and not even having read that part carefully. The lender also knew of defaults under a first mortgage. Taking all these factors into account, the judge would have reduced damages awarded by 75%. However, this was obiter; the claim in fact failed altogether, since the judge found that the plaintiff had not relied on the valuation.

In the New Zealand case of *Kendall Wilson Securities Ltd v Barraclough* [1986]1 NZLR 576, contributory negligence was raised successfully as a defence where the lender's agent made no enquiries at all in relation to a borrower's capacity to repay. Officers of the lender had notice that the borrower had defaulted in a separate transaction. The damages were reduced by one-third.

3.2 The **SAAMCO/Platform** *dimension*

As noted in section 1.1 of this paper, the effect of the House of Lords' decision in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 is that the liability of a negligent valuer cannot exceed the amount by which the property in question has been over-valued. This adds an extra dimension to the effect of contributory negligence in valuation cases in the UK and (probably) New Zealand, although it appears that the SAAMCO principle does not apply in Australia.

The relationship between *SAAMCO* and contributory negligence was considered by the House of Lords in *Platform Home Loans Ltd v Oyston Shipways Ltd* [1999] 1 All ER 833. The plaintiff lenders there had lost a total of £611,748 when a borrower defaulted on his repayments. However, the liability of the defendant valuers was "capped" at £500,000, this

being the amount by which they had over-valued the property to be mortgaged. The trial judge had held the lenders guilty of contributory negligence on two grounds (operating an imprudently high loan-to-value ratio and failing to obtain important information from the borrower), and had decided that 20% would represent a "just and equitable" reduction in their damages.

The question which then arose was whether the plaintiffs should receive £489,399 (80% of £611,748) on the ground that the final figure was within the "cap", or £400,000 (80% of the "capped" figure of £500,000). A majority of the House of Lords, reversing a unanimous Court of Appeal, held that the former solution was correct (a decision which brought a spirited and convincing dissent from Lord Cooke, the former President of the New Zealand Court of Appeal). The majority, treating the *SAAMCO* "cap" as bringing about a reduction in the lender's damages, felt that it would not be "just and equitable" to make what they described as a *further* reduction.

If this is correct, the consequences appear bizarre (though (Stapleton 1999) suggests that the decision of the Court of Appeal was no more correct than that of the House of Lords). If there had been no contributory negligence in the *Platform* case, the valuers would have been liable to pay the lenders damages of £500,000. However, the court ruled that the lenders were partly responsible for their own loss, and assessed that responsibility at 20%. How on earth can that ruling result in the valuers having to pay damages of £489,939?

4. Ouflanking the contributory negligence defence

The statutory provisions enabling a defendant's liability to be reduced on the ground of the plaintiff's contributory negligence apply, first and foremost, to claims brought in the tort of negligence. Whether they can also be utilised in the context of other claims is not at all certain; everything depends upon the wording of the statutes in question, and the decisions of courts in the three countries reveal marked divergences of approach. This uncertainty has encouraged plaintiffs to present their claims in ways which do not require reliance on the tort of negligence and to argue that, when they are so presented, they fall outside the statutory provisions which give rise to proportional responsibility.

Of course, not every claim lends itself to such treatment. The UK, for example, has no equivalent to the statutory "fair trading" claims found in Australia and New Zealand, and the requirements of a claim in fraud or for breach of fiduciary duty have not hitherto been found in many cases involving valuers. However, any client can, by definition, treat a professional adviser's "negligence" as a breach of the contract under which they have been instructed, and we accordingly look first at such cases.

4.1 Breach of contract

In the UK, the issue of contributory negligence in contract claims was, until comparatively recently, an extremely controversial one. However, this was resolved by the decision of the Court of Appeal in *Forsikringsaktieselskapet Vesta v Butcher* [1989] AC 852. The court approved the analysis adopted by the trial judge (Hobhouse J, reported at [1986] 2 All ER 488), which was that contractual claims must be divided into three categories:

1. Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.

2. Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
3. Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract.

It was held, adopting the New Zealand position in *Rowe v Turner Hopkins & Partners* [1980] 2 NZLR 550, that a reduction of damages on the ground of contributory negligence was possible in cases falling within category 3, but not those which fell within categories 1 or 2 (though the English Law Commission has recommended that apportionment should be extended to category 2 cases: (Commission 1993). And, since actions for professional negligence brought by clients are almost invariably category 3 claims, this means that, in New Zealand and the UK, a client cannot evade the possibility of proportional responsibility by pleading the claim as a breach of contract.

In Australia, too, it had been generally assumed that the contributory negligence legislation also applied to actions for breach of contract (*Queen's Bridge Motors & Engineering Co Pty Ltd v Edwards* [1964] Tas S R 93; *AWA Ltd v Daniels* (1992) 7 ASCR 759; *Craig v Troy* (1997) 16 WAR 96). However, in *Astley v Austrust Ltd* (1999) 197 CLR 1, the High Court decided by a 4-1 majority that section 37A of the South Australian *Wrongs Act 1936*, similar to the contributory legislation throughout Australia and that in the UK and New Zealand, did not apply to actions for breach of contract. As a result, if the action was brought in contract there could be no apportionment.

The majority reviewed the history of the apportionment legislation and considered the policy reasons involved. They focussed on the fact that contractual obligations are voluntarily assumed and that there has been often very substantial consideration paid. Reflecting the idea of contract as a bargain between the parties, they said:

> If the defendant wished to reduce its liability in a situation where the plaintiff's own conduct contributes to the damage suffered, it is open to the defendant to make a bargain with the plaintiff to achieve that end.

Further, if the parties agreed that there could be a contribution by the defendant, the consideration paid under the contract could be reduced.

Much has been written about this decision (Edwards 1999; Swanton 1999; Bloom 2000; De Jersey 2000; Masel 2000). There was considerable concern about the effect on liability for professionals. The Law Council of Australia, the Insurance Council of Australia, the lawyers' associations and the Australian Medical Association campaigned for a change in the law (Phillips-Fox 2001; Warne 2001). The Queensland Court of Appeal in *Wiley v ANI* [2000] QCA 314 suggested that legislative intervention was required. Model legislation was drafted by the Parliamentary Counsels Committee. NSW (*Law Reform (Miscellaneous Provisions)Amendment Act 2000*) and Victoria (*Wrongs (Amendment) Act 2000*) have passed similar legislation. The definition of "wrong" has been amended so that where there is a wrong which includes an act or omission that ...amounts to a breach of contractual duty of care that is concurrent and co-extensive with a duty of care in tort, then the contributory negligence statutory regime will apply. The Tasmanian provision (*Tortfeasors and Contributory Negligence Amendment Act 2000*) is slightly different, but incorporates similar

wording. The new legislation means that contributory negligence in contract (if concurrent and coextensive with a duty of care in tort) is a defence, even if the breach occurred before the amendments commenced. However, where the breach of contract is 'pure contract' and not concurrent with tort, the decision in *Astley* means that contributory negligence cannot be used as a defence unless there is such a term in the contract. Most actions taken against valuers in contract would be covered by the new legislation.

Thus to summarise, in NSW, Victoria, and Tasmania the plaintiff may claim the defendant is proportionally responsible for a breach of contract (if concurrent and coextensive with a duty of care in tort). Similar legislation has been proposed for Queensland and the Northern Territory. However, no changes have occurred in South Australia and Western Australia. The Western Australian legislation clearly only applied to tortious claims by its wording (*Arthur Young & Co v WA Chip & Pulp Pty Ltd* [1989] WAR 100; cf *Craig v Troy* (1997) WAR 96).

4.2 Misleading and deceptive conduct

Statutory provisions in Australia and New Zealand (which have no equivalent in the UK) have proved a potent weapon in actions against valuers. The Australian federal provision is section 52 of the *Commonwealth Trade Practices Act 1974*. For constitutional reasons section 52 applies only to a corporation acting in trade or commerce, but the Australian states (NSW, *Fair Trading Act 1987*, s 42; Queensland, *Fair Trading Act 1989*, s 38; SA, *Fair Trading Act 1987*, s 56; Tasmania, *Fair Trading Act 1990*, s 14; Victoria, *Fair Trading Act 1985*, s 11; WA, *Fair Trading Act 1987*, s 10; ACT, *Fair Trading Act 1992*, s 12; NT, *Consumer Affairs and Fair Trading Act, 1990*, s 42) and New Zealand (*Fair Trading Act*, s 9) have similar provisions which apply to an individual acting in trade or commerce. For simplicity we will use section 52 to include it and the other similar provisions.

Section 52 is deceptively simple:

> A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or likely to mislead or deceive.

The section has been compared to an exocet missile (Pengilley 1987) and a statutory comet (French 1989). The annual Miller's *Annotated Trade Practices Act* (Miller 2001) has over 50 pages summarising cases decided under section 52 since 1985. Attitudes to the legislation are neatly summed up by Raynor Asher (Asher 1996). He quotes from Hammond J in *Crump v Wala* [1994] 2 NZLR 331:

> [T]his statute was originally conceived as a consumer relief measure. But the Courts have allowed the statute to float like oil across water. The water in this context is turning out to be practically the whole spectrum of commercial law.

A more positive view was expressed by another New Zealand judge in *Duncan v Perry* (13 August 1993, unreported):

> It is simply a fact of life that the law relating to damages on breach of contract and negligent misstatement is extraordinarily complicated. Under the Fair Trading Act it is comparatively simple.

Section 52 must be read in conjunction with the remedial sections of the Trade Practices Act 1974 (to which there is no New Zealand equivalent). Section 82 allows the award of damages, where a person "suffers loss or damage by conduct of another person". The courts have used this section to govern the question of causation and reliance (*Munchies Management Pty Ltd v Belperio* (1993) 84 ALR 700; *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514). Section 87 contains similar wording and allows the courts to make a wide range of orders, including rescission and the making of an injunction.

For people unfamiliar with the legislation it may not be obvious how this consumer protection provision applies to professionals. It is well established that it does and a clear explanation of what the statute requires was set out by the Full Federal Court in *Kenny & Good v MGICA* (1997) 147 ALR 568:

> An applicant claiming damages under s 82 of the TP Act, based on an infringement of s 52 of the TP Act, must show that:
> the respondent engaged in misleading or deceptive conduct, in contravention of s 52 of the TP Act
> the applicant sustained loss or damage;
> the loss or damage was sustained "by" the contravening conduct.

Lindgren J in the same case at first instance said:

> I think that the supply of Mr Kenny's valuation report dated 19 April 1990 and his letter dated 13 February conveyed representations, not only that the opinions expressed in them were held, but also
> a) that the opinions were based on reasonable grounds;
> b) that they were the product of the exercise of due care and skill; and
> c) that they were, after making due allowance for their nature as opinions as to the market value of real estate as at a particular time, safe to be relied upon and not outside the range of latitude properly to be allowed to them.

He found that the valuation of $5,000,000 was so far removed from the true value (of the order of $3,900,000 to $4,000,000) as to be misleading and deceptive.

Can a valuer faced with a claim under section 52 raise a defence that the plaintiff did not take suitable steps to protect his or her interests and therefore the damages to be awarded should be reduced accordingly? As section 52 is often used in addition to a claim in negligence, it would be easy to assume that the rules about apportionment also apply to actions under section 52. However, this would be incorrect. The general principle is that section 52 applies regardless of fault and that there is no provision for a reduction in damages based on a claim similar to contributory negligence (*Karedis Enterprises Pty Ltd v Antoniou* (1995) ATPR 41-427; *Sutton v AJ Thompson* (1987) 73 ALR 233; *Neilsen v Hempson* (1986) 65 ALR 302; *Collins Marrickville Pty Ltd v Henjo Investments Pty Ltd* (1987) 72 ALR 601; see also (Campbell 1993; Heydon 1995)). This was clearly explained by Lee J in *Burke v LFOT* [2000] FCA 1155:

> The TPA provides a remedy for the broad spectrum of people likely to be affect by conduct of a corporation that contravenes the TPA. The TPA does not restrict the relief it provides to the astute and intelligent and to those who have taken appropriate steps to protect themselves against such conduct. A right of remedy is extended to the careless and the inattentive and

those less than diligent in protecting their own interests. Failure by a party to make enquiries that may have exposed misleading or deceptive conduct will not absolve the breach of the TPA constituted by that conduct.

Disquiet in Australia over the rule that there is no provision under section 52 for apportionment, similar to that under contributory negligence, has provoked some criticism, both judicial (Gummow J in *Elders Trustee and Executor Co Ltd v EG Reeves* (1987) ATPR 46-030; Einfeld J in *Haynes v Cut Price Deli* (1993) 110 ALR 565) and academic (Seddon 1997). One way of overcoming the problem is to identify part of the damage which has not been caused by the misleading conduct. In this way Enfield J in *Haynes v Cut Price Deli* (1993) 110 ALR 565 was able to reduce the damages by 50% because he felt that part of the plaintiff's losses were caused by poor management.

This approach has been taken in recent cases. In *Walker v Henville* [1999] WASCA 117, a real estate agent, represented to a property developer that the property market in Albany favoured quality home units. It was found that the valuation evidence showed that these representations were misleading conduct, nor was there reasonable grounds to make them, however, they were not the only cause of the losses suffered. Factors such as extravagant design, poor costing and failure to finish in a reasonable time were important. The Full Court of Western Australia reviewed the law relating to causation and applied the common sense approach endorsed in *March v E & M H Stramare* (1999) 99 ALR 423. They concluded that the agent's misleading conduct was not a cause of the developer's loss, which had resulted entirely from the developer's independent and unreasonable action. This case has been appealed to the High Court.

The Queensland Court of Appeal, sitting with five judges because of the importance of the case, dealt with a claim against valuers (*I & L Securities v HTW Valuers (Brisbane) Pty Ltd* [2000] QCA 383) under section 52 in which there were two independent causes of loss when borrowers defaulted. It was agreed that the valuation was wrong and it was a cause of making the loan on which substantial losses were made. Williams J at first instance found that another cause of the loss was the bad work on the part of the money lender. In the words of the Court of Appeal:

> His Honour concluded that the respondent valuer's responsibility should be regarded as twice that of the appellant money lender and assessed damages accordingly; that is his Honour awarded the appellant two-thirds, not the whole, of the loss on the loan. No argument is advanced that this was an apportionment which was unfair or that led to an unjust result. It was submitted to His Honour that he had no power under the Act to do other than award the whole of the loss. His Honour rejected that argument.

The Court of Appeal considered the effect of the all or nothing interpretation of s 87, one of the remedial sections linked with section 52. They acknowledged:

> The process of sorting out a variety of losses connected with the contravention, into those which should fairly be allowed and those which should not, is a means of preventing the recovery of an excessive amount by allowing all losses which can be causally connected with the misleading statement to be recovered; it is a means of allowing for contributory negligence.

The court upheld the decision of Williams J that, where the plaintiff's conduct was independent of the defendant's breach, only part of the loss may be awarded. Thus it would

appear that if the valuer can show various strands of causation leading to the loss, the valuer will only be liable for those which are causally connected with the valuer's misleading statement or conduct. However, the court did not reach a conclusion on the more general question of whether a proportional result is a more just result. Further, although the court referred to the proposition that the 'gullible plaintiff' defence is never available, it did not venture into that field.

The New Zealand case of *Jagwar Holdings Limited v Julian* (1992) 6 NZCLC 96-562 contrasts vividly with the Australian decisions. Jagwar bought shares in Fullers Corporation Ltd, a new company created by the merger of the Fullers Tourist business and the Julian family business. As part of the float of the company, prospective shareholders were sent a Corporate and Financial Profile. The Financial Profile contained forecasts of future profits and et asset positions. The shares subsequently proved to be valueless. An action was brought which alleged negligence, deceit and a breach of the Fair Trading Act 1986.

Thorp J found that the necessary elements for a breach of section 9 of the Fair Trading Act 1986 were made out and that there had been misleading and deceptive conduct in the course of trade. Although he had considered the need for consistency between the courts in Australia and New Zealand in approaching these similar provisions, he felt that apportionment was the proper approach and therefore incorporated a similar discount into the calculation of recoverable loss under the act as was allowed in the claims at common law. Similarly, in *Goldbro v Walker* [1993] 1 NZLR 395 the New Zealand Court of Appeal "favoured adoption of an apportionment regime, in which an individual's liability would closely resemble his or her responsibility for the injury" (Simpson 1995).

4.3 Fraud

It has traditionally been assumed, although there is no Australian authority directly on the point, that contributory negligence cannot be used as a defence to an action in deceit (fraud, in lay terms). The leading UK decision to this effect is that of Mummery J in *Alliance & Leicester Building Society v Edgestop* [1994] 2 All ER 38, which concerned a number of deliberate over-valuations of hotel properties, perpetrated as part of a large-scale mortgage fraud. The decision is a strong one, since it ruled that the defence could not be used to a defendant who was innocent of any moral blame (an employer held vicariously liable for fraud committed by an employed valuer).

The *Edgestop* decision was endorsed by Blackburne J in *Nationwide Building Society v Thimbleby & Co* [1999] Lloyd's Rep PN 359, and again by a majority of the Court of Appeal in *Standard Chartered Bank v Pakistan National Shipping Corp* [2000] 2 Lloyd's Rep 511. However, the recent decision of the House of Lords in *Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363, which permitted deliberate misconduct *by a plaintiff* to rank as contributory negligence, is thought by some to have cast doubt on these earlier decisions, since it suggests that the statutory definition of "fault" now includes such conduct.

The reason for the traditional assumption was graphically expressed by Southin J in the Canadian case of *United Services Funds v Richardson Greenshields Ltd* (1988) 48 DLR (4th) 98:

> There may be greater dangers to civilised society than endemic dishonesty. But I can think of nothing which will contribute to dishonesty more than a rule of law which required us all to be on perpetual guard against rogues lest we be faced with the defence of "Ha ha, your own fault I fool you". Such a defence should not be countenanced from a rogue.

Few, surely, would disagree with this suggestion, and yet it is worth noting that the judge is dealing with only one of the three types of contributory negligence which we identified earlier, that of "blind reliance". It is by no means self-evident that the same argument should prevail in a case of "independent imprudence", especially if the defendant's fraud played a relatively minor role in influencing the plaintiff's decision. This is the line taken by Sir Anthony Evans, in his dissenting judgment in *Standard Chartered Bank v Pakistan National Shipping Corp* [2000] 2 Lloyd's Rep 511. The judge conceded that a defendant who makes a statement, intending it to be relied upon, cannot then contend that the plaintiff was at fault in failing to check the accuracy of his statement, even though a prudent and careful man would or might have done so. However, he continued:

> It does not follow from this, however, that he should recover full damages when his own independent fault, intentional or negligent, has partly caused his loss and it is just and equitable that the damages should be reduced.

We would regard this distinction as entirely reasonable; however, it must be noted that the other two members of the Court of Appeal specifically disagreed, holding that a finding of fraud means that the defendant must bear total responsibility for all the plaintiff's subsequent losses.

The most thorough (and, it should be said, the most convincing) examination of contributory negligence in fraud cases was that undertaken in the New Zealand case of *Jagwar Holdings Limited v Julian* (1992) 6 NZCLC 96-562. Thorp J, having reviewed the authorities beginning with *Derry v Peek* (1889) 14 App Cas 337, stated that an action in deceit would succeed if it could be proved that the maker of a statement either knew that it was false or acted recklessly, without a positive honest belief in the truth of what was said. He concluded that two of the directors had tendered the estimates of profits to Jagwar without any belief in their validity; they were thus guilty of deceit in the second, lesser, sense. Although the judge started from the general proposition that contributory negligence could not be a defence in deceit, he went on to consider the principles underlying that proposition. He pointed out two important factors: that the rule grew up at time when there was no apportionment legislation; and that the moral stigma which attaches to deceit perhaps should not be as great if the tort is made out because of recklessness as to whether the information is true or not. He said:

> The attractions of that argument overlook , it seems to me, that both in the case of innocent misrepresentation and recklessness, there is no such moral obloquy as inspired the passage cited above [from Spencer Bower's "Actionable Misrepresentation", at p 218] and that while the case against apportionment is strong where reliance on the representation was complete, it may be less strong where the representation was merely one of several matters upon which the reliance was placed.

He concluded that, on the facts of the case, justice called for apportionment of responsibility between the plaintiffs and the defendants. He considered the part played by Jagwar, which advertised itself as a professional team that could assess the potential and development

requirements of each operation which it investigated. Jagwar realised that the figures were optimistic, but wanted to get a foothold in FCL and was therefore prepared to override ordinary prudence. Thorp J therefore discounted the amount of the loss by 50%.

4.4 Breach of fiduciary duty

Where the relationship between the parties can be characterised as fiduciary, equity demands a level of propriety of conduct which exceeds the normal standard of care imposed by the tort of negligence and usually also exceeds the standards imposed by contracts (Finn 1977; Dal Pont 2000). The most significant aspects of this form of liability were described by Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1:

> The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary.

A plaintiff who can establish that a fiduciary relationship exists may be able to make a claim where there would be no common law right of action. In addition, in situations where the relationship between the parties would also give right to a claim at common law, equitable relief and remedies may be more beneficial to the plaintiff. For example, it appears that "equitable compensation" may offer some advantages over common law damages, although quite how remains to be worked out by the courts (Davidson 1982). Given the potential advantages, it is not surprising that, in recent years, there has been an increase in cases where it is sought to establish a fiduciary relationship (McPherson 1998).

Certain relationships have long been recognised as fiduciary, such as those between trustee and beneficiary and solicitor and client (*Brown v Inland Revenue Commissioners* [1965] AC 244). More recently, courts have imposed fiduciary duties upon stockbrokers (*Daly v Sydney Stock Exchange* (1986) 160 CLR 371) and financial advisers (*Cook v Evatt (No 2)* [1992] NZLR 676). However, it has been emphasised repeatedly that it requires more than a normal, professional relationship to create a fiduciary one. There must be some expectation of loyalty, possibly deriving from the indicia of trust and confidence, vulnerability and confidentiality (Millett 1998).

It seems unlikely that a valuer would owe fiduciary duties to a client or anyone else, except in unusual circumstances. However, in *Duke Group v Pilmer* [1999] SASC 97, the Full Court of the South Australian Supreme Court considered this question, in the context of a general discussion as to the duty of professional advisers. Having pointed out that a valuer can quite legitimately value a house for different parties with conflicting interests, the court used the example of a valuer valuing vacant land intended as a shopping centre for an asset revaluation, where the valuer himself owned land adjacent to the land to be valued. Here there would be no fiduciary duty. However, if the valuer were called on by a third party investor to value the same vacant land, and the valuer had an interest in possibly selling his own land to the third party investor, there would be a conflict of interest and fiduciary obligations would therefore arise.

In the context of this paper, the crucial question is whether a person accused of a breach of fiduciary duty is entitled to raise the defence of contributory negligence. This question, which has generated an intensive academic debate, has received conflicting answers in different Commonwealth jurisdictions. It has been held in New Zealand (*Day v Mead* [1987] NZLR 443; *Mouat v Clark Boyce* [1992] 2 NZLR 559) and Canada (*Canson Enterprises Ltd v Boughton & Co* (1991) 85 DLR (4th) 129) that the defence is available, so that a plaintiff may suffer a reduction in the amount of equitable compensation awarded, equivalent to the reduction which would be appropriate if he or she sued in negligence.

In *Duke Group v Pilmer* [1999] SASC 97, the Full Court of the South Australian Supreme Court reviewed the judicial authorities and academic literature and concluded that the defence of contributory negligence was available to a firm of accountants, who were found guilty of a breach of fiduciary duty to their clients in valuing shares in the context of a takeover bid. On appeal, the High Court of Australia held that no fiduciary duty was owed, so that the claim failed. However, the High Court went on to express the view that, had there been such a duty, the accountants would not have been entitled to use their clients' contributory negligence as a defence.

This more restrictive approach is also reflected in the UK. In *Nationwide Building Society v Balmer Radmore* [1999] Lloyd's Rep PN 558, the Commonwealth authorities were again reviewed, but the conclusion which the judge drew from them was the opposite of that drawn by the Full Court in South Australia. Having pointed out that the kind of fiduciary duty with which he was dealing was one which could only be committed intentionally ("the fiduciary cannot be unconsciously disloyal … the betrayal of trust inherent in the breach is necessarily a deliberate act"), Blackburne J continued:

> I therefore take the view that where, in order to establish a breach of fiduciary duty, it is necessary to find that the fiduciary was consciously disloyal to the person to whom his duty was owed, the fiduciary is disabled from asserting that the other contributed, by his own want of care for his own interests, to the loss which he suffered flowing from the breach. To do otherwise … risks subverting the fundamental principle of undivided and unremitting loyalty which is at the core of the fiduciary's obligations.

For the moment, this remains the leading UK authority on this point. However, some commentators have argued that, if the House of Lords's decision in *Reeves v Commissioner of Police of the Metropolis* [1999] 3 WLR 363 really has changed the law on fraud (as suggested above), then it probably also opens the door to apportionment in cases involving a breach of fiduciary duty.

5. Summary and conclusions

The courts in Australia, New Zealand and the UK all accept that, in appropriate circumstances, the statutory schemes for apportionment of responsibility between a negligent plaintiff and a negligent defendant can apply in the context of a claim for professional negligence. Table 1 demonstrates the *types* of plaintiff conduct which have so far been relied upon in each jurisdiction to produce this result.

Table 1 Available grounds for defence of contributory negligence

Plaintiff's default	**Australia**	**New Zealand**	**UK**
Contribution to defendant's error	?	?	Yes
Unreasonable reliance on negligent advice	Yes	?	Yes
"Independent" negligence	Yes	Yes	Yes

It should be noted that, while Australia and New Zealand appear to accept a narrower range of conduct for this purpose, this does not mean that those jurisdictions have rejected any of the grounds successfully used in the UK. It is rather that there have as yet been no cases in which those grounds have been specifically raised.

A particularly vexed question is whether, given the courts' acceptance of proportional responsibility as a principle, a plaintiff should be able to sidestep the statutory apportionment regime by simply framing his claim in something other than the tort of negligence. Table 2 shows the extent to which such evasions have so far been permitted in each of the three jurisdictions, and also indicates the views of the authors of this paper as to whether or not apportionment should be available in respect of each type of claim.

Table 2 Availability of contributory negligence defence

Type of claim	**Australia**	**New Zealand**	**UK**	**Recommendation**
Tort of negligence	Yes, in category 2 and 3 cases	Yes, in category 3 cases	Yes	Yes
Breach of contract	Not unless statute is specific	Where liability is concurrent	Where liability is concurrent	Where liability is concurrent
Statute (Trade Practices Act)	No	Yes	N/A	Yes
Fraud	No authority, but seems unlikely	Yes, in category 3 cases	No, but doubtful	Yes, in category 3 cases
Breach of fiduciary duty	No	Yes	No, but doubtful	Yes, in category 3 cases

These findings appear to show that, of the three jurisdictions examined, New Zealand is the most "liberal", in the sense of attempting to see that a plaintiff's own fault is reflected in an apportionment of the damages recoverable, irrespective of the nature of the claim. The UK is not far behind. However, the Australian courts appear much more ready to allow form to prevail over substance, in the sense of permitting a plaintiff to evade an apportionment regime by finding an alternative basis for his or her action. It follows that, in this respect at least, valuers are at risk of greater liability in Australia than in New Zealand or the UK.

Whether there are any clear reasons for this divergence of views is doubtful. In any event, if there are such reasons they are in all probability unrelated to the practice of valuation. The statutory apportionment regimes in the three countries were enacted for reasons unconnected with professional negligence, and many if not most of the professional negligence cases have been concerned with other professions. In short, it appears that Australian valuers bear an additional burden which is not of their making.

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