INTRODUCTION

Where C has suffered loss or damage from the use of a defective product, two potential avenues are available to C for redress – (1) an action in negligence, or (2) a claim under Pt I of the Consumer Protection Act (CPA) 1987. The latter implemented the Product Liability Directive 85/374/EEC. These are the subject for examination in this chapter.

For noting, other remedies which may be available to a consumer, C, in such circumstances – against the retailer in contract for breach of express or implied terms; or for breach of statutory implied obligations as to fitness for purpose and merchantable quality under the Sale of Goods Act 1979, the Consumer Credit Act 1974, and the Supply of Goods and Services Act 1982; and specific statutory compensation schemes for particular injury – lie outside the scope of this chapter.

Side-by-side regimes

The statutory regime in the Consumer Protection Act 1987 applies alongside the common law action in negligence.

Section 2(6) of the CPA provides that, ‘[t]his section shall be without prejudice to any liability arising otherwise than by virtue of this Part’. This provision permits C to bring his claim under both causes of action concurrently – albeit that both claims may be pleaded, but only the CPA claim pursued, because of the perceived advantages which the statutory claim provides.

The Schedule at the end of this chapter sets out the leading cases on product liability since the introduction of the CPA, and the claims which were pursued under one, or both, avenues.

1 The CPA was enacted on 15 May 1987, and took effect on 1 Mar 1988. Pt II, which is not the subject of this chapter, imposes a general safety requirement for consumer goods, and permits the Secretary of State to make safety regulations in relation to goods.

2 At the time of writing, new laws governing consumer contracts are contained in the Consumer Rights Act 2015, which simplifies and consolidates consumers’ rights of redress, but which does not affect their tortious rights.

3 e.g., fixed payments under the Vaccine Damage Payments Act 1979 (UK), in respect of designated diseases purportedly caused by the pertussis vaccination of C or his or her pregnant mother, and depending upon degree of disability suffered.

Online resources: Mulheron, Principles of Tort Law, Cambridge University Press, © 2016
How the CPA and negligence differ

There are notable differences between the two causes of action which have manifested in the limited case law to date. In combination, these may render a CPA claim far more appealing than a claim brought in negligence.

§DP.2

A CPA action is a form of strict liability, in the sense that C does not have to prove any negligence on D’s part. The relevant question under the CPA is whether the product was safe or defective. For that reason, a CPA action will generally be easier to prove than an action in common law negligence, which requires proof of a lack of reasonable care.

As the High Court put it in Worsley v Tambrands Ltd, under the CPA, ‘[t]he criteria ... for liability is defectiveness, not fault’. C does not have to prove that the product’s defect was as a result of a lack of reasonable care on D’s part – all that matters under the CPA is whether there was a defect.

Several cases have noted that a CPA claim is, where available, more claimant-friendly than negligence – per Palmer v Palmer (‘[i]t is hard to see how an allegation in negligence adds anything, since if the product was defective under the CPA, then the [manufacturer] is strictly liable, and if it was not, then it is hard to see how the [manufacturer] can have been negligent and in breach of any common law duty to [C]’); per Sayers v Smithkline Beecham plc (‘claims for negligence ... are much more difficult to prove because of the need to establish fault, and which have a more onerous burden of proof than the claims under the 1987 Act’); and per A v National Blood Authority (the CPA’s purpose was to ‘increase consumer protection ... [and] to render compensation of the injured consumer easier, by removing the concept of negligence as an element of liability and thus of the proof of liability’).

The results of some leading cases (noted in the Schedule) also highlight the distinction. In both Abouzaid v Mothercare (UK) Ltd and A v National Blood Authority, the respective products contained a ‘defect’ sufficient to give rise to a successful CPA claim; but on the facts, there was no negligence at common law. Hence, the practical distinction between the CPA and negligence can matter significantly. Of course, the CPA does not always provide much advantage over negligence – in some cases (such as Bogle v McDonald’s Restaurants Ltd and Tesco Stores Ltd v Pollard), both claims failed.

§DP.3

It is not relevant, under a CPA action, whether D knew of – or was entirely ignorant of – the risk of C’s injury. However, in negligence, D must have either actually or reasonably foreseen the risk of C’s injury, in order to be liable (otherwise, no reasonable D would have behaved differently, or taken precautionary steps, had the risk been unknown or unforeseeable).

To take into account D’s knowledge of the risk of injury, and what could be done to reduce that risk, in a CPA claim would be to ‘seek to reintroduce concepts familiar in the context of a claim in negligence at common law into a statutory regime’ (per Chadwick LJ in Abouzaid v Mothercare (UK) Ltd). It follows that arguments about omitting to carry out risk assessments, or to
take precautionary steps in response to a foreseeable risk, etc, are not relevant as to whether or not the product was safe or defective (per *Bogle v McDonald’s Restaurants Ltd*).\(^{13}\)

It also follows that, for a ‘factually eccentric scenario’ (to adopt the words of *Tesco Stores Ltd v Pollard*),\(^{14}\) the CPA will be the only avenue of redress possible. Something so unexpected will not be reasonably foreseeable, which will preclude an action in negligence from succeeding (as it did in *Tesco*).

### SDP.4

Under a negligence action, foreseeability of the type of damage suffered by C is mandatory (for otherwise, the damage will be too remote to be recoverable at law). Under a CPA action, however, no foreseeability of damage is required.

In *Abouzaid v Mothercare (UK) Ltd*, Chadwick LJ remarked that ‘[i]t is important to keep in mind ... that the question under [the CPA] is “how was the damage caused”; the question is not “was the cause of the damage foreseeable”.’\(^{15}\) Hence, the type of remoteness enquiry which is necessary in a negligence action (as discussed in Chapter 9) is absent for the statutory action. Even if C sustains personal injury of a most unusual and idiosyncratic kind, recovery will be permitted under the CPA.

### SDP.5

In a negligence action, breach is to be assessed by reference to the knowledge or foreseeability of injury which existed at the date of the breach. Under a CPA action, however, hindsight is highly relevant when assessing definitiveness.

When assessing a product’s safety or defectiveness under the CPA, the court must ‘look back on the full picture, [as to] what the public was entitled to expect’ (per *Abouzaid v Mothercare (UK) Ltd*).\(^{16}\) Hence, when judging whether a product is defective under the CPA, hindsight is certainly relevant (per *A v National Blood Authority*).\(^{17}\) However, as discussed in Chapter 7, the use of hindsight can be a dangerous (indeed, an impermissible) thing in negligence, for as *Roe v Minister of Health* notes, the court must consider the case by wearing the ‘spectacles’ of the time that the breach occurred.\(^{18}\)

These principles variously demonstrate why a CPA claim may hold more promise for C than does a negligence action. Attention will now turn to the latter in detail:

### AN ACTION IN NEGLIGENCE

#### The framework

The tort of negligence, in the context of product liability claims, requires proof of the following:

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**Nutshell analysis:** *Product liability in negligence*

**Preconditions for the tort to apply:**

1. No damages for the defective product itself
2. The defective thing is an appropriate product
3. Capacity to sue and to be sued

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\(^{16}\) (CA, 21 Dec 2000) [171]. \(^{17}\) [2001] EWHC 446 (QB) [7], under ‘Conclusion on routine screening’.

\(^{18}\) [1954] 2 QB 66 (CA) 84 (‘[the Court] must not look at the 1947 accident with 1954 spectacles’).
The rationale of Donoghue v Stevenson

The ‘grande dame’ of all negligence cases – Donoghue v Stevenson – concerned a claim for personal injury arising from a defective product in which the defect was latent (i.e., hidden).

In Donoghue v Stevenson, Mrs Donoghue, C, visited a café in Paisley with a friend. Her friend purchased a bottle of ginger beer for C from the café owner. The bottle was opaque and sealed with a metal cap, exactly as it had left Mr Stevenson’s, D’s, premises where it was manufactured. The bottle contained a decomposed snail, some of which was poured out into C’s glass, after C had already consumed part of the bottle. C suffered gastroenteritis and nervous shock. Held (3:2): C’s action in negligence could proceed; it could not be struck out. Where manufacturer, D, makes a product intended for human consumption, and it is sent out in a form which showed that D meant it to reach the ultimate consumer, C, in the form in which it left his factory, with no reasonable possibility of intermediate examination by the retailer or consumer, and with D’s knowledge that a lack of reasonable care on its part during the manufacturing might result in injury to C, D owed a duty to C to take such care.

The sea-change in the law that Donoghue v Stevenson represented – by discarding the requirement of privity of contract, and by holding that a manufacturer owed a duty of care to a user of his product, irrespective of a lack of contract between them – has been discussed previously in Chapter 2. Irrespective of its impact upon the law of negligence generally, Donoghue v Stevenson represented a dramatic change in the law of product liability. Prior to that case, if C was injured when using or consuming a product, then the common law only permitted recovery where it was proven that the product was inherently dangerous (e.g., loaded firearms, poisons, explosives, flammable fuels). In Dominion Natural Gas Co v Collins & Perkins, Lord Dunedin stated that ‘there is a peculiar duty to take precautions imposed upon those who send forth or install such articles, when it is necessarily the case that other parties will come within their proximity.’

In Dominion Natural Gas Co v Collins, Dominion, D, a gas company, manufactured and installed a gas apparatus at Mr Collin’s, C’s, blacksmith’s shop. A pipe should have been connected from the brass safety valve on the apparatus up through the roof to the outside of the building, to allow gas from

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the safety valve to escape outside, instead of staying inside the building. A large quantity of gas escaped through the brass safety valve into the shop, and a serious explosion occurred in the shop.

**Held:** D was negligent, allowing the gas to escape directly into the premises.

However, *Donoghue v Stevenson* imposed a duty of care on the manufacturer of goods which were not dangerous, but merely defective. Hence (per McTear), the case ‘introduced, for the first time, the possibility of recovery where injury was caused by a defective product.’

In *McTear v Imperial Tobacco Ltd*, Lord Nimmo Smith (of the Scottish Outer House) noted that the rationale of *Donoghue v Stevenson* arose specifically in the context of latent defects, where there was no opportunity for intermediate examination. By contrast, where a defect was patent (i.e., obvious), then the law supported individualism and a consumer’s informed choice as to whether or not to use that product, and upheld the right of the manufacturer to produce goods that were less-than-perfect. According to McTear:

the common law [following *Donoghue*] did not, in general, impose a duty on manufacturers not to produce or sell goods, the use or consumption of which involved risks to health. The legislature might intervene to regulate, or even prohibit, the manufacture and sale of particular commodities, but that did not tread upon the individualist assumptions of the common law. The policy of the common law, in the context of product liability, was not that all risk should be eliminated but, consistently with the underlying principle of individual autonomy, that consumers should not be exposed to dangers of which they could not reasonably be expected to be aware. In *Donoghue v Stevenson*, the manufacturer was in breach of duty, not simply because there was a snail in the ginger beer bottle, but because the bottle was opaque, and the dangerous snail was unlikely to be discovered by any intermediate inspection before the consumer poured the ginger beer into her glass. If the risks associated with the use of the product were patent, it was up to the consumer to decide whether or not he or she wished to use or consume the product.

The negligence action is subject to three significant curtailments, which are best considered as preconditions.

**PRELIMINARY MATTERS**

**Precondition #1: No damages for the defective product itself**

The position in negligence, compared with contract

C cannot recover damages in negligence for damage to, or a defect in, the defective product itself. This principle may lead to fine distinctions between damage to the defective product itself (which is uncompensable), and damage to other property of C (which is compensable).

No remedy against manufacturer D is available within the realm of the *Donoghue v Stevenson* principle, for damage to ‘the thing itself’. If the product itself is less valuable or useful than C was entitled to expect because of its defect, and requires repairing or replacing, then C’s remedy lies in either breach of contract (if there is such a thing with D), or under the Sale of Goods Act 1979, against the supplier of the goods. It is via those routes that C can recover for the loss of or damage to that product.

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21 [2005] CSOH 69, [7.65].  
22 [2005] CSOH 69, 2005 2 SC 1, [7.66].  
23 ibid, [7.64] (emphasis added).
However, C is unable to claim *in negligence* for the costs of replacing the defective product, or any consequential economic loss, when it is only the product itself which was damaged as a result of the defect. It follows that, in *Donoghue v Stevenson*, C would not have been entitled to recover the cost of the ginger beer bottle in her claim (as pointed out in *Finesse Group Ltd v Bryson Products (a firm)*[^24]).

The reason: if the product had an inherent defect, rendering it less valuable but not causing any personal injury or property damage to C, then D did not damage C, in the sense contemplated by *Donoghue v Stevenson*. It is, essentially, a restriction based on policy. In *Junior Books Ltd v Veitchi Co Ltd*,[^25] the House of Lords explained that to allow C to recover the cost of the defective product itself, without proof of any other damage:

would raise very difficult and delicate issues of principle, having a wide potential application … any manufacturer of products would become liable to the ultimate purchaser if the product, owing to negligence in manufacture, was, without being harmful in any way, useless or worthless or defective in quality so that the purchaser wasted the money he spent on it. One instance [would be] … ginger beer which turned out to be only water.

Despite its overrule on other points, the facts of *Junior Books* still provide a useful example of this principle:

In *Junior Books v Veitchi*, Veitchi, D, were specialist flooring contractors, who laid a floor for factory owners Junior Books, C, but there was no contractual relationship between C and D (D had been engaged by a building company, not by C). A couple of years after it was laid, the floor developed cracks over all of its surface. C sued for the estimated cost of re-laying the floor. The floor had not given rise to any danger of injury to people or property in the factory, but C claimed consequential economic loss caused by the defective flooring (e.g., the cost of shifting machinery, and loss of profits, while the floor was being relaid). **Held:** the deterioration in the floor itself, which rendered the floor less valuable, and the consequential losses, could not give rise to a claim for damages falling within the principle of *Donoghue v Stevenson*. The flooring had an inherent defect in it from the start.

To reiterate, where there is only loss or damage to the defective product itself, then C cannot proceed against manufacturer D in contract for that loss, where there is no contract between them; and cannot sue D in negligence under *Donoghue v Stevenson* to recover that loss, as that is not permitted as a matter of policy. In negligence, however, C can recover for damage to either C’s person, or C’s ‘other property’, which was caused by the defective product.

There is no doubt that the distinction between the ‘defective thing itself’ and C’s ‘other property’ is a technical and legally problematical one. The principle is easy to state, but very difficult – and sometimes fairly artificial – to apply.

**Identifying ‘other property’**

In *Aswan Engineering Establishment Co v Lupdine Ltd*,[^26] it was noted that the distinction between the ‘thing itself’ (irrecoverable under *Donoghue v Stevenson*), and ‘other property’ (recoverable), was sourced to *Junior Books Ltd v Veitchi Co Ltd* (especially Lord Brandon’s dissenting

[^24]: [2013] EWHC 3273 (TCC) [24].
[^26]: [1987] 1 WLR 1 (CA) (with the *Junior Books* cite at 18), and quote at 21.
speech\(^{27}\), and subsequently endorsed in \textit{Murphy v Brentwood DC},\(^{28}\) and is ‘a distinction which is well established, both in English and American law. Where the defect renders the product less valuable, [C]’s remedy (if any) lies in contract. Where it creates a danger to other property of [C], the remedy (if any) lies in tort’.

The distinction can be very significant, where the seller or retailer has gone into liquidation, but the manufacturer remains solvent. In that event, it is in C’s interests to prove that there was some damage to other property, which would expose the manufacturer to potential liability under \textit{Donoghue v Stevenson}. In fact, in the two leading cases – \textit{Aswan} and \textit{Muirhead} – that is precisely how the litigation evolved. However, C can only do so, if there is some damage which the law of negligence will compensate, i.e., something other than the loss of or damage to the defective product itself.

A real problem arises where the defective product and the other property are so inextricably linked that damage to one inevitably means damage to the other. Even if they are manufactured by different entities, and capable of being physically separated, they could arguably be considered as ‘one property’, and damage to ‘the thing itself’, which would preclude \textit{Donoghue v Stevenson} from applying. Several real-life cases, and judicially-given examples, are summarised below:

<table>
<thead>
<tr>
<th>C sues to recover for damage to ...</th>
<th>‘other property’, under \textit{Donoghue v Stevenson}</th>
<th>... when the defective property itself was ...</th>
<th>was it truly ‘other property’, for which damages were recoverable by C in negligence?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lupguard</td>
<td>pails in which the Lupguard was stored</td>
<td>divided opinion in \textit{Aswan} – yes (Lloyd LJ); no (Nicholls LJ)</td>
<td></td>
</tr>
<tr>
<td>dead lobsters</td>
<td>the electric motors which oxygenated the lobsters’ tanks</td>
<td>yes, per \textit{Muirhead}</td>
<td></td>
</tr>
<tr>
<td>the car</td>
<td>the tyre fitted to the car</td>
<td>yes, per example in \textit{Aswan}</td>
<td></td>
</tr>
<tr>
<td>the wine</td>
<td>the corks</td>
<td>yes, per example in \textit{Aswan}</td>
<td></td>
</tr>
<tr>
<td>the pump in which it was installed</td>
<td>an electric motor</td>
<td>yes, per example in \textit{Aswan}</td>
<td></td>
</tr>
<tr>
<td>the goods carried in the containers</td>
<td>the containers</td>
<td>no (Nicholls LJ in \textit{Aswan})</td>
<td></td>
</tr>
<tr>
<td>pipework to carry chilled water</td>
<td>insulation in the water pipe</td>
<td>no, per \textit{Linklaters}</td>
<td></td>
</tr>
<tr>
<td>laminated panels which bulged and bubbled because the glue lost its adhesive effect</td>
<td>glue or adhesive</td>
<td>no, per \textit{Finesse Group}</td>
<td></td>
</tr>
<tr>
<td>a compressor used to compress vapours that passed through it</td>
<td>a fan, which was a component of the compressor</td>
<td>no, per \textit{Tunnel Refineries}</td>
<td></td>
</tr>
</tbody>
</table>

As stated in \textit{Tunnel Refineries Ltd v Bryan Donkin Co Ltd}, ‘[t]he dividing line between recovery and non-recovery in this context must be defined case by case’.\(^{29}\) The illustrations below, however, show just how difficult it can be to determine that dividing line. This first collection illustrates what did, or could, constitute ‘other property’, from the Table above:


In *Aswan Engineering Establishment Co v Lupdine Ltd*, Aswan, C, a construction company, purchased about 31,500kg of a liquid waterproofing compound, Lupguard, from Lupdine Ltd, which was stored in pails manufactured by Thurgar Bolle, D. The liquid was shipped in the pails to Kuwait, and then those pails were stacked 5–6 high in shipping containers. When they arrived in Kuwait, the containers were left standing on the quayside in full sun, and the temperature inside the containers became so high (over 70 degrees centigrade, ‘like an oven’) that the pails collapsed, and the entire consignment of Lupguard was lost. Lupdine went into liquidation. Hence, C sued D, the manufacturer of the pails, and claimed that Lupguard and the pails were different items of property, so that failure of D’s pails caused physical damage to C’s other property (i.e., the Lupguard). **Held (CA):** it was not necessary to decide the issue – C failed in negligence, because the damage suffered by C was not reasonably foreseeable. However, Lloyd LJ suggested that the damage to the Lupguard was damage to ‘other property’, and not damage to the property itself (i.e., the pails), so that C could at least maintain a possible action under *Donoghue v Stevenson* for recovery of the Lupguard. Fox LJ agreed with Lloyd LJ. Nicholls LJ agreed that C should not succeed in negligence against manufacturer D, but dissented on this particular point.

In *Muirhead v Industrial Tank Specialities Ltd*, Robert Muirhead, C, a wholesale fish merchant, engaged Industrial Tank Specialities, D1, to install a tank for the storage of lobsters. ITT, D2, manufactured and supplied pumps which circulated oxygenated seawater through the tank. Leroy Somer Electric Motors Ltd, D3, supplied the electric motors for the pumps. Unfortunately, due to an oversight, it was not realised that the voltage of the motors in France (where the motors were manufactured) was not the same as in England. As a result, the motors cut out after installation, water was not circulated around the tanks, and the lobsters died from lack of oxygen. D1 had gone into liquidation, so C had to pursue claims against D2 and D3. **Held:** C could recover against motor manufacturer, D3, for the value of his stock of lost lobsters, and any consequential economic loss flowing from that loss. The motors fitted in the tanks were the defective product, and the lobsters in the tanks were ‘other property’ of C.

In *Aswan*, the leading judgment of Lloyd LJ gave further *hypothetical examples* to demonstrate the distinctions between the loss of defective property (irrecoverable), and damage done to C’s other property (recoverable):

- C buys a car, it has a defective tyre which has a catastrophic failure, and the car crashes – the car is presumably ‘other property’ of C, even though the defective tyre was a component part of the car, and property in the tyre and property in the car passed to C simultaneously – hence, C would be able to pursue a *Donoghue v Stevenson* claim against the tyre manufacturer for damage to the car (Lloyd LJ);
- C buys wine shipped in bottles, where the corks are defective, ruining the wine – the cork is the defective product, and the wine is presumably ‘other property’ of C, for which C could sue the manufacturer of the defective corks under the principle in *Donoghue v Stevenson* (Lloyd LJ);
- if the electric motors in *Muirhead* did not just cut out, but actually overheated, and damaged C’s pumps – the pumps could be considered as ‘other property’ of C, for which C could sue the manufacturer of the electric motors under *Donoghue v Stevenson* (Lloyd LJ).
On the other hand, the following sample cases illustrate what could not constitute ‘other property’, and hence, what was irrecoverable under *Donoghue v Stevenson*:

In *Linklaters Business Services v McAlpine Ltd*, law firm Linklaters, C, moved to new premises in 1996. Widespread corrosion occurred to the steel chilled water pipes which served the air conditioning system throughout the premises. The installation of the insulated chilled water pipework was undertaken by How Group, and the insulation in those pipes was done by Southern Installation (Medway) Ltd, D. Following a serious leak from some chilled water pipes, the insulation was removed, and corrosion of pipes was discovered, and C had to replace the corroded pipework throughout the building. The insulation work by D was alleged to be defective. A question arose as to whether the pipework and insulation was all ‘one thing’. **Held:** D did not owe a duty of care to C, because C could not claim for damage to ‘the thing’ itself. It was not possible to differentiate between the insulation and pipework for the purposes of *Donoghue v Stevenson*, because they went to make up ‘one thing’ (the insulated chilled water pipework). Thus, any damage to the pipework was damage to ‘the thing itself’. C would never have chilled water pipework without insulation, as the chilled water would not remain chilled and the pipes would corrode. The insulation was a key component, and part of ‘the thing’ damaged. Hence, it followed that no cause of action could arise in tort as between C and D.

In *Aswan*, Nicholls LJ considered the view of Lloyd LJ, that the Lupguard was ‘other property’, to be ‘surprising and unattractive’, even if it was probably correct in ‘strict legal analysis’. Given the closest physical proximity between the Lupguard and pails, Nicholls LJ treated the lost Lupguard as the ‘same property’, and suggested that to find that the Lupguard was ‘other property’ would be to ‘extend the duty of care in *Donoghue v Stevenson* unacceptably far’. Nicholls LJ considered that, where an elegant bag containing an expensive jewellery ring, or a plastic bag carrying supermarket groceries, or a galvanised iron bucket carrying glass beads in a factory, break due to some negligence by D during manufacture of that receptacle, and the goods being carried by C in those defectively-manufactured receptacles are damaged or lost, then they were the ‘same property’, and C should not be able to pursue manufacturer D for negligence under *Donoghue v Stevenson* to recover the value of the lost contents. Nicholls LJ concluded that ‘there is much to be said for the view’ that C could normally only sue the party who supplied the damaged or lost goods for breach of contract (as Aswan did against Lupdine, but without redress, given Lupdine’s liquidation).

In *Tunnel Refineries Ltd v Bryan Donkin Co Ltd*, Tunnel Refineries, C, ran a factory in Greenwich, close to the southern end of the Blackwall Tunnel, and manufactured syrup from maize and wheat. The vapours given off during that process were compressed by being passed through a compressor. A fan, manufactured by Alsthom SA, D, was contained within that compressor. Due to metal fatigue from a casting defect, one of the vanes of the fan shattered, and wrecked the compressor. C sued for the cost of replacing the compressor, and for lost production. **Held:** C could not recover for the cost of replacing the compressor, as it was not ‘other property’. Rather, the fan was ‘simply the particular defective part of a defective compressor’, it was all ‘the one thing’. The fact that the fan was separately assembled and installed, and could be separately removed from the compressor for servicing and replaced, were not sufficient bases to hold that the fan was property separate from the rest of the compressor. It was significant that the fan and compressor were purchased together, and the fan was an integral part of the function which the compressor had to perform.

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33 See too: *Finesse Group Ltd v Bryson Products (a firm)* [2013] EWHC 3273 (TCC).
The abovementioned examples amply illustrate the artificial distinctions which prevail on this principle.

**Precondition #2: The defective thing is an appropriate product**

Not every defective thing can give rise to an action under *Donoghue v Stevenson* for product liability.

§DP.7 Under the *Donoghue v Stevenson* principle, ‘defective products’ includes chattels, defective buildings, and vessels.

Although the leading case itself concerned a chattel, *viz* a ginger beer bottle, defective buildings also fall within the principle in *Donoghue v Stevenson*. In *Murphy v Brentwood DC*, Lord Keith stated that, ‘[i]n the case of a building, ... a careless builder is liable, on the principle of *Donoghue v Stevenson*, where a latent defect results in physical injury to anyone, whether owner, occupier, visitor or passer-by, or to the property of any such person’, while Lord Bridge remarked that ‘these principles [from *Donoghue v Stevenson*] are equally applicable to buildings. If a builder erects a structure containing a latent defect which renders it dangerous to persons or property, he will be liable in tort for injury to persons or damage to property resulting from that dangerous defect.’

On the other hand, where a defect is discovered in a building, but the defect is yet to cause C any physical injury or property damage to C, then that is a claim for pure economic loss, and is a scenario which is governed by different principles altogether (discussed in Chapter 4).

Furthermore, ships, aircraft and vehicles are included as products, for the purposes of *Donoghue v Stevenson*. In *Colman v Bibby Tankers Ltd (The Derbyshire)*, the House of Lords considered the scope of the Employer’s Liability (Defective Equipment) Act 1969, and held that the Act must have had the purpose of ‘cast[ing] upon employers the liability which would otherwise fall on the manufacturer of a defective product under *Donoghue v Stevenson*’, to include, say, a Boeing 747, a ship and a cable-car. Further, ‘[t]he fact that the product may be large enough to be regarded as the employee’s place of work is ... irrelevant.’

§DP.8 The *Donoghue v Stevenson* principle strictly covers manufactured defective products. Products which are inherently dangerous or inherently defective fall outside the scope of the principle – although an action in negligence may nevertheless lie.

Products can be of three types – but only a product which is defective because of some manufacturing or production error is covered by the *Donoghue v Stevenson* principle.

The other two types of products are strictly outside the *Donoghue v Stevenson* principle, but nevertheless can give rise to negligence (per *McTear v Imperial Tobacco*):

i. an inherently dangerous product: for products which are inherently dangerous *per se* (e.g., explosives), and as mentioned earlier in the chapter, manufacturer D was already under a duty

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37 [1991] 1 AC 398 (HL), with quotes at 464 and 475, respectively.
38 Cross cite to Chapter 4, ‘Pure economic loss’ (online content, pp 12–26).
39 [1988] AC 276 (HL) 296–97 (Lord Oliver), citing Lloyd LJ (CA, dissenting) 285–86, whose judgment was upheld on appeal to the HL.
40 [2005] CSOH 69, [7.133], [7.175].
41 Cross cite pp 154–55.
of care to avoid risk of injury arising from their negligent manufacture, well before Donoghue was decided (per Dominion Natural Gas Co Ltd v Collins\(^{42}\)). The Donoghue principle does not strictly apply in this instance.

ii. **an inherently defective product**: for a product that is used precisely as intended, but nevertheless poses risks to persons or property (e.g., tobacco products, or high-fat foods), that product does not fall within the Donoghue v Stevenson principle either. That principle applies strictly where there is a latent defect with the product which the end-user C did not know about, and could not reasonably have foreseen. Cigarette smokers, or consumers of high-fat foods, use those products exactly as the manufacturer intended. They have no latent defects that attract the operation of the principle.

### Precondition #3: Capacity of D to be sued

\(\text{§DP.9} \) Donoghue v Stevenson concerned a product manufacturer. However, other entities (e.g., retailers, distributors, repairers) are covered by the principle too, where no intermediate examination of the product between their activity, and C’s use or consumption, was possible.

As evident from cases since Donoghue v Stevenson, the range of those who can claim under the principle has been cast very widely. The categories of C include (by reference to cases discussed later in this chapter, in which at least the capacity to sue under the principle was demonstrated):

- those who purchased or acquired the product directly or indirectly from D, and then used/consumed it (as in, e.g., Grant v Australian Knitting Mills Ltd, and Herschtal v Stewart);
- friends and family of those purchasers, who themselves used/consumed the product (as in, e.g., Donoghue itself, Tesco Stores Ltd v Pollard, and Abouzaid v Mothercare (UK) Ltd);
- employees who were provided with, and used, D’s goods in the course of their employment (as in, e.g., Wright v Dunlop Rubber Co Ltd); and
- strangers who happened to be in physical proximity to where D’s defective product was being used (as in, e.g., Carroll v Fearon, and E Hobbs (Farms) Ltd v Baxenden (Chemical Co) Ltd).

A variety of defendants, other than manufacturers, have been successfully sued under the Donoghue v Stevenson principle. The Table below sets out the range of potentially culpable parties, with an illustrative example. In each case, there was no reasonable opportunity for the examination of the product after D’s conduct, and before it was used/consumed:

<table>
<thead>
<tr>
<th>The entity</th>
<th>Illustrative case</th>
</tr>
</thead>
<tbody>
<tr>
<td>a product retailer</td>
<td>In Fisher v Harrods,(^a) department store Harrods, D, bought a jewellery cleaner from the manufacturer without making any inquiries as to its safety. The cleaner contained substances liable to injure the eyes, but there was no warning on the bottle. Mrs Fisher, C, used a bottle purchased by another, and was injured when she opened the bottle and the contents sprayed into her eyes. D was negligent for the defective product, in failing to make inquiries of the manufacturer, failing to have the cleaner analysed, and marketing it without a warning.</td>
</tr>
</tbody>
</table>

\(^a\) [1966] 1 Lloyd’s Rep 500 (QB). See also: Holmes v Ashford [1950] 2 All ER 76 (CA).

\(^{42}\) [1909] AC 640 (PC, on appeal from the SCC).
### Table: Illustrative cases of defective products

<table>
<thead>
<tr>
<th>Entity Description</th>
<th>Case</th>
<th>Details</th>
</tr>
</thead>
<tbody>
<tr>
<td>an intermediate distributor, or re-supplier, of a product</td>
<td><em>Andrews v Hopkinson</em>&lt;sup&gt;b&lt;/sup&gt;</td>
<td>George Andrews, C, a door-to-door salesman of drapery products, bought a second-hand car from a second-hand dealer, D, who said that the car (which had been in his possession for about a week) was 'a good little bus. I would stake my life on it. You will have no trouble with it.' The car was actually sold by D to a finance company, with whom C entered into a hire-purchase agreement. A week later, C was seriously injured when his car collided with a lorry, owing to a steering defect in the car. The defective condition of the steering, though probably not discoverable by an ordinary owner-driver, could have been simply discovered by any competent mechanic. D was negligent for having put into circulation a car in a dangerous condition. The defect could and ought to have been discovered by reasonable diligence on D’s part, and D could not have reasonably anticipated that C would examine the steering or have it seen to by a mechanic himself before use.</td>
</tr>
<tr>
<td>the repairer or servicer of a product</td>
<td><em>Haseldine v CA Daw &amp; Son Ltd</em>&lt;sup&gt;c&lt;/sup&gt;</td>
<td>Mr Haseldine, C, a solicitor's clerk, was visiting a client in a block of flats on the 5th floor. C got into the lift with the porter, it got as far as the 2nd floor, and fell to the bottom of the lift well, causing both men very serious injury. The premises were occupied by CA Daw, the landlord of the flats. The engineering company, A&amp;P Steven, D, serviced the hydraulic lift, which was 35 years old. D told the landlord that the rams of the lift were badly worn and ought to be replaced, but they did not consider that the lift was dangerous to use. D doubted that they could get the necessary parts anyway, owing to the war, so agreed to visit more regularly to service the lift. During one of these services (before C's visit), D negligently repacked one of the components, causing it to fracture when the lift was worked. D was liable in negligence under the principle of <em>Donoghue v Stevenson</em>: 'if ever there was a case where a repairer, when sending out for immediate use a machine in a condition made dangerous by his professional want of skill or care, could not and would not “reasonably anticipate any intermediate examination before use”, it is the case of a repair to a lift which is intended to be used by a non-expert porter, as soon as the repair is finished, for taking people up to a higher floor.' (The landlord’s separate liability, as occupier, was discussed in Chapter 12).</td>
</tr>
<tr>
<td>the fitter or installer of a product</td>
<td><em>Malfroot v Noxal Ltd</em>&lt;sup&gt;d&lt;/sup&gt;</td>
<td>Noxal, D, fitted a sidecar to Mr Syer's motor-cycle. Mr Syer and Mrs Malfroot, C, took it for a ride. The sidecar became detached from the motor-cycle, and both Cs were injured. Mr Syers had a claim against D for breach of warranty (because there was a contract between them), and D owed Mrs Malfroot a duty of care, as a passenger in the sidecar who was injured due to the negligent fitting.</td>
</tr>
<tr>
<td>a technical advisor re a product</td>
<td><em>Andrew Weir Shipping Ltd v Wartsila UK Ltd</em>&lt;sup&gt;e&lt;/sup&gt;</td>
<td>Andrew Weir Shipping Ltd, C, was the chartered owner of the ship, 'Baltic Eider', which had two Wartsila 46 engines installed. WFI, D1, a Finnish company, designed and manufactured the engines; and Wartsila UK, D2, supplied spare parts, service engineers and technical data to C for those engines used in the UK. In 2001, a serious fire occurred in the port engine. C argued that this was because of erosion of a plug in the engine's fuel injection pump, and that D1 and D2 should have been well aware of the problem, because of previous experience on a similar engine, the Wartsila 32, where they had issued advice or warnings to customers. No such advice or warnings were given to Wartsila 46 owners. The claims in negligence against D1 and D2 were allowed to proceed, ‘though it may be easier to establish these matters as against</td>
</tr>
</tbody>
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<sup>b</sup> [1957] 1 QB 229 (Court of Assizes, Leeds).
<sup>c</sup> [1941] 2 KB 343 (CA), with quote at 363.
<sup>d</sup> (1935) 51 Times LR 551, 79 Sol Jo 610.
<sup>e</sup> [2004] EWHC 1284 (QB, Comm) [60].
Where D is the manufacturer of a component part, then C must allege that the failure or defectiveness of that component part caused damage to other property of C. Otherwise, it will be recalled that C will fall foul of precondition #1, because damage to a carelessly-manufactured ‘thing itself’ does not found a cause of action – the problem which C encountered, e.g., in Lin- klaters Business Services and Finesse Group, above.

**LIABILITY IN NEGLIGENCE: ELEMENTS**

The usual principles governing negligence apply to negligent product manufacture. This section summarises the key areas and cases, insofar as they apply to product liability.

**Element #1: Duty of care**

A recognised category

A manufacturer of goods, D, owes a duty of care to avoid causing injury to a user of those goods, C, where D intended them to reach C in the form in which they left his premises. Specifically, D’s duty is to avoid putting into circulation products which are liable to cause foreseeable damage to C’s person or property from their use, and where there is no reasonable likelihood of, or opportunity for, intervening examination of the product, either by C or a third party.

This principle was espoused by Lord Atkin in *Donoghue v Stevenson*,\(^{43}\) with which the other members of the majority (Lords Thankerton and Macmillan) agreed. Nowadays, this duty by manufacturer to consumer is a recognised category – ‘beyond question’ (per *Abouzaid v* ...

\(^{43}\) [1932] AC 562 (HL) 599 (Lord Atkin), 603 (Lord Thankerton), 622 (Lord Macmillan).
Defective products

Mothercare (UK) Ltd, and of which ‘there can be no doubt’ (per Andrew Weir Shipping Ltd v Wartsila UK Ltd).

Scope of the duty

However, Donoghue v Stevenson does not cast on manufacturer D a duty to avoid all defects in quality. The scope of the duty is much narrower than that, and it is important to delineate that scope correctly. For the duty to attach, six matters must be established:

i. D’s knowledge or foreseeability

D must have known, or should reasonably have been aware, of the potential dangers posed by the product, when the product left D’s manufacturing premises. Alternatively, D is under a duty to avoid personal injury or property damage befalling C, where the potential danger in the product is discovered by D after the time of first supply/distribution.

Most commonly, of course, D has no actual knowledge of a product’s defect, when it leaves his factory. Rather, reasonable foreseeability of harm arising from a product’s use is all that will be possible to establish. That will be sufficient.

In Muirhead v Industrial Tank Specialities Ltd facts previously, held: negligence proven against the manufacturers of the pumps and electric motors, because both knew that the motors were going to be incorporated in pumps for use on UK fish farms. Hence, physical damage to farm stock, if the motors failed, was reasonably foreseeable on the manufacturers’ part.

Conversely, the lack of either actual knowledge or reasonable foreseeable of D’s part of any defect in the product will mean no negligence. There are distinct limits to what should be held to have been reasonably foreseeable. As stated by Lloyd LJ in Aswan, ‘[i]n one sense, of course, almost anything can be foreseen. But that is not the test. The question is not whether the consequence was of a type which was foreseeable, but whether it was of a type which was reasonably foreseeable. The scope of the manufacturer’s duty of care does not extend beyond that point.’ To hold otherwise would be to treat the manufacturer as an insurer of all consumers’ ills. In the following cases, the damage was unforeseeable, and negligence failed:

In Aswan, facts previously, Thurgar Bolle Ltd, D, was not liable in negligence for the manufacture of their pails, which led to the loss of Aswan’s, C’s, property, the Lupguard. D could not have foreseen that their pails would be tested to destruction by being exposed to such high temperatures for several days. D ‘were obliged, as manufacturers, to exercise reasonable care to ensure that the pails were robust enough to withstand the ordinary stresses and strains of an export transaction, without the lid coming off and without leaking.’ Hence, stacking the pails in shipping containers destined for Kuwait was not abnormal. However, the pails were subject to conditions – stacked 5–6 high, without vertical or horizontal supporting boards, carrying loads of 25kg per pail – which D should not reasonably have foreseen, and were ‘therefore outside the scope of their duty of care.’ In Tesco


47 [1987] 1 WLR 1 (CA) 22 (emphasis added). All three CA members agreed that the damage to the Lupguard was not reasonably foreseeable. As discussed earlier in the chapter, the court had split over whether the action was possible to bring in negligence at all – i.e., whether Aswan was claiming for damage to ‘other property’, or whether it was the property itself which was damaged (which damage is recoverable in contract, but not in negligence).
Stores Ltd v Pollard, 48 Connor Pollard, C, 12 months old, ingested dishwasher powder from a plastic bottle supplied by Tesco’s, D, by removing a child-resistant cap. At the time, C was temporarily out of the sight of his mother who was on the phone. C became very seriously ill, and claimed that the cap of the plastic bottle was defective. However, his injury was unforeseeable. Given the improbability of a child of that age removing the cap, and given the likelihood that a child of that age would have a parent or guardian in the house to prevent his having access to the bottle, it was unforeseeable that this accident could happen. ‘That left either the CPA or nothing.’ In the end, it was ‘nothing.’ The CPA claim against D failed (the cap was not defective, for reasons discussed later in the chapter). Separately, there was no negligence against C’s mother either. Hence, C had absolutely no avenue of redress open to him.

However, what manufacturer D may have known, or foreseen, when the product was first put into circulation, is not the end of D’s responsibility. When a product is first marketed, there may be no reason to suppose that it is defective (say, carcinogenic, or prone to failure). However, if D thereafter receives information that proves or suggests that the product may have been defective, then D is required to do what is reasonable in keeping up-to-date with such developments, and to act accordingly (per Wright v Dunlop Rubber Co Ltd 49). If D realises that a defect arises, then D must take reasonable steps to warn past customers of the danger, even though he was not negligent at the time the goods were sold to C.

In E Hobbs (Farms) Ltd v Baxenden (Chemical Co) Ltd, 50 Gerber Foods (Holdings) Ltd, C, rented a hangar from Hobbs, D1, near Hobbs’s barn. While one of D1’s employees was using a grinding machine in the barn, a spark fell on ignitable material, starting a fire which spread to C’s hangar. D1 argued that the fire would have been fairly minor, except that foam insulation, manufactured by Baxenden, D2, caused the fire to spread out of control and to engulf C’s hangar. D1 sought contribution from D2, alleging that, when the foam insulation was installed in its barn in 1977–80, it was described as ‘self-extinguishing’, but that technical trade information of D2’s was known to be inaccurate after 1974. Held: D2 was negligent in describing the foam as ‘self-extinguishing’. Its duty of care, as manufacturer, did not cease when the goods were first sold.

ii. The existence of a defect

The defect which existed in manufacturer D’s product must have existed when the product left his possession, and constitute the same defect as encountered by the consumer/user, C. However, it is not necessary that D maintain strict control over the product, from the point of manufacture to the point of consumption.

This requirement was clearly established in Donoghue v Stevenson, 51 given the sealed bottle of ginger beer – the snail was undoubtedly introduced in the course of the manufacturing process, and remained there until its decomposed remains were poured out in the café. Lord Macmillan (one of the majority) remarked that the principle in Donoghue applied, when the product was ‘prepared as to be intended to reach the consumer in the condition in which it leaves the manufacturer, and the manufacturer takes steps to ensure this by sealing or otherwise closing the container so that the contents cannot be tampered with ... his control remain[s] effective

until the article reaches the consumer and the container is opened by him. The intervention of any exterior agency is intended to be excluded, and was in fact in the present case excluded.’ However, this statement is no longer to be taken quite at face value.

Any notion that the product must be ‘untamperable-with’, from manufacture to consumption, to attract the operation of the principle, was plainly rebutted, four years later, in Grant v Australian Knitting Mills Ltd. Lord Wright remarked that, ‘the article should reach the consumer or user subject to the same defect as it had when it left the manufacturer’ – but that it was unnecessary that D retained ‘control’ over the product, from the point of dispatch to the point of consumption. Whilst that degree of control occurred in Donoghue v Stevenson itself, it certainly did not in Grant:

In Grant v Australian Knitting Mills Ltd, Richard Grant, C, contracted acute dermatitis as a result of wearing woollen underwear which he purchased from a shop in Adelaide. The material contained excessive free sulphites which had been negligently left in the garment by Australian Knitting Mills Ltd, D, during manufacturing, and which could, when mingled with sweat, produce sulphuric acid. Held: D was liable in negligence. The presence of the sulphites was a hidden and latent defect, and could not be detected by any reasonable examination. Nothing happened between D’s making the garment and C’s wearing it to change its condition. It was expected that the retailer would unseal and handle the products prior to their sale, but no defect was introduced at that stage.

The only point that matters is that the product is in the same condition (i.e., the garment had the same sulphur content) from when it left manufacturer D to when C used it, and that D must have intended the product to reach C in the form in which the product left D’s premises. Even if there was an opportunity for the product to be examined along the way, the defect can still give rise to D’s liability in negligence.

iii. Used as intended
§DP.13 The manufactured article must have been used by C, as consumer/user, in the manner in which it was intended by D to be used. No recovery is possible, where either the product was used by C in a manner which contravened the purpose for which the product was manufactured, or C failed to follow D’s instructions when using the product.

This is another ‘essential ingredient of liability’ under the principle in Donoghue v Stevenson, according to Lord Atkin. In such cases, the product itself is not defective or dangerous. However, once it is put to a use that was not intended, then no Donoghue v Stevenson duty is owed by manufacturer D to consumer C at all. The following contrasts are useful:

In Grant v Australian Knitting Mills Ltd, facts previously, held: negligence proven. The underwear garments worn by C ‘were made by the manufacturers for the purpose of being worn exactly as they were worn in fact by [C]; it was not contemplated that they should be first washed.’ In Aswan Engineering v Lupdine, Lloyd LJ gave a hypothetical example: if manufacturer D sells a defective tyre which was fitted to a car, then D owes a duty of care to the car owner; but if that same tyre is fitted to a bus, D owes no duty of care – because the use to which the tyre was put was not that which D intended.
iv. A latent and undiscoverable defect

For a duty of care to be owed, the defect in manufacturer D’s product must have been latent, i.e., not one that D could reasonably have expected consumer/user C, or a third party, to discover or be aware of (and thereby correct or avoid). This will depend upon whether there was a ‘reasonable probability of intermediate examination’ of the product before C used/consumed it, whether by C or by some third party, which would have revealed the defect – if so, then the defect was discoverable, and no duty of care will be owed to C.

The statement by Lord Atkin in Donoghue v Stevenson,\(^{57}\) that a duty of care will be owed when there was no ‘reasonable possibility for intermediate examination’, was noted by Lloyd LJ, in Aswan Engineering,\(^{58}\) to ‘have been the subject of much subsequent analysis, almost as if they formed part of a statute’. Similarly, Lord Thankerton put great store\(^{59}\) by the fact that no intermediate examination of the sealed and opaque ginger beer bottle was possible – that manufacturer D ‘has intentionally so excluded interference with, or examination of, the article by any intermediate handler of the goods between himself and the consumer that he has, of his own accord, brought himself into direct relationship with the consumer’.

However, again these statements are not to be taken quite literally. They have been judicially modified since. Intermediate examination of the product, whether by C or by another, must be probable – rather than being merely possible, as expressed by Lords Atkin and Thankerton – for a duty of care to be precluded under Donoghue v Stevenson. A mere possibility of intermediate examination is not sufficient to negative the duty owed to C, the defect would still be regarded as latent and undiscoverable. That more generous pro-C legal view was confirmed by Goddard LJ in Paine v Colne Valley Electricity Supply Co Ltd,\(^{60}\) and reiterated much more recently (in Pearson Education Ltd v The Charter Partnership Ltd\(^{61}\)). In yet other cases, a latent defect has been described as one which is a ‘concealed flaw’, which is an ‘actual defect in the workmanship or design’ of a product, and which would not be discoverable by an exercise of inspection of due diligence of the sort that D could reasonably anticipate that the product would be subject to (per Baxall Securities Ltd v Sheard Walshaw Partnership\(^{62}\)).

In the following cases, D was liable in negligence, because it was not probable (or, indeed, even remotely possible) that C would have inspected the product for himself, so as to ascertain the defect:

In Divya v Toyo Tire and Rubber Co Ltd (t/a Toyo Tires of Japan),\(^{63}\) facts previously, the probable cause of the tyre’s failure was the incomplete bonding of the steel cords within the tyre, and/or a failure to cure the tyre for the correct time and temperature and/or pressure: ‘[t]he end user of such a tyre expects and relies on the integrity of a tyre and the absence of such dangerous latent defects’ C could not possibly have examined and detected the disbonding in the tyre for himself. Similarly, in Carroll v Fearon; Barclay v Dunlop Ltd,\(^{64}\) Mr Carroll, C, was driving his car westbound on the M4 to Wales, when his car was hit by a vehicle travelling in the opposite direction, driven by Mr Fearon, D1. D1 lost control of his car, when the tread of the rear tyre stripped completely. The tyre was manufactured by Dunlop Ltd, D2. D1 brought contribution proceedings against D2. In finding negligence against D2, it was held that any defects in the process of tyre manufacture, in which

\(^{57}\) [1932] AC 562 (HL) 599.  
\(^{58}\) [1987] 1 WLR 1 (CA) 22–23.  
\(^{59}\) [1932] AC 562 (HL) 603.  
\(^{60}\) [1938] 4 All ER 803 (CA) 808–9.  
\(^{61}\) [2005] EWHC 2021 (TCC) [117].  
\(^{62}\) [2002] EWCA Civ 9, [45]–[48].  
\(^{63}\) [2011] EWHC 1993 (QB) [67] (Mackay J), quote at [70], and see too [72].  
proper adhesion between the steel cord in the tyre, and the rubber in the tyre did not occur, were not discernible, once the tyre had been made and left the factory. There was no possible opportunity for intermediate inspection of the tyre. In *Herschtal v Stewart and Ardern*, Mr Herschtal, C, was supplied with a car on hire-purchase by Mr Stewart and Mr Ardern, D, who were car engineers and distributors. The car was delivered to C in the afternoon/evening, and he signed a receipt for it, stating that it was in good condition and he had ‘seen, tried and approved’ the car. The car was left outside C’s flat overnight; next morning, at 7.00 am, C drove the car to work, but after a few miles, the rear wheel came off. The nuts on the wheel had not been properly tightened for some time, and the threads were stripped. D argued that C had the opportunity to inspect the wheel nuts before driving the car. In finding negligence against D, the court held that, merely because C had the opportunity to inspect the wheel was not determinative. When D supplied the car to C, ‘the last thing they contemplated was that there was ever going to be any such intermediate examination of it by [C] or by anybody else ... before the next morning.’ It might have been different (said the court) if the accident had occurred after several weeks/months, or after the car had been driven a considerable distance.

The point of a defect being hidden, latent, unknown, and undiscoverable, is that it proves ‘the directness of cause and effect’ (per *Grant*); ensures that the relationship between manufacturer D and consumer/user C remains ‘proximate’ (per *Paine*); and renders it foreseeable, to a reasonable person in manufacturer D’s position, that C was likely to suffer damage from using or consuming the product (per *Carroll v Fearon*). In *Murphy v Brentwood DC*, Lord Keith called the requirement of a latent and undiscoverable defect an ‘essential feature’ of *Donoghue v Stevenson* liability.

The probability of intermediate examination does not have to be at the hands of C himself. A duty of care will be precluded, where there was the probability of intermediate inspection by a third party too (i.e., where a distributor or a supplier in the retail chain, or an employer issuing tools to its employees, had the means and opportunity of examining the product before it was re-issued to user C).

In *Evans v Triplex Safety Glass Co Ltd*, Mr Evans, C, sued Triplex Safety Glass, D, for a windscreen which was fitted in their Vauxhall car bought in 1934. The windscreen was fitted with ‘Triplex Toughened Safety Glass’, until the windscreen cracked and disintegrated into small pieces, causing C cuts and shock. Held: negligence failed. There was the possibility of intermediate examination between the manufacture of the windscreen and C’s use of the car (this case was just pre-*Paine*, when a mere possibility of inspection was enough), because the suppliers of the car had every opportunity to examine the windscreen before they sold it to C.

Where, unusually, C was already aware of (i.e., had discovered) the defect in the product at the point at which he was injured by it, then manufacturer D cannot be liable under *Donoghue v Stevenson*.

In *Farr v Butter Bros & Co*, Mr Farr, C, was employed by builders as an experienced crane erector. Butter Bros, D, manufactured cranes, and sold a crane to C’s employer in parts. It was C’s job to assemble the crane in working order. C found that certain cog-wheels worked with unusual stiffness.
and did not fit properly, and he marked those spots with chalk, and said that he would refer the matter to his employers. However, before the defect with the cog-wheels was fixed, C started working the crane, and was standing under the jib when it fell (due to the defect in the wheels) and killed him. C’s wife brought an FAA action in tort. Held: negligence failed. Not only was the defect in the product (the crane) discoverable upon reasonable inspection, but it was actually discovered by C (and was distinguishable from Donoghue on that basis). Hence, D could not be liable.

Alternatively, if D was entitled to assume that C knew precisely the nature of the defect posed by the product – say, from previous personal experience, from information passed on by either D or by some other party, or from publicly-available information – then C has no remedy against the manufacturer either.

In McTear v Imperial Tobacco Ltd, Alfred McTear, C, died of lung cancer. He had smoked cigarettes manufactured by Imperial Tobacco, D, from 1964–92. His estate claimed that the cigarettes were a defective product. Held: negligence failed. There was no ‘defect’ in cigarettes of which C was unaware. From the 1950s (and certainly by 1964, when C started smoking D’s cigarettes), the public knew of a clear association between cigarette smoking and lung cancer. The government had provided the public with information and education about the risks to health, in particular lung cancer, associated with cigarette smoking; imposed restrictions to prevent the sale of cigarettes to children; and imposed fiscal measures designed to deter their purchase. C’s knowledge of the dangers posed by cigarette smoking took the case outside the Donoghue v Stevenson principle. Also, C acted on the information about dangers when he chose to stop smoking on occasions from 1971 onwards.

Where intermediate examination of the defect was probable, or C already knew of it when he used/consumed it, then that has two possible legal results (per Farr v Butter Bros & Co): it negatives a duty of care, because C’s damage will not have been reasonably foreseeable; or it breaks the chain of causation. The legal effect, of course, is the same – C will have no remedy against manufacturer D.

v. C assumed to be ‘reasonable’

When assessing whether C should have known, or taken the opportunity of undertaking an intermediate examination, of the defect in the product, D is entitled to presume that a person to whom a product is supplied (whether an intermediate party, or C himself) is reasonable.

This principle (per Holmes v Ashford) has been borne out in a couple of instances.

For one thing, D cannot expect C to be abnormally careful. Mr Grant (in Grant v Australian Knitting Mills) could have washed his underwear before wearing them, and removed the excess free sulphites in the garments. He did not, and suffered terrible dermatitis. As pointed out in Herschtal, ‘ample opportunity existed [in Grant] for something to happen which would have resulted either in the discovery of the defect or prevention of the injury ... there was no difficulty in applying to the pants a process which would not have destroyed them but which would have prevented the accident happening. Nonetheless, the defendants were held to be liable.’ In other words, D cannot insist that C take abnormally precautionary steps to prevent his own injury.

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[72] [2005] CSOH 69, 2005 2 SC 1, especially [7.175]–[7.176], [9.3], [9.4], [9.11].
[73] [1932] 2 KB 606 (CA) 615–16, 620.
[74] [1950] 2 All ER 76 (CA) 77 (Tucker LJ).
[75] [1940] 1 KB 155, 172.
Furthermore, it is not valid to assume that, because C was in a lower socio-economic class, C was ‘somehow to be regarded as more a victim of circumstances and as having less than full responsibility for his own choices and actions’ (per McTear v Imperial Tobacco Ltd\(^{76}\)). That principle is highly relevant when an adult of full legal capacity consumes or uses a defective product, because each adult (cigarette smokers, in that case) ‘is presumed to be reasonable, and to have the responsibility of making reasonable choices, not least in matters affecting his or her safety, health and welfare’.

vi. The whole manufacturing process

§DP.16 The duty of care owed by manufacturer D attaches to all parts of the manufacturing process for which D was responsible.

There were six separate parts of the manufacturing process in Grant v Australian Knitting Mills, in order to make the underwear garments, and the Donoghue v Stevenson principle applied to all parts of it.

In Donoghue v Concrete Products (Kirkcaldy) Ltd\(^{77}\), Mr Donoghue, C, a workman on a building site, was carrying a concrete slab when it broke and fell onto his foot. He sued Concrete Products, D, which supplied the concrete slab. The slab broke because it was ‘green’ inside, meaning that it had not been ‘cured’ long enough. Held: negligence proven. The curing was fully part of the manufacturing process of the slabs. The slabs could not be ready for the market until the requisite number of days in the stack yard had elapsed.

What does not preclude a Donoghue v Stevenson duty of care

§DP.17 A potentially vast class; and any contractual claim which C may have, do not preclude a Donoghue v Stevenson claim from arising.

Various attempts have been made by litigants to circumscribe the duty of care owed by manufacturer D, and it is worth noting what does not preclude the duty from arising.

i. A large class of potential consumers. C, as the injured party, may be one of a vast class of persons for whose use ‘the article was issued to the world’ (as the court termed it in Grant v Australian Knitting Mills Ltd\(^{78}\)). Yet, a duty will lie.

Indeed, in Grant, it was said\(^{79}\) that the duty of care owed by manufacturer D is actually ‘potential or contingent’ in such cases. Even though the product may contain some defect when manufactured, it may be destroyed, never used, or scrapped – the duty only crystallises when the product is used. In that respect, the issue of a defective product is somewhat like the utterance of an inaccurate statement – until it is relied upon, the duty does not crystallise, it is contingent up to that point.

Of course, in some cases, the product is manufactured/supplied by D to a specific user, a person whom D has within his specific contemplation. This was evident from Herschtal v Stewart (the case where the wheel detached from the car). The court described\(^{80}\) supplier D and user C as:

very immediate neighbours. [D] were supplying a dangerous article to a person with whom they were in actual contact. He was not some ultimate person or user who might have been envisaged.

\(^{76}\) [2005] CSOH 69, 2005 2 SC 1, [7.177], [7.178]. \(^{77}\) [1976] SLT 58 (CSOH) 60. \(^{78}\) [1936] AC 85 (PC, on appeal from Australia) 103. \(^{79}\) ibid, 103–4. \(^{80}\) [1940] 1 KB 155, 170.
He was an actual man with whom they were dealing in the flesh. They were supplying his company through him with a dangerous vehicle, knowing that it was going to be used forthwith by him... there was a very close proximity or relationship existing between [C and D], which imposed a duty on [D] to take reasonable care to see that the article which they were delivering to [C], knowing that he was going immediately to put it on the road, was not in a condition whereby a wheel might rapidly fly off.

However, it is at the other end of the spectrum that the powerful legal effect of the Donoghue v Stevenson duty is most acutely realised. The duty can equally attach where C was not known to D whatsoever, but simply as one of a class of potential consumers, a class as wide as that of 'road-users' or 'the general public'.

ii. Concurrent contractual claims. Where consumer C has a contractual claim for defective goods against a retailer directly, C may concurrently bring a separate tortious claim in negligence against manufacturer D – '[t]he [manufacturer's] tort liability is independent of any question of contract', said Lord Wright in Grant v Australian Knitting Mills Ltd.\(^81\) The Donoghue v Stevenson duty applies, in addition to any warranty which may be in the contract of sale between vendor and purchaser (per Clarke v Army and Navy Co-op Socy Ltd\(^82\)).

Where an employee is injured by a manufacturer's product

As noted previously,\(^83\) the law of negligent defective products has proceeded upon the rationale of individual autonomy, because it is the lack of any real opportunity for examination of the product (the latent nature of the defect, unknown to C) which invokes the Donoghue v Stevenson duty of care – it is in that scenario that C, as consumer, lacks the freedom of choice or 'individual autonomy' (per McTear v Imperial Tobacco\(^84\)). However, once the court is satisfied that consumer/user C either discovered the defect for himself, or should have been aware of the nature of the defect, and uses the product anyway, then as the cigarette smoker in McTear found to his cost, that is his choice, and a duty owed by manufacturer to C cannot lie.

The position of a consumer in the law of negligence may be contrasted with that of an employee. An employee does not have the same freedom to exercise choice as a consumer does, because an employee must follow the instructions of his employer, and use the products/implements/tools which the employer tells him to. As a result, the common law is somewhat more protective of employees than ordinary consumers. For example, an employer is under a duty to take reasonable care to protect its employees, even against obvious risks or self-inflicted harm. Additionally, an employer may be required to undertake more precautionary steps to discharge his duty of care than a manufacturer would be required to undertake. As a result of the somewhat differential treatment which the law adopts towards employees and consumers, the inter-relationship between the employer and the manufacturer is somewhat complex, when defective tools or equipment are supplied for an employee's use.

When the employer is not liable: Where manufacturer D1 supplies a product to an employer D2 for use by that firm’s employee C, then the manufacturer will ordinarily owe a Donoghue v Stevenson-type duty of care to D2’s employees to avoid injury or damage arising from the defective product supplied by that manufacturer.

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\(^81\) [1936] AC 85 (PC, on appeal from Australia) 105. \(^82\) [1903] 1 KB 155 (CA) 168. \(^83\) Cross cite p 155. \(^84\) [2005] CSOH 69, 2005 2 SC 1, with quote at [7.64].

The scenario: the *Donoghue v Stevenson* criteria are met, i.e., the manufacturer D1 knew, or ought to have realised, that there was a real risk to D2’s employees caused by the product; the defect in the product existed when leaving D1’s possession, and reached employee C in the same condition; neither D2 as employer, nor C as employee, was aware of the danger or defect; C, as an employee of D2 the employer, was obliged to use the product, as per the instructions received from the manufacturer, in the course of his employment, and did so as intended; and there was no opportunity for intermediate examination of manufacturer D1’s product by the employer, before the employee started using it, or by the employee, C.

In this scenario, manufacturer D1 will be liable; but employer D2 will not be liable if the defect in D1’s product was one that was entirely unknown to D2, and nor should D2 have reasonably been aware of it. Absent any indication of apparent defect, employer D2 will not be liable for any injury which that tool or product causes to employee C. As Finnemore J said in *Mason v Williams & Williams Ltd*: 85

Employers have to act as reasonable people, they have to take reasonable care; but if they buy their tools from well-known [tool]makers, ... they are entitled to assume that the tools will be proper for the purposes for which both sides intended them to be used, and not require daily, weekly or monthly inspection to see if in fact all is well.

**When the employer may be liable:** However, if there is something which suggests to employer D2 that there is a defect in the manufacturer’s product, then D2 may be under a duty to employee C, to inspect the product, either before issuing it to his employees, or by daily, weekly or monthly inspections after it has been used by C. In that event, both manufacturer D1 and employer D2 may be liable in negligence.

Where employer D2 supplied the goods or equipment to employee C, without providing any, or any adequate, warning of the types that were supplied by manufacturer D1, then only D2 will be liable, for breach of the common law duty of care arising in the employment relationship. D1, on the other hand, will not be liable in such circumstances, for C’s use of the tools or equipment will be regarded as unforeseeable.

To provide various examples of these scenarios in operation:

**The employer and the manufacturer: relevant cases**

<table>
<thead>
<tr>
<th>manufacturer D1 (ICI; Thomas Turton and Sons Ltd; Ultra Violet Products Ltd)</th>
</tr>
</thead>
<tbody>
<tr>
<td>employee C (Mr Wright; Mr Mason; Miss Lewis)</td>
</tr>
<tr>
<td>employer D2 (Dunlop Rubber Co Ltd; Williams &amp; Williams; University of Bristol)</td>
</tr>
</tbody>
</table>

In *Wright (and Cassidy) v Dunlop Rubber Co Ltd*, 86 Mr Wright, C, started employment with Dunlop Rubber Co Ltd, D2, in 1946. C worked with Nonox S, a chemical containing carcinogenic substances,
which was manufactured by Imperial Chemical Industries Ltd (ICI), D1, and sold to D2, to be used in the manufacture of tyres and rubber products. C alleged that he had contracted bladder cancer as a result of being exposed, during the course of his employment, to Nonox S. In 1949, D1 warned D2 that they might have a grave problem of bladder cancer, and D2 ceased using Nonox S at its workplace. C was diagnosed with cancer in 1966. C sued both D1 and D2 in negligence for the exposure to the defective product of Nonox S. Held (first instance): C succeeded against D1 and D2 in negligence. Held (on appeal by D1): D1 was negligent, as manufacturer of the chemical product, and owed to D2’s employees a duty of care to take all reasonable steps to satisfy itself that Nonox S was safe, in the sense that there was no substantial risk of any significant injury to employees’ health. D1 was negligent in failing to stop manufacturing and supplying Nonox S before the end of 1946.

In Mason v Williams & Williams Ltd,87 Mr Mason, C, was using a new chisel at his workplace, where he worked for Williams & Williams, D2. The chisel was manufactured by Thomas Turton & Sons Ltd, D1. A chip of metal flew off the chisel and struck C in the eye, causing its loss. The chisel head was dangerously hard, but this defect was not apparent. C sued both D1 and D2. Held: D2 was not liable in negligence (but D1 was negligent). D2 bought this tool from a reputable manufacturer, D1, and was not required to set up inspections, either before issuing the tool or progressively as it was being used, unless there was something which called their attention to the suggestion that the chisel head was defective (which was not the case here). D1 certainly would not have expected intermediate examination of its product – in fact, ‘they would probably be rather affronted by the mere suggestion’.

In Lewis v Univ of Bristol,88 Miss Lewis, C, was an experienced molecular biologist and research assistant employed by the University of Bristol, D2. She was using an ultra violet trans-illuminator to photograph DNA gel in a laboratory, when she was exposed to an excessive dose of UV light, and suffered serious burns to her face and neck. C had long used a UV trans-illuminator known as a TL33 without any problems, but shortly before the accident, and without her knowledge, D2 had replaced that machine with a more powerful machine, the TM40, of similar appearance. The new machine was manufactured by Ultra Violet Products Ltd, D1, who had supplied an instruction book with the machine. C sued D1 in negligence. Held: D1 was not negligent. The TM40 was manufactured for a niche market, for exclusively scientific uses. D1 could not reasonably have foreseen that D2, as an expert professional buyer, i.e. the scientific department of a university, would make a powerful machine like this available for use by its staff without familiarising them with the potential hazards of such a machine, and without warning its staff of the dangers and of the instructions for its safe operation.

An employer’s ‘deemed’ negligence: Notably, the common law duty imposed upon employer D to provide safe plant and equipment to his employee is supplemented by the implementation of the Employer’s Liability (Defective Equipment) Act 1969. This Act deems employer D to have, himself, been negligent, in respect of any defective equipment provided by a third party (such as a manufacturer) to employer D, and which then causes injury to employee C. As with all deeming provisions, it creates a potentially powerful avenue for an injured C, albeit that the provision has not been much-used since its implementation. The provision, and the reasons for its relative lack of utility, are discussed in the online chapter, ‘Employers’ liability’.

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Element #2: Establishing the standard of care, and proving breach

Establishing the standard

§DP.18 There is no duty imposed upon manufacturer D that a manufacturer must ensure the safety of consumer/user C. D is only required to take reasonable steps to avoid injury or damage to C.

As with all negligence-related causes of action, the standard of care applicable to a Donoghue v Stevenson claim is that of reasonable care (per Holmes v Ashford[89]). Liability requires that the defect in D’s product ‘must be attributable to a lack of reasonable care on the part of the manufacturer, and in no sense is the obligation on him an absolute one’ (per Donoghue v Concrete Products (Kirkcaldy) Ltd[90]).

However, the case law suggests that the standard of care imposed will be at the higher end of the spectrum. In Divya v Toyo Tire and Rubber Co Ltd (t/a Toyo Tires of Japan), Mackay J remarked, ‘I must be careful not to apply a standard of care which amounts to the imposition of strict liability on the manufacturer’, but nevertheless noted that the standard to be applied to the Japanese tyre-maker was ‘at the highest level’.91

Proving breach

The usual principles governing proof of breach, discussed in detail in Chapter 7, are as applicable in this area of negligence as in any other. This section highlights a few points of particular pertinence.

Foreseeability.

§DP.19 To be liable for breach of duty, manufacturer D must have actually or reasonably foreseen that his product could give rise to the risk of injury to C, or to a class of persons of whom C was one.

If the risk was foreseeable, then the next step is to ask what a reasonable D would do by way of response to the risk. If the risk was not foreseeable, then a reasonable D would not have acted any differently. A couple of factors have proven to be very relevant, when addressing this test in the context of defective products.

Firstly, if there were already problems with the product concerned (as in the tyre case of Carroll), then manufacturer D can hardly be heard to complain that the risk of injury to C was unforeseeable. Obversely, if D had no actual knowledge of the risk of injury at the time of the accident, and could not reasonably have foreseen that risk either, then there can be no negligence (as occurred in Lewis v Uni of Bristol).

Secondly, the fact that D may know, in hindsight, that the product posed a risk of injury, is irrelevant; it is D’s actual or constructive knowledge of the risk of injury at the time of the accident which is relevant. In that respect, product liability negligence follows the principle in Roe v Minister of Health – that ‘[w]e must not look at the … accident [whenever it occurred] with [modern-day] spectacles’.92

[92] [1954] 2 QB 66 (CA) 84 (Denning LJ).
In *Abouzaid v Mothercare (UK) Ltd*, Abouzaid, C, was 12 years old in 1990, when he was helping his mother to attach a fleecy-lined Cosytoes product to his younger brother’s pushchair. The fleecy-lined Cosytoes, manufactured by Mothercare, D, was attached to the pushchair by elasticated straps passed around the back of the pushchair and joined by a metal buckle. C was trying to join the straps when one of the elastic straps slipped from his grasp and the buckle hit him in the left eye, penetrating the eye, detaching the retina, and leaving C almost wholly blind in that eye. D argued that it could not have known of the defect in 1990, and there were no records of comparable accidents on the products database at that time. **Held:** D was not negligent, in not taking steps to prevent the accident in 1990. The joint experts acknowledged that, in 1990, no manufacturer of child care products could reasonably have been expected to have recognised that the elastic attachment straps for a Cosytoes could be hazardous to the eyes of children or adults. Manufacturers knew this in 1999, but not earlier.

In *A v National Blood Authority*, blood recipients, C, sued under the CPA, and not in negligence, for damages arising out of their infection with Hepatitis C from blood and blood products received through blood transfusions from 1 March 1988, until a screening test was introduced in the UK in 1991. The contraction of hepatitis usually occurred in the course of undergoing surgery after accidents, childbirth, or treatment for a blood disorder. Most Cs were identified by the National Blood Authority’s Look-Back programme, which began in 1995. For these Cs, there was no possibility of their having received ‘contaminated’ blood from some source other than the Blood Authority’s blood stocks. **Held:** D was liable under the CPA, but could not have been liable in negligence. In negligence, it was highly relevant to assess whether any steps (or any further steps) could have been taken to avoid or reduce the risk that the blood would be infected. D knew that the blood contained a contaminant, but did not know (nor could it be ascertained) what it was. Given that the Hepatitis C virus itself had not been discovered or identified at the date when the claims commenced (i.e., 1 March 1988 – Hepatitis C was only formally identified in May 1988); and when no screening test to discover the presence of Hepatitis C in a blood donor was even known at that time, D could have taken no precautionary steps to prevent infection, other than to cease the supply of blood and blood products altogether.

**Warnings.**

§DP.20 There is no mandatory legal duty on D to issue a warning about defects and dangers which its product may pose for consumer or user, C. However, in order to discharge the duty of care, D must take ‘reasonable precautions’, which may take the form of a warning that special care or steps are required or highly desirable.

A number of propositions about warnings and defective products have emerged from the case law to date.

i. it is not necessary that manufacturer D should always ensure that the end-user of a product which is dangerous or defective is warned of the risk which such danger or defect poses to the end-user;

ii. a warning may be taken to have been a reasonable precaution where the manufacturer D knew, or ought to know, something which C did not know about the product, and could not reasonably be expected to know. Given that the *Donoghue v Stevenson* duty applies where the defect

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93 (CA, 21 Dec 2000) [51].
94 [2001] EWHC 446 (QB), [2001] 3 All ER 289, [2], [42].
was hidden or latent, a warning may be particularly effective in correcting C's false impression that the product was safe, when it was not;

iii. on the other hand, if the existence of a risk was patent; or was common knowledge as a result of information in the public domain; or was information that a reasonable manufacturer would expect an ordinary consumer to be aware of, the manufacturer may not be under a duty to give a warning (per McTear v Imperial Tobacco Ltd\(^{95}\)). Just because an injury manifests to C does not mean that a failure to warn with respect to that risk of injury will necessarily constitute a breach of duty. There was no negligence in the following cases, involving patent risks:

In Bogle v McDonald's Restaurants Ltd\(^{96}\), a group of customers, C, sued for personal injuries caused by the spillage of hot drinks served by McDonald's Restaurants, D. At a trial of generic issues, the court had to consider whether there was a duty on D to warn C as to the risk of scalding from hot drinks. D was not negligent, because customers who bought coffee and tea could be assumed to know that such drinks sometimes get spilled, that tea and coffee are made with very hot water, and that these drinks are served at temperatures which cause serious and painful injury if they come into contact with skin. The dangers posed were patent and obvious. There was no duty on D to warn C about the risk posed by the temperatures at which tea and coffee were served. In McTear v Imperial Tobacco Ltd\(^{97}\) facts previously, cigarette manufacturer, D, was not negligent, because it 'had no better or greater knowledge than the average consumer, and they gained it at precisely the same time as the average consumer did.' Further, '[t]here was no evidence that the public would have been any better informed than they already were, if D had printed warnings on cigarette packets or in advertisements that smoking could cause fatal diseases. When Mr McTear, C, started smoking in 1964 or later, D's products carried no hidden danger, such that they were under a duty to give warnings about it. The public awareness that smoking was linked with health risks, and lung cancer, was so widespread that D had no duty to give warnings about it.'

iv. the type of warning which a reasonable D should have put out may differ by recipient and type. It may be issued to C, as consumer or user; or to an intermediate party interposed between manufacturer and C; or to the public by means of television or other public advertising. It may take the form of written or oral warnings. Any of these steps may be sufficient to discharge the duty of care which D bears.

In Holmes v Ashford\(^{98}\), a hairdresser, D1, used dye to treat C's hair, and C contracted dermatitis. The dye, manufactured by D2, was delivered to the hairdresser in labelled bottles, with a small brochure of instructions. Both labels and brochure issued by D2 contained a warning that the dye might be dangerous to certain skins, and recommended that a skin or patch test should be done first. D1 read the labels and the brochure, and hence was aware of the danger, but he made no test and did not warn C. C sued D1 and D2. Held (first instance): C succeeded against both. Held (on appeal): D2 was not negligent, having given D1 a warning which was sufficiently clear to indicate the potential danger of the dye. It was not necessary that D2 should have warned C as well. The law presumed that the warnings were supplied to reasonable people; the hairdresser 'said that he read the warning, appreciated what it meant, and ignored it.' The warning given by D2 was sufficient.

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v. a range of customers may purchase D’s products. If the danger or defect in D’s product was obvious or patent to most of that customer class, no warning is necessary. D is not under a duty to warn the minority of the customer class of the risks associated with its product, simply to cater for that minority.

In *Bogle v McDonald’s Restaurants Ltd*, Master Bogle, C, a child, argued that young children may not be aware of the risk of scalding posed by tea/coffee, and that the duty to warn arose because some of McDonald’s customers might not be aware of the risk. **Held:** no negligence proven. Small children very rarely buy, or consume, coffee and tea at McDonald’s, and McDonald’s could therefore expect that the great majority of those who bought hot drinks in their restaurants would be in their teenage years or above. No duty to warn arose.

vi. just because D gave warnings to some people (e.g., its employees) about its product, is not determinative of whether D had a duty to warn consumers of the dangers or defects associated with its product too.

In *Bogle*, there was no duty on McDonald’s to warn their customers about the risk posed by the temperatures at which tea and coffee were served – notwithstanding that they gave warnings to their employees; and notwithstanding that, from 1995, a warning was printed on the cups (some of the claims in this group litigation arose from injuries incurred prior to 1995, but there was no need to spell out something like, ‘Caution: Contents Hot!’ at any time).

Precautionary steps.

Apart from the issue of a warning, there may be other precautionary steps which D could *reasonably* have taken to avoid the injury or damage sustained by C, the failure of which may amount to a breach of the reasonable standard of care.

As discussed in Chapter 7, whether precautionary steps should be taken will ultimately depend upon an assessment of the probability of the risk of injury; the gravity of the risk of injury, should it occur; the cost of any precautionary steps; and the social or economic utility of D’s activities which would be compromised if the precautionary steps were taken. It is a balancing exercise.

In the context of product liability, and having regard to relevant case law, several precautionary steps may be possible (apart from warnings), including (but not limited to) those outlined below:

- the product be withdrawn by D from the market, so as to prevent its being used altogether (ruled out in *McTear v Imperial Tobacco Co Ltd*);
- the product be withdrawn, or production stopped for a limited period (rejected as being necessary in the Australian contaminated oyster case of *Graham Barclay Oysters Pty Ltd v Ryan*);
- D may conduct surveys or inspections (or additional surveys or inspections) to examine whether the product was contaminated, or whether the risks of injury created by the product were within acceptable limits (also rejected as being necessary in *Graham Barclay Oysters*);
- a regulatory authority be contacted by D, with information which D had within its knowledge, about the defects apparent in the product, so that the regulatory authority could take steps to

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Defective products

protect the public (disputed in Carroll, where the trial judge held that it was a breach of duty by Dunlop not to bring the rate of inadequate adhesion in some of its tyres evident from its own investigations to the attention of the Department of Transport – a finding which was upheld in very lukewarm terms on appeal, principally because a causal link between that breach and C’s damage in the resulting car accident was very tenuous).

Given the balancing exercise which the quadrant entails (i.e., probability; gravity; precautionary steps; and the compromise to social or economic utility), where D puts into circulation a commonly-used product which is defective; and the gravity of the injury can be extreme (death, severe personal injury), negligence may be difficult to refute. However, the challenge of proving a lack of reasonable care is a considerable one for some injured claimants.

In Abouzaid v Mothercare (UK) Ltd, facts previously, held: no negligence proven. The probability of injury arising from the elastic tie-straps was extremely low. There had been an absence of previous comparable accidents; there had been no case recorded on the public database of product accidents until two years after this incident; and it was far less serious and not an identical fact scenario. Further, given the widespread use of elastic in products in general use by the public, experience had not shown that its use in children’s products like Cosytoes was likely to cause injury. There had been no previous customer complaints to Mothercare. The mechanism by which the injury occurred, the metal buckle at the end of a light elasticised strap recoiling and entering C’s eye, was predictable, but very unlikely. Re gravity, a recoil would not normally be expected to have these very serious consequences. The low probability had to be balanced against the seriousness of the eye injury which could occur, as it did to Iman – the risk of such injury was ‘identifiable’, but ‘very small’. A manufacturer in 1990 was not negligent in supplying the product in the form it was supplied to Ms Abouzaid and her family.

The role of res ipsa loquitur.

More detailed analysis of this doctrine is contained in Chapter 7. This section highlights a few pertinent points, in the context of defective products.

§DP.22 Whether the doctrine of res ipsa loquitur applies in the context of product liability has been a matter of judicial disagreement, although the predominant view is that it does not. However, in an appropriate case, the particular individual responsible for the defect in the product, or the particular act of negligence, need not be identified, but can be inferred.

In Donoghue v Stevenson itself, Lord Macmillan stated that, ‘[t]here is no presumption of negligence in such a case as the present, nor is there any justification for applying the maxim res ipsa loquitur. Negligence must be both pleaded and proved.’ The recognition of a duty of care owed by manufacturer D to consumer/user C was a profound step at the time, given that it departed from the recognised categories of negligence which had then existed – but Lord Macmillan reiterated that the law of negligence had certainly not moved to a strict liability tort. There may have been a defect in D’s product, but that alone did not impute that D was guilty of any negligence.

In Carroll v Dunlop Ltd, though, Judge LJ appeared not to entirely rule out the application of res ipsa loquitur in product liability claims. However, the longer the period between date of

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manufacture of the product, and the damage suffered by C, the more unlikely it was that *res ipsa loquitur* would apply – because ‘failure might have resulted from any one of a number of possible causes, including, for example, misuse or abuse, or inadequate repair of earlier damage’. *Res ipsa loquitur* did not apply in *Carroll* itself, where the gap between manufacture (1981) and accident (1988) was several years.

If *res ipsa loquitur* were not to apply to defective product cases, then Finnemore J pointed out, in *Mason v Williams & Williams Ltd*, 106 that some real difficulties could result. Often, consumer/user C is not in any position to prove that manufacturer D did some positive act or omitted to do something, regarding the manufacturing process, which was negligent. Similarly to incidents of medical negligence, much happens ‘behind closed doors’, with the process, and mishaps, known only to a few. At the most, C will be able to prove that the product was defective; that anything happening in C’s own premises could be eliminated; that the product came to C directly from manufacturer D; and that it arrived in the same condition in which it had left D’s premises. However, whether the product was manufactured in a way that rendered it defective, accidentally, carelessly or deliberately, it was impossible for C to say – and, said Finnemore J, ‘that is really as far as any plaintiff can be expected to take his case.’

The solution to this dilemma has been to invoke a near-application of *res ipsa loquitur* in some product liability cases – because negligence can be ‘inferred’. According to the Privy Council in *Grant v Australian Knitting Mills Ltd*, 107 consumer/user C ‘is not required to lay his finger on the exact person in all the chain who was responsible, or specify what he did wrong. Negligence is found as a matter of inference, from the existence of the defect, taken in connection with all the known circumstances’. In *Grant*, the fact that excess sulphites were left in the underwear garments could only have been because someone was at fault, but it was impossible for C to prove at which of the six stages of the whole manufacturing process that may have occurred. In *Carroll*, this was summarised to mean that, ‘in an appropriate product liability case, the particular individual responsible for the defect in the product need not be identified, nor indeed need the particular act of negligence be specified.’ 108

The *Grant* principle means that, although the strict application of *res ipsa loquitur* is supposedly disallowed (given Lord Macmillan’s comments in *Donoghue v Stevenson*), C has the considerable advantage of not having to prove how, precisely, the defect happened during D’s manufacturing process, or at whose hands. Even in *Donoghue* itself, the fact that there was an undetected snail in the bottle was treated by Lord Macmillan to be ‘prima facie evidence of negligence’ (to cite Judge LJ in *Carroll*). As with the doctrine of *res ipsa loquitur*, the *Grant* principle means that, practically speaking, there is a reversal of the evidential burden of proof in product liability cases.

However, the principle has not always been invoked in C’s favour, as the following contrasting cases demonstrate:

In *Divya v Toyo Tire and Rubber Co Ltd (t/as Toyo Tires of Japan)*, 109 facts previously, it was established that the tyre disintegrated because of an identified fault in the course of its manufacture at Toyo Tire’s factory, viz, the probable cause of the tyre’s failure was the incomplete bonding of the steel cords within the tyre, but how that happened could not be proven. **Held:** negligence proven. C did not have to identify which individual, or group of employees, was responsible for the defect, nor


which particular acts or omissions caused the inadequate construction of the tyre. According to Mackay J, 'I cannot find at what stage the failure to exercise reasonable care occurred, [but] I do not believe I am required by the authorities to do so. What can be said as a matter of probability is that at some stage of the manufacturing process ... the mechanised procedures have failed to cover and penetrate these cords fully with rubber and/or to cure the green tyre properly, and the human side of the process has failed to detect such failure or failures. The result is that the tyre fell below the high standard that Toyo set itself and that the end users of its products were foreseeably entitled to expect.'

In *Evans v Triplex Safety Glass Co Ltd*,\(^{110}\) facts previously, held: negligence failed. In *Grant*, there was only one possible cause of the dermatitis, the excess sulphites. Here, however, there were a number of causes that could have caused the disintegration of the windscreen: defective manufacture; if the outside surface was broken by cutting; or if it was strained when being screwed and fastened into its frame; or if some damage was sustained to the windscreen during the year that C owned the car. The principle in *Grant* could not apply to infer negligence. In *Hufford v Samsung Electronics (UK) Ltd*,\(^{111}\) Mr Hufford, C, had his kitchen entirely refurbished, and for that purpose, his fridge freezer (manufactured by D) was temporarily moved into the hall. It was then moved back into the kitchen. The fridge then caught fire a few days later, and C alleged that it originated in the machinery compartment at the rear, whilst D alleged that the fire must have originated in some combustible material outside of the appliance. Held: negligence failed. C could not prove where the seat of the fire originated; and 'the mere fact of a fire involving the appliance does not mean that this is a case where the maxim *res ipsa loquitur* applies.'

**Element #3(a): Causation**

§DP.23 Whether the manufacturer's, D's, breach caused the consumer or user, C, damage (including the but-for test), and whether that damage was too remote at law to be foreseeable, are governed by the usual principles of negligence.

As mentioned in the Introduction, causation can easily be an insurmountable challenge for C, in product liability claims.

The defect in D's product must have caused C's injury or loss, on the balance of probabilities (per the usual principles canvassed in Chapter 8, to which readers are referred for greater detail). In accordance with the but-for test, if D's act or omission in bringing about the defect in the product was hypothetically fixed, and C's injury would probably have been suffered in any event, then the defect did not cause C's damage. Manufacturer D will frequently try to assert that the defect in the product was not caused by a manufacturing defect, but by a third party, by natural or external forces, or by C himself.

In *Carroll v Fearon*,\(^{112}\) facts previously, held: negligence proven. D2, as manufacturer of the tyre, sought to argue that the loss of tread on the tyre was due to C's own behaviour – 'persistent abuse of the tyre by running it or allowing it to run under-inflated for significant distances', especially given that C had 'shown a significant lack of enthusiasm for the proper maintenance of his car and ... prior to the test in May 1988, had been driving it on two condemned tyres.' Alternatively, it was

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\(^{110}\) [1936] 1 All ER 283 (KB) 286 (Porter J).  
\(^{111}\) [2014] EWHC 2956 (TCC) [51].  
due to a supplier providing manufacturer D with faulty or dirty steel cords used in the radial tyre manufacture. Both of these alternative explanations were rejected.

In *McTear v Imperial Tobacco Ltd*[^113^] facts previously, held: negligence failed. As a matter of general causation, C could not prove, on the balance of probabilities, that as a matter of fact, cigarette smoking can cause lung cancer. Epidemiological studies did not establish that there was a correlation between an increase in cigarette smoking and a subsequent increase in lung cancer mortality. It was not possible to determine how much of the apparent rise in lung cancer mortality between 1900–1950 was due to changes in population; in diagnosis and treatment; in medical knowledge and practice; in the role of hospitals; in the availability of medical care and in death certification and general statistical methods. As a matter of individual causation, C could not prove that, but for C’s having smoked cigarettes, he would probably not have contracted lung cancer. Some of the risk factors for lung cancer, other than cigarette smoking, were present in C’s case: personality traits, family history of lung cancer, stressful lifestyle, viral infections of the respiratory tract, alcohol abuse, vitamin A deficiency, low socio-economic status and residence in an urban area of west Scotland. A non-smoker exposed to any or all of these risk factors can develop lung cancer. A causal connection between C’s smoking and his lung cancer could not be established on the balance of probabilities.

Interestingly, the outcome in *McTear* contrasts with that of *Badger v MOD*,[^114^] where a causal connection between Mr Badger’s smoking and his lung cancer was established, for the purposes of establishing contributory negligence against him. As a finding of fact, his risk of contracting lung cancer from smoking became twice that of his contracting lung cancer from wrongful asbestos exposure caused by his employer. Stanley Burnton J noted that, “surprisingly, there is no reported case in which the question whether the smoking of tobacco constitutes contributory negligence has been considered. Conversely, in no case decided in the UK has a smoker succeeded in recovering damages against a manufacturer of cigarettes or other tobacco product.”[^115^] As demonstrated earlier in the chapter, *McTear*’s case also floundered under the principle in *Donoghue v Stevenson*, quite apart from its problems with causation.

Furthermore, if D’s breach is that it did not notify a third party of the defects in its product which were within D’s knowledge or awareness, then the hypothetical enquiry required for causation involves a chain of consideration: that if D had notified the third party, then the third party would have taken some steps that would probably have precluded the injury from occurring. If it cannot be shown that the third party probably would have taken those steps, then D’s breach of failing-to-notify did not cause C’s damage.

In *Carroll v Fearon*,[^116^] facts previously, one of the breaches on Dunlop’s, D2’s, part was that it failed to notify the Dept of Transport of the inadequate adhesion which had been apparent in its tyres. However, a causal link between that breach and the shredding of the rear tyre was impossible to prove. Neither the Dept, nor their Vehicle Inspectorate, was called to give evidence of their probable response, if D2 had disclosed the problem. No garage offering MOT services, or the particular garage which did the MOT test on the defective tyre in May 1988, was called to explain how it would have implemented any advice or directives, whether from the Dept or from D2. In light of such significant gaps in the evidence, no causal link could be established for this breach. However, D2 was liable for negligently manufacturing the tyre, which could be causally related to the tyre’s shredding.

[^114^] [2005] EWHC 2941 (QB), [2006] 3 All ER 173, [50]–[53].
[^115^] ibid, [3].
Where the allegation of negligence against manufacturer D is that it failed to warn of the risks posed by its product, then if the court is satisfied that, had a warning been given, C would probably have used/consumed the product in the same manner in any event, then the failure to give the warning did not cause the damage, and negligence will fail (per the usual principles canvassed in Chapter 8).

In *Coal Pension Properties Ltd v Nu–Way Ltd*, a gas explosion occurred in the boiler house of the BHS store in Oxford Street in August 2001, as the result of a gas leak from a GB3500 gas booster manufactured by Nu–Way, D. The claim was actually brought by the owner of the building for the costs of repair, and an issue arose as to whether D should have issued a warning about boosters possibly suffering from a failure of their casings if not properly maintained, and whether BHS, as operator of the system, would have heeded that warning. **Held:** a warning should have been given by D; but even if it were, the loss would have happened anyway. The warning would probably not have been heeded, given the 'very low standard of inspection and maintenance of the boosters by [the operator’s] maintenance contractors', and given BHS's poor supervision of its maintenance regime. Hence, C's claim failed.

Thus far, there has been no case in which the exceptional theorem of causation provided by *Chester v Afshar* has been applied in the context of a defective product, and it is not clear whether it would be so extended, or restricted to its context of negligently-provided medical services.

The likely (non)application of the ‘material contribution to risk’ exceptional theorem of causation to anything beyond mesothelioma claims, and the non-recognition of the market-share theory of apportionment (per *Sindell v Abbott Laboratories*) in English law thus far, are discussed in Chapter 8.

**Element #3(b): Remoteness**

The general principles of remoteness have been discussed in Chapter 9. As always, the type or kind of damage must be foreseeable. It will be recalled that D is liable to an ‘egg-shell skull’ C, provided that a person of normal susceptibilities would have suffered some damage as a result of D’s negligence. The fact that the extent of that injury may be greater-than-normal is legally irrelevant.

In *Grant v Australian Knitting Mills Ltd*, facts previously, it was suggested that Mr Grant's, C's, previous suffering of TB had made him more susceptible to dermatitis, because it weakened the resistance of the skin and lowered his vitality; or alternatively, that C's skin had become ‘allergic’, by reason of his past illness. However, ultimately, it was held that C's skin was normal, and that for some unexplained reason, he suffered unduly from the free sulphites which infiltrated the garments. In any event, C was able to recover for the full extent of his dermatitis.

It will be recalled that a remoteness difficulty can arise, where the ultimate damage is several links removed from manufacturer D’s activity. If D is to be liable for all the injury and loss caused by a defective product which it manufactures, then there is a theoretical prospect of indefinite liability. This example was given in *Grant*:

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117 [2009] EWHC 824 (TCC) [61]–[68].
118 [2005] 1 AC 134 (HL).
119 607 P 2d 924 (SC Cal, 1980).
120 [1936] AC 85 (PC, on appeal from Australia).
Suppose that a steel manufacturer operated a steel foundry which had constructed a rudder to be fitted on an ocean liner. The liner sailed for several years, but unknown to the owners, the rudder had a latent defect due to faulty and negligent casting, and one day it broke. The liner sank, and lives and property were lost.

The owners of that property, and the estates of those deceased, could potentially have a *Donoghue v Stevenson*-type action against the steel manufacturer – thus exposing that manufacturer to ‘damages of an indefinite amount, after an indefinite time, and to claimants indeterminate until the event’. However (said the Privy Council), ‘[s]o many contingencies must have intervened between the lack of care on the part of the makers, and the casualty’ that the damage suffered by the various parties may be too remote. There is a policy dimension too, for if all that damage was to be put at the door of manufacturer D, then business would be too unworkable: “[i]t is impossible to accept such a wide proposition, and, indeed, it is difficult to see how, if it were the law, trade could be carried on”.

DEFENCES AND REMEDIES

The usual principal defences

§DP.24 The usual defences of contributory negligence and *volenti* are applicable to manufacturer D.

The principal defences of contributory negligence and *volenti* which are available to D in negligence, as discussed in Chapter 10, are applicable to manufacturers who make or produce defective products, although successful instances of their application are difficult to find in this context.

In *Farr v Butters Bros & Co*, the defence of contributory negligence was raised, but not considered, in light of the failure of the claim. In *Linklaters Business Services v McAlpine Ltd*, the defence of Linklaters, C, poorly maintained the insulation to the chilled water pipework, but the defence of contributory negligence was abandoned for lack of evidence. In *McTear v Imperial Tobacco Ltd*, the defence of *volenti* was raised, but rejected, because the court preferred the view that, where D’s conduct gave rise to a risk to health which C knowingly ran and took a chance on, there was no negligence on D’s part. C, who had consumed or used the thing which he knew to be dangerous or defective, could not complain of D’s negligence, in respect of whatever mischief followed.

Economic losses

The principal remedy sought by C in this negligence action will be compensatory damages. However, the heads of damage within the scope of the *Donoghue v Stevenson* principle have been judicially circumscribed in one important respect.

§DP.25 Damage to C’s person or other property is compensable damage under the *Donoghue v Stevenson* principle. However, C cannot recover damages for pure economic loss under the principle.

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121 ibid, 107, citing: *Earl v Lubbock* [1905] 1 KB 253, 259.
123 [2005] CSOH 69, [7.204]–[7.206].
In most cases (as for Mrs Donoghue herself), the defective product will cause personal injury of some sort, which is plainly recoverable. Property damage caused by the defective product is also recoverable, provided that it is ‘other property’ of C’s, and not the defective property itself which is being claimed for (as discussed under Precondition #1).

However, pure economic loss cannot be recovered from a negligent manufacturer, under the principle in Donoghue v Stevenson. In Home Office v Dorset Yacht Co Ltd, Lord Reid stated that Donoghue v Stevenson ‘may be regarded as a milestone ... [and] a statement of principle’, but that, under this principle, ‘causing economic loss is a different matter’. In Lexmead (Basingstoke) Ltd v Lewis too, the House of Lords expressed the opinion, in dicta, that pure economic loss was not recoverable from manufacturer D under the Donoghue v Stevenson principle, and that recovery was restricted to physical injury and property damage.

In cases where the defective property causes damage to C’s other property – and that other property would have earned profits for C, had it not been damaged or lost – then C has suffered property damage (with the lost profits being consequential upon that damaged or lost property), all of which is recoverable. On the other hand, where C has suffered pure economic loss (because, say, C’s operations have been shut down, with lost profits being accrued, whilst the defective product itself was being repaired or replaced), then that is irrecoverable loss under Donoghue v Stevenson.

According to Muirhead v Industrial Tank Specialities Ltd, the Court of Appeal would not sanction a principle permitting recovery by C for the lost profits arising from his business brought about by the defective product (i.e., the electric motors in that case), on the basis that this would be irrecoverable pure economic loss. C’s position was aligned (said the court) with the party who suffered property damage and lost profits in Spartan Steel & Alloys Ltd v Martin & Co (Contractors) Ltd, when an essential facility owned by a third party was damaged by D’s activities – in that case, C could recover damages for the property damage (the damaged batches of metal), and for the lost profits on those batches, but not for the lost profits on batches that could not be processed during the power cut (see Chapter 4). These types of claimants were not identically-placed, of course, but were sufficiently analogous to warrant losing out on their claims for lost profits:

In Muirhead v Industrial Tank Specialities Ltd, facts previously, the defective motors caused the pumps to fail, and the lobsters in the tanks to die. As a fish merchant, C would have sold the lobsters for a profit, but lost that opportunity. Held (at trial): C succeeded against the manufacturers of the motors, D3, and was able to claim for the lost profits, as well as for the costs of replacing the pumps and the lobsters. Held (on appeal): negligence was proven against D3, and ‘other property’ was damaged, but the damages recoverable were restricted to: (i) dead lobsters (being the ‘other property’), and (ii) the financial losses consequential on that physical damage (e.g., the lost profits on the intended sales of those particular dead lobsters, and the labour costs in boiling and refrigerating the salvaged dead lobsters). However, C could not have recovered the lost profits on the operation as a whole (e.g., future batches of lobsters which could not be farmed whilst the tanks were out of operation), because that was ‘pure economic loss’, irrecoverable under Donoghue v Stevenson: ‘this case is so close to Spartan Steel that ... it should not be distinguished from that case, and until it is overruled, we are bound by it.’

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In *Tunnel Refineries Ltd v Bryan Donkin Co Ltd*,\(^{129}\) facts previously, *held*: no recovery was possible, because there was no ‘other property’ damaged. However, had the compressor been ‘other property’ damaged, then C could have recovered for (i) the cost of replacing the compressor, and (ii) the loss of syrup actually in production when the compressor ceased to function. However, damages could not have been recovered for the loss of production of further batches of syrup until the compressor was brought back into service, ‘on the authority of *Spartan Steel*, and of *Muirhead*, where recovery of damages for future batches of lobsters was denied.’

**Psychiatric damage**

Recovery of damages from manufacturer D in negligence, for pure psychiatric injury which C sustained as a result of manufacturer D’s defective product, will be governed by the usual principles determining whether, and in what circumstances, D owes a duty of care to avoid causing C pure psychiatric injury.

As discussed in Chapter 5, the rules governing the recovery of damages by so-called primary victims, secondary victims, and fear-of-the-future victims, are complex. Their application in the context of defective products has been quite sparse. However, some useful cases drawn from that earlier chapter may illustrate.

It will be recalled that if C is psychiatrically-damaged upon seeing damage to his property which was caused by a defective product manufactured by D, then according to *Attia v British Gas plc*,\(^{130}\) C can recover in negligence, under the *Caparo v Dickman* three-part test. Foreseeability will be proven if it was cherished property of C’s (a house and its contents in that case); there was proximity between C and D whose activities caused the destruction (British Gas, whose installation of gas heating caused a destructive fire), and no public policy reason precluded the duty from arising. Alternatively, C may suffer from psychiatric injury arising from a defective product with which he is injected, and which does not cause physical injury, but gives rise to the fear of what disease or impairment may occur in the future. In *Creutzfeldt-Jakob Disease litigation; Group B Plaintiffs v Medical Research Council*\(^{131}\) – where several young children who exhibited signs of stunted growth were injected with human growth hormone (HGH) under clinical trial, and were exposed to contracting Creutzfeldt-Jakob disease, a brain-wasting and untreatable condition – again recovery was permitted under the *Caparo* test. Alternatively, suppose that someone is injured by a defective product, and C is a witness to that event and suffers psychiatric injury from what he saw. He must have shared a close tie of love and affection with the injured party, per one of the ‘*Alcock* control mechanisms’, to recover in negligence. Hence, in *Monk v PC Harrington Ltd*,\(^{132}\) although that was not a defective product case (a platform erected during the construction of Wembley Stadium collapsed when a crane’s load accidentally snagged the platform, killing and injuring those underneath the platform), if the facts were hypothetically adjusted so that the scaffolding was defective and caused fatal injuries to a worker on site, and C, as a co-employee, witnessed that injury to his colleague and was psychiatrically-damaged, C’s claim in negligence would fail if he did not share a close tie of love and affection with his fatally-injured colleague.

\(^{129}\) [1998] EWHC Technology 322, [40]–[41].  
Exemplary damages
Exemplary damages against a manufacturer D, whilst technically available (e.g., where the manufacturer’s conduct was calculated to make a profit that exceeds the compensation recoverable by C), have never been awarded in a product liability case in this jurisdiction, and the prospect of any circumstances falling within the narrow confines of exemplary damage (as discussed in Chapter 11) seems remote.

ACTIONS UNDER THE CONSUMER PROTECTION ACT 1987
Implementation of the European Product Liability Directive

The EC Product Liability Directive 85/374/EEC133 (‘the Directive’) was, in the words of Burton J in *A v National Blood Authority*,134 ‘a long time in coming’. Initially discussed in 1969/70, at a time when the Thalidomide scandal attracted huge consternation, various delays, such as the admission of new Member States, and complex intergovernmental and parliamentary debates and negotiations, ensued.

The Directive provides that ‘the producer shall be liable for damage caused by a defect in his product’ (per Art 1). Liability is strict, in the sense that all the victim needs to prove is ‘the damage, the defect and the causal relationship between defect and damage’ (per Art 4). In that sense, the aim of the Directive was to widen the protection available to consumers. The ECJ confirmed, in *European Commission v UK*, that as a motivation of the Directive, consumers injured by a defective product ‘were, in fact, and too often, deprived of an effective remedy, since it proved very difficult procedurally to prove negligence on the part of the producer, that is to say, that he failed to take all appropriate steps to avoid the defect arising.’135 The Directive’s Preamble provides that its aim was to deal with differences among Member States which could ‘distort competition, and affect the movement of goods within the common market, and entail a differing degree of protection of the consumer against damage caused by a defective product to his health or property.’

The Directive did not envisage *absolute* liability on the part of producers for their defective products, however, because of the number of defences available. In the usual scenario, the ‘producer’ will be the manufacturer, but there are some exceptional scenarios (under Art 3) when someone else can be treated as the producer (e.g., the supplier, ‘unless he informs the injured person, within a reasonable time, of the identity of the producer’). Article 6 provides what was meant by a ‘defective’ product, i.e., one that ‘does not provide the safety which a person is entitled to expect’.

All Member States had to give effect to the liability provisions of the Directive within three years of its promulgation – and the UK did so via the implementation of the Consumer Protection Act 1987 (the CPA).136 Part 1 of that Act implements a regime of strict liability for damage arising from defective products. However, the terms of the CPA are not identical to those of the Directive, and this has given rise to some problems. In 1995, the European Commission contended that the UK Government had not met its obligations under the Directive, by enacting the CPA in the terms which it had (the Commission was particularly unhappy with the

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134 [2001] EWCA Civ 446 (QB), [2001] 3 All ER 289, [13].

135 [1997] 3 CMLR 923 (ECJ (Fifth Chamber)) [16].

‘development risks defence’ in the CPA, discussed later). However, the European Court rejected the challenge (in European Commission v UK\(^{137}\)).

To clarify, the Directive is not directly enforceable against D by C, it confers no cause of action itself; C must rely on the CPA for his cause of action (per A v National Blood Authority,\(^{138}\) although in that early case, Burton J did concentrate on the terms of the Directive, more so than later cases have demonstrated).

According to s 1(1), the purpose of the CPA was to make ‘such provision as is necessary in order to comply with the Product Liability Directive, and shall be construed accordingly’. Hence, it has been judicially reiterated that the CPA 1987 ‘must be construed so as to give effect to the Directive’.\(^{139}\) Similarly, the ECJ stated, in European Commission v UK, that the CPA must be interpreted ‘in the light of the wording and the purpose of the Directive, so as to achieve the result which it has in view’.\(^{140}\)

**The key provision**

The main provision of the CPA is s 2(1), entitled, ‘Liability for defective products’, which provides as follows:

\[
\text{where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage. (emphasis added)}
\]

The preconditions for application of the CPA regime depends upon the bolded terms being met, and these are discussed separately. To reiterate, under the statutory regime contained in the CPA, a producer is liable for damage caused by any defect in his product, irrespective of any fault on the producer’s part.

Somewhat surprisingly, it was a decade before any litigation under the CPA first appeared (in Worsley v Tambrands Ltd\(^{141}\)), and since then, there have not been many cases decided under it. Part of the reason for this may be attributable to the non-availability (or withdrawal) of legal aid or other source of public funding – for example, pharmaceutical claims are notoriously expensive to pursue, are often brought as group litigation claims,\(^{142}\) and without some form of public funding, some cases concerning allegedly defective products have not progressed.\(^{143}\) The problems frequently associated with proving a causal link between the defect and the damage may also account for the relative dearth of case law.

Be that as it may, the relative lack of judicial pronouncements has contributed to ongoing uncertainty surrounding the scope and interpretation of the CPA. Incredibly, Smith J could state, in the FAC Litigation, some 20 years after the CPA’s enactment, that ‘[p]roduct liability under the 1987 Act is an area of law which is uncertain and developing’.\(^{144}\)

\(^{137}\) [1997] 3 CMLR 923 (ECJ (Fifth Chamber)) [33]–[39]. \(^{138}\) [2001] EWHC (QB) [2].

\(^{139}\) O’Byrne v Aventis Pasteur MSD Ltd [2007] EWCA Civ 966, [7]. See too: Multiple Claimants v Sanifo-Synthelabo Ltd [2007] EWHC 1860 (QB) [5]; Bogle v McDonald’s Restaurants Ltd [2002] EWHC 490 (QB) [71].


\(^{142}\) e.g., the FAC litigation, MMR litigation, and the National Blood Authority litigation, all followed this route.


\(^{144}\) Multiple Claimants v Sanifo-Synthelabo Ltd [2007] EWHC 1860 (QB) [43].
The CPA only applies to goods manufactured/produced/put into circulation after the Act took effect (i.e., 1 March 1988).

Hence, goods manufactured/produced/put into circulation prior to that date can only be the subject of a negligence action. To note, D puts a product into circulation, ‘when it is taken out of [D’s] manufacturing process ... and enters a marketing process in the form in which it is offered to the public in order to be used or consumed’ (per O’Byrne v Sanofi Pasteur MSD Ltd).\footnote{[2006] 1 WLR 1606 (ECJ) [32].}

In Carroll v Fearon; Barclay v Dunlop Ltd,\footnote{[1998] EWCA Civ 40, [1998] PIQR P416.} facts previously, the subject of the claim was a radial tyre manufactured by Dunlop Ltd at their factory in Tyne & Wear during June 1981. Hence, the CPA did not apply.

### The framework

An analysis of a claim under the CPA may be outlined as follows:

#### Nutshell analysis: The Consumer Protection Act 1987

**Preconditions for the claim:**

- No damages for the defective product itself
- The product is covered by the CPA
- Within the relevant limitation period
- Capacity to sue and to be sued

**Elements of the claim:**

1. A defect in the product
2. The defect wholly or partly caused C’s damage
3. C suffered the requisite damage

**Defences to the claim:**

- The defect was due to compliance with mandatory regulations
- D did not put the product into circulation
- D provided the goods in a private capacity
- No defect existed in the product
- The ‘development risks defence’
- The defect was attributable to the design of a subsequent product
- Contributory negligence

The burden of proving that a product is defective, and that the causal link is established, is on the party who so asserts (C),\footnote{Bogle v McDonald’s Restaurants Ltd [2002] EWHC 490 (QB) [73].} while the burden of proving any statutory defence rests on D.\footnote{Multiple Claimants v Sanifo-Synthelabo Ltd [2007] EWHC 1860 (QB) [6]; Abouzaid v Mothercare (UK) Ltd (CA, 21 Dec 2000) [10].}
PRELIMINARY MATTERS

Precondition #1: No damages for the defective product itself

§DP.28 The loss or damage to the product itself cannot be claimed (per s 5(2) of the CPA). This reflects the position at common law in negligence.

The common law position – which involves some very technical distinctions between the defective property and ‘other property’ belonging to C – was canvassed earlier in this chapter. Precisely the same distinction arises under the CPA, by virtue of s 5(2).

Precondition #2: The product is covered by the CPA

§DP.29 The term, ‘product’, to which the CPA applies, means ‘any goods or electricity’, and ‘includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise’ (per s 1(2)).

Notably, the term, ‘goods’, is further defined inclusively (in s 45) as ‘substances, growing crops, and things comprised in land by virtue of being attached to it, and any ship, aircraft or vehicle’. Clearly, then, land itself is excluded from the scope of the CPA. Although buildings are ‘attached to’ land, they are not ‘comprised in land’, and hence, are also excluded from its ambit.

When originally enacted, tobacco was exempted from the application of the CPA, under s 19(7)(f), thus protecting manufacturers from strict liability thereunder. However, that section was repealed in England in October 2005 (but not in Scotland, where an action against tobacco manufacturers, as to whether or not tobacco was defective, had to be brought in negligence – unsuccessfully, as it turned out, in McTear v Imperial Tobacco Ltd).

Some types of products to which the CPA has applied (although not always with a successful claim) are listed in the Table below:

<table>
<thead>
<tr>
<th>Products covered by the CPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>medicines, pharmaceutical products</td>
</tr>
<tr>
<td><em>Lilly &amp; Co Ltd v James,</em>(^a) where C was prescribed Zyprexa for bipolar disorder, and allegedly developed Type 1 diabetes as a result of taking the drug; Multiple Claimants <em>v Sanito-Synthelabo Ltd (the FAC Litigation),</em>(^b) where C were children of mothers who suffered from epilepsy, and during their pregnancy, these mothers took an anti-epileptic, anti-convulsant, drug, Epilim, which C claimed was a known teratogen, which crosses the placenta during pregnancy and causes deformities</td>
</tr>
<tr>
<td>a hip replacement prosthesis</td>
</tr>
<tr>
<td><em>Piper v JRI (Manufacturing) Ltd,</em>(^c) where C underwent a hip replacement operation, but after 18 months, the prosthesis sheared in two, had to be explanted, and another hip replacement operation carried out, causing substantial loss of mobility</td>
</tr>
</tbody>
</table>

\(^{a}[2009]\) EWHC 198 (QB).
\(^{b}[2007]\) EWHC 1860 (QB).
\(^{c}[2006]\) EWCA Civ 1344.

149 Cross cite pp 155–60.
<table>
<thead>
<tr>
<th>Products covered by the CPA</th>
</tr>
</thead>
<tbody>
<tr>
<td>a tampon</td>
</tr>
<tr>
<td>vaccines</td>
</tr>
<tr>
<td>hot drinks at McDonald’s</td>
</tr>
<tr>
<td>the handle-bars of a mountain bike</td>
</tr>
<tr>
<td>the electrical system in a car</td>
</tr>
<tr>
<td>a device fitted to a car seatbelt to provide slack and more comfort</td>
</tr>
<tr>
<td>water supplied by a water treatment works</td>
</tr>
<tr>
<td>the screw top lid of a dishwasher powder container</td>
</tr>
<tr>
<td>a fleecy-lined sleeping bag to be fitted to a pushchair for young children</td>
</tr>
<tr>
<td>a condom</td>
</tr>
<tr>
<td>processed blood, and blood products</td>
</tr>
</tbody>
</table>

<sup>d</sup> [2000] PIQR P95 (QB, Ebsworth J)
<sup>g</sup> [2002] EWHC 490 (QB).
<sup>h</sup> [2007] EWHC 1667 (QB), and aff’d: [2008] EWCA Civ 424.
<sup>j</sup> [2006] EWHC 1284 (QB, Admin).
<sup>k</sup> [1993] QB 507 (CA).
<sup>l</sup> [2006] EWCA Civ 393 (D conceded liability under the CPA; the case concerned a claim for exemplary damages).
<sup>m</sup> (CA, 21 Dec 2000).
<sup>n</sup> [2000] PIQR P164 (QB).
<sup>o</sup> [2001] EWHC 446 (QB).

Interestingly, the inclusion of blood and blood products within the scope of liability under the CPA occurs in circumstances where, as Burton J noted in *A v National Blood Authority*,<sup>152</sup> there is no ‘blood shield’ statute in the UK which could have protected blood suppliers from liability.

**Comparative corner: US blood-shield statutes**

Blood-shield statutes typically protect the manufacturers or distributors of blood products from strict products liability or from liability based on breach of implied warranty. They do

<sup>152</sup> [2001] EWHC QB 446, [35].
not necessarily preclude claims in negligence, however, albeit that negligence can be very
difficult to prove.

In Rogers v Miles Laboratories Inc,153 Jeremy Rogers, C, a child and haemophiliac, sued
D, alleging strict liability and negligence, for supplying a blood component, Factor IX,
that caused him to contract AIDS. At that time, the Washington blood immunity statute,
RCW 70.54.120, partly provided that, 'The procurement, processing, storage, distribution,
administration, or use of whole blood, plasma, blood products and blood derivatives for
the purpose of injecting or transfusing [them] into the human body is declared to be ... the
rendition of a service ... and no civil liability shall be incurred as a result of any of such
acts, except in the case of wilful or negligent conduct'. Whatever their form of wording,
the court noted that, '[t]he public policy represented by these statutes is not difficult to
discern: blood transfusions are essential in the medical area [the court referred elsewhere
to 'the unique lifesaving properties of blood and blood products'], and there are not now,
and realistically there may never be, tests which can guarantee with absolute certainty
that the donated blood is uncontaminated with certain viruses', given the state of human
knowledge, and the emergence of new and dangerous viruses. The District Court concluded
that any claim for strict liability against D must be doomed to failure, because the blood
product provided by D to C was prescribed by a doctor, and 'was of unquestioned benefit to
hemophiliacs such as Jeremy Rogers ... in the absence of clear legislative direction, a Wash-
ington court would have to weigh the medical and social value of producing and supplying
medications such as Factor IX, against the principles of common-law strict liability which
favor the innocent consumer. In so doing, the Washington court would likely come down
on the side of immunising vital blood components such as Factor IX.' Hence, that part of
C's claim was decided in D's favour on summary judgment. However, given that the statute
only precluded claims for strict liability, but not for 'willful or negligent conduct', the court
would not strike out C's claim against D in negligence.

Precondition #3: Limitation period

§DP.30 Under the CPA, a limitation period of three years applies, from the date on which C, the con-
sumer, became aware, or should reasonably have become aware, of the damage. However, a
'long-stop' period provides for a limitation period of 10 years from the date at which D first put
the product into circulation.

Article 10 of the Directive provided for the 3-year limitation period, and in addition, a 'long-
stop' limitation period was specified in Art 11. The Limitation Act 1980 was duly amended to
give effect to these Articles – by the insertion of, respectively, s 11A(4) and s 11A(3)).

These limitation periods which apply under the CPA are not as generous as those which apply
to other torts – normally six years for property damage, but only three years under the CPA for

153 1990 US Dist LEXIS 1680, 10–11 (WD Wash, 4 Jan 1990). For other decisions in which blood shield statutes have
barred strict liability claims, see: Poole v Alpha Therapeutic Corp, 698 F Supp 1367, 1370–71 (ND Ill 1988), and
also citing: Coffee v Cutter Biological, 809 F 2d 191, 193 (2d Cir 1987); Doe v Cutter Labs, 703 F Supp 573 (ND
Texas 1988); Jones v Miles Labs, 705 F Supp 561 (ND Ga, 1987); McKee v Miles Labs, 675 F Supp 1060 (ED Ky
all types of damage, and normally a 15-year long-stop limitation period for latent damage not involving personal injury,\(^{154}\) but only 10 years under the CPA.

Otherwise, the usual law associated with limitation periods (discussed in the online chapter, ‘The beginning and end of liability’) applies to claims under the CPA. Under the ‘traditional rule’, the limitation period will start to run from the date that the cause of action accrued (i.e., when the damage occurred, for a claim under the CPA). However, C may not be aware of a latent personal injury which the product has caused, in which event, C’s cause of action will commence from his ‘date of knowledge’ (per s 11A(4)(b)), as per the provisions of the Limitation Act 1980 which apply, to C’s benefit, where C’s personal injury is latent and undiscoverable.

However, the liability of producer D for a defective product is absolutely extinguished, at the expiry of 10 years from the date on which the product was put into circulation by D. Hence, no matter how long a latent injury lies undetected, and regardless of the ‘date of knowledge’ provisions mentioned above, there is a finite end to D’s potential liability. This long-stop provision was a *quid pro quo* for the generous provisions of the CPA which enabled a strict liability regime against a producer without proof of fault. In *O’Byrne v Sanofi Pasteur MSD Ltd*, it was remarked that, '[i]n order not to discourage technological innovation, and to allow insurance cover, it was thought to be necessary to limit the strict liability rule in time.'\(^{155}\)

What if C names the wrong party as producer D? Can the correct party be substituted outside those limitation periods? Under s 35 of the Limitation Act 1980, the substitution of a new party, after the expiry of the limitation period, is generally prohibited. However, the Act does soften this somewhat, by providing\(^{156}\) that rules of court may give courts the power to substitute a party, if the name in the original claim was inserted in the claim form ‘in mistake for the new party’s name’. That rule is provided for in CPR 19.5(3)(a), whereby a court may add a new party, as a matter of discretion, but only if the justice of the case requires that such a substitution be made. The power, under s 35, to substitute a new party, in a defective product claim, applies as much to the 10-year long-stop limitation period, as it does to the shorter 3-year period.

In *Horne-Roberts v SmithKline Beecham plc*,\(^{157}\) Harry Horne-Roberts, C, was born on 29 June 1989, and was vaccinated with MMR (measles, mumps and rubella) on 20 June 1990. He became autistic, and claimed that this was due to the MMR vaccine. The MMR vaccine was manufactured by three pharmaceutical companies – SmithKline, Merck, and Aventis Pasteur MSD Ltd. The batch number for the vaccine indicated that the manufacture was an SK product, but it was mistakenly attributed to Merck, so Merck was sued. The error was found on 22 August 2000. At that point, more than 10 years had passed by the time the error as to the manufacturer had been realised, and a new claim could not have been commenced against SK, so C sought to substitute SK for Merck as the defendant in the proceedings already issued. **Held:** the court had the power to allow the substitution of SK for Merck, even after the 10-year long-stop period in s 11A(3) had expired. C ‘had always intended to sue the manufacturer of the identified vaccine, and that is sufficient to give the court the power to substitute the true manufacturer under s 35 of the Limitation Act and CPR 19.5’.

\(^{154}\) Per s 14A(B) of the Limitation Act 1980, inserted by the Latent Damage Act 1986.

\(^{155}\) [2006] 1 WLR 1606 (ECJ), per opinion of Advocate General Geelhoed (at [29]).

\(^{156}\) See ss 35(5)(b), 35(6)(a).

\(^{157}\) [2002] 1 WLR 1662 (CA) [45], although its reasoning was queried, and narrowed, in: *Lockheed Martin Corp v Willis Group Ltd* [2010] EWCA Civ 927, [42], in what the court called, ‘a difficult area of the law’ (at [41]).
Precondition #4: Capacity to sue and to be sued

The Act does not expressly state who may sue; but it implicitly confers standing on consumers and employees, but not on business entities which suffer commercial losses. Section 2(2) of the CPA provides that certain parties – i.e., producers, ‘self-branders’, and importers – are covered by the strict liability regime.

The Act (and the preceding Directive) sought to provide a more generous basis for consumers to obtain redress for the ramifications of using defective products than fault-based negligence provided (‘to make it easier for claimants to prove their case’, as Burton J put it in *A v National Blood Authority*[^158]).

There is no express provision in the CPA prescribing who has standing to sue. However, given that the Act permits for the recovery of personal injuries; and for any damage to property caused by the defective product where that property was ‘ordinarily intended for private use, occupation or consumption’, and where C must intend the damaged property to be mainly for his ‘own private use, occupation or consumption’ (per s 5(3)(a) and (b)), it follows that solely commercial losses suffered by business entities are excluded from its province. The CPA is directed towards consumer claims. The Act also covers employees’ claims, where the employee C suffers personal injury as a result of using D’s defective product (in that scenario, the interplay between the liability of C’s employer under the Employer’s Liability (Defective Equipment) Act 1969, and the liability of manufacturer D under the CPA, is a thorny issue which is discussed in the online chapter, ‘Employers’ liability’).

In furtherance of its generous objectives, the ambit of potential defendants is cast much wider than merely product manufacturers. Where more than one D is liable under the CPA, then their liability is joint and several (per s 2(5)). Culpable parties under the CPA may consist of the following:

- **the producer of a product** – which, in turn, is defined (in s 1(2)), to mean:
  - the manufacturer of the product (or the manufacturer of a *component part* contained in another product, per the definition of a ‘product’ in s 1(2));
  - the person who won or abstracted a substance, i.e., the producer of raw materials (e.g., mineral, gas, or coal producers); or
  - the person who carried out an industrial or agricultural process. Originally, the CPA excluded from the scope of strict liability those who supplied agricultural produce (which was defined in s 1(2) as ‘any produce of the soil, of stock-farming, or of fisheries’), and which had not yet undergone an industrial process (per s 2(4) of the CPA). However, s 2(4) was repealed, both in England[^159] and in Scotland,[^160] and Pt I of the CPA was extended to primary agricultural products and game, in order to implement Directive 1999/34/EC, which increased protection for all consumers to include agricultural products, given the concerns arising over BSE. Hence, those who provide farm produce, or who farm livestock, are now caught by the CPA.

[^158]: [2001] EWHC QB 446, [57].
In *Bogle v McDonald’s Restaurants Ltd*, it was accepted that, by adding hot water to coffee grounds and tea bags, McDonald’s was a ‘producer’ of hot drinks. In *Abouzaid v Mothercare (UK) Ltd* Mothercare manufactured the product called ‘Cosytoes’, a fleecy-lined attachment to a young child’s pushchair, and sold it in their UK stores, rendering them a ‘producer’. In *A v National Blood Authority*, the NHS (via the National Blood Authority) was responsible for the production and supply of blood and blood products, which was an ‘industrial process’ for the purposes of the CPA.

- ‘own-branders’ – i.e., a person who, ‘by putting his name on the product, or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be producer of the product’ (per s 2(2)(b)). This shows a legislative intent to ‘cast the net wide in order to provide redress to the consumer’ (per *O’Byrne v Aventis Pasteur SA*).

- an importer – i.e., one who ‘has imported the product into a Member State from a place outside the Member State in order, in the course of any business of his, to supply the product to another’ (per s 2(2)(c)).

- a supplier – i.e., any person who supplied the defective product along the chain at some point between manufacture and consumption, where C requests that supplier to identify the producer of the product, within a reasonable time of the damage occurring; where C cannot, with reasonable practicability, identify that producer himself; and the supplier does not identify the producer, or at least who supplied the product to him, within a reasonable time of receiving C’s request (per s 2(3)). As pointed out in *O’Byrne v Aventis Pasteur SA*, the effect of this section is that, in limited circumstances, a supplier is to be legally treated as if it was the producer. Where it applies, the provision widens the net of potential Ds, so as to potentially ‘catch’ an intermediary supplier or distributor of a product (i.e., the type of party in *Andrews v Hopkinson*).

Ironically though, and despite the generous pro-C regime which the Product Liability Directive sought to achieve, the range of potential Ds noted above does not appear to match the potential Ds which are available under the principle in *Donoghue v Stevenson* – given that repairers, servicers, fitters and installers, and technical advisors, are not caught by the CPA.

Notably, the Crown is an appropriate D, given that it is bound by Pt 1 of the CPA (although subject to the scope of its liability under the Crown Proceedings Act 1947, and not to any greater extent) (per s 9 of the CPA). It also follows, from the terms of the defence in s 4(1)(c), that local authorities and public authorities are appropriate Ds under the Act (for they cannot avail themselves of that defence, as discussed later in the chapter).

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161 [2002] EWHC 490 (QB) [74].
162 [CA, 21 Dec 2000].
163 [2001] EWHC 446 (QB), [2001] 3 All ER 289, [3].
165 [2006] EWCA Civ 393.
167 [2007] EWCA Civ 966, [8].
168 [1957] 1 QB 229 (Court of Assizes, Leeds).
169 Cross cite pp 161–63.
LIABILITY UNDER THE CPA: ELEMENTS

Element #1: A defect in the product

The statutory framework

§DP.32 For the purposes the CPA, a product is defective ‘if the safety of the product is not such as persons generally are entitled to expect’ (per s 3(1)).

Provided that the safety of the product was not such as persons generally were entitled to expect, then the product is defective for the CPA’s purposes. This encompasses two important points. First, defectiveness depends upon the public’s reasonable expectations – and not upon proof of a lack of reasonable care by producer D. Secondly, whatever a product lacks that makes it defective, that shortcoming must relate to its safety.

When deciding what persons generally are entitled to expect in relation to a product, the Legislature has specified that various circumstances are relevant to take into account:

s 3(2) ... all the circumstances shall be taken into account, including –

(a) the manner in which, and purposes for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another, and nothing in this section shall require a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question.

Clearly, the above legislative description is not exhaustive of the circumstances which may be relevant as to what the public are entitled to expect, but it refers to the principal circumstances to be assessed.

The ‘get-up’ referred to in s 3(2)(a) includes warnings in relation to the product, discussed further below. It will also be recalled\(^\text{170}\) that the principle in \textit{Donoghue v Stevenson} does not apply, if the product is not used as intended. That is one of the requirements for the duty to arise. Its equivalent under the CPA is s 3(2)(b), such that, if C uses the product in a way that was not contemplated (recall the example of the defective car tyre being used on a bus), then the product will not be defective. Under s 3(2)(c), the greater the time that has passed since the product left D’s possession, the more room there may be for other causes (e.g., environmental impact, weathering, wear and tear from ordinary usage) to be responsible for the product’s defect. Further, a product is not necessarily defective, merely because another safer product was later produced/manufactured/put into circulation (per the closing words in s 3(2)). It is feasible that the degree of safety that the public generally was entitled to expect at the date of the accident was indeed lower than the degree of safety which was to be expected at the date of trial – especially where there was some improvement in the safety design/properties of the product brought about by technical advances. (Conversely, as \textit{Abouzaid}\(^\text{171}\) demonstrates, if a

\(^{170}\) Cross cite p 166. \(^{171}\) (CA, 21 Dec 2000) [40], quoting the trial judge.
product caused an injury in 1990, and at the date of trial in 1999, the same product of the same design/properties would be regarded as defective, then the product will be regarded as having been defective back in 1990.)

§DP.33 The CPA contains a strict liability, in that it does not require proof of negligence. On the other hand, the CPA does not expect an ‘absolute level of safety’, nor does it impose automatic liability on D for injury caused by the product.

Under a CPA claim, even if an accident has never occurred in the past, and if D could not have reasonably foreseen the injury which befell C, the product may nevertheless be defective. It will be recalled that this is one of the key differences between negligence and the CPA action – foreseeability of injury is not required under the CPA (per Abouzaid v Mothercare (UK) Ltd\textsuperscript{172}). Whereas, in negligence, a court must consider whether the risk of injury was one which D knew about or should have known about and taken steps to guard against, the sole task under the CPA is to decide whether the product was safe or defective.

Hence, it is not relevant whether D, as producer, carried out a risk assessment of the product; or conducted an assessment of the quadrant of Bolton v Stone/Tomlinson factors (considered in Chapter 7), or assessed the cost or difficulty of taking precautionary steps. All of that smacks of a negligence analysis – which the CPA does not encompass. Several cases have made that plain. To take into account these sorts of factors would ‘seek to reintroduce concepts familiar in the context of a claim in negligence at common law into a statutory regime’ (per Chadwick LJ in Abouzaid v Mothercare (UK) Ltd\textsuperscript{173}). If D omits to carry out risk assessments, or fails to take obvious precautionary steps, etc, that is not relevant as to whether or not the product was safe (per Bogle v McDonald’s Restaurants Ltd\textsuperscript{174}). If C wishes to run that type of argument, then negligence is the relevant cause of action. As Burton J admitted in National Blood Authority, to disregard these types of matters under a CPA claim ‘is obviously a tough decision for any common lawyer to make. But I am entirely clear that this was the purpose of the Directive’.\textsuperscript{175}

Moreover, the public cannot expect that the product will be absolutely safe. That cannot be read into the CPA, ‘as if there were a contractual warranty as to the safety standard to which the product had been designed. It is quite impossible to get such a result out of the terms of the 1987 Act’ (per Tesco Stores Ltd v Pollard\textsuperscript{176}). Rather, the standard which the law expects is the level of safety which the general public is legitimately entitled to expect of the product. A product may indeed have a harmful characteristic, which has resulted in an injury to the user of the product – and yet, there may be no ‘defect’ that gives rise to compensation (per Sayers v Smithkline Beecham plc\textsuperscript{177}). All the CPA requires (per s 3(2)(b)) is that the court must consider what might reasonably be expected to be done with the product – it does not have to withstand all uses and applications in all circumstances.

Explaining ‘defectiveness’ under the CPA

Clearly, the meaning of ‘defect’ under the CPA has a ‘special statutory meaning, different from its normal meaning in the English language’ (per McGlinchey v General Motors UK\textsuperscript{178}). Some fairly sparse case law has sought to ‘flesh out’ the meaning of a defective product under the

CPA. It is useful to have regard to some leading cases, before turning attention to the principles themselves.

In the following cases, the relevant product was defective; the public expectations of safety were not met in relation to the product:

In *A v National Blood Authority*, facts previously, the Hep C-infected blood and blood products were defective products under the CPA, because the public was entitled to expect that blood and blood products being supplied were 100% clean. There was no public understanding or acceptance of the risk of infection of transfused blood by Hepatitis C at the time, and hence, blood available for transfusion to C, infected with Hepatitis C on or after 1 March 1988, did not provide the safety which persons generally were entitled to expect. For the CPA claim, ‘[i]t is not material to consider whether any steps or further steps could have been taken to avoid or palliate the risk that the blood would be infected’ – this was significant, given that the virus was not even identified, let alone screenable, until after some Cs in this case had been infected. In *Piper v JRI (Manufacturing) Ltd*, facts previously, Mr Piper, C, contended that his implanted hip prosthesis sheared because either (1) the defect was a point defect on the surface which caused its premature failure, or (2) the prosthesis was unable to withstand the ordinary forces applied to it when it was implanted. The product was *prima facie* defective, although both allegations ultimately failed (due to a successful defence). When determining safety, the court must take into account what might reasonably be expected to be done with or in relation to the product. In the ordinary course, it would be expected that a prosthesis would have to withstand forces on implantation; and if it was not designed and manufactured to withstand those, then it would be defective at the time it was supplied to the hospital. In *Abouzaid v Mothercare (UK) Ltd*, facts previously, Iman, C, who lost his eye, sued under the CPA alleging that the elastic Cosytoes strap was a defective product. D argued that the potential risk of elastic snapping back as it did here had not been recognised in 1990, and that there were no records of comparable accidents on the products database. However, C argued that the properties of elastic had not changed, so if the elastic risk constituted a defect in 1999, it was equally a defect in 1990. An expert acknowledged that it would be necessary to advise anyone manufacturing the Cosytoes product in 1999 that the product posed a risk of injury, without which it would not be as safe as persons generally are entitled to expect. Given this, the product was defective when the injury occurred in 1990. It could not be suggested that public expectations about elasticated products had changed between 1990 and 1999. Elastic had been used for many years, without any great technical advances which might reasonably affect the expectations of members of the public as to how it behaved.

In the following cases, however, the relevant products were not defective; they met with public expectations of safety:

In *Richardson v LRC Products Ltd*, a condom manufactured by D, which was being used by Mr Richardson, failed, and Mrs Richardson, C, became pregnant. C sued under the CPA (not in negligence), alleging over-exposure of the rubber surface to ozone between the time of manufacture and packaging, but was unsuccessful. Although the user’s expectation was that a condom would not fail, D made no claim that this form of contraception would never fail; ‘no-one has ever supposed that any method of contraception intended to defeat nature will be 100% effective’. Studies also showed that there could be inexplicable failures of condoms, even when manufactured to a

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179 [2006] EWCA Civ 1344, [34].
standard in excess of the relevant British standard. Given this, the public could not expect that this contraceptive product would be 100% fail-safe. In *Tesco Stores Ltd v Pollard*, facts previously, the cap was not manufactured to the British Standard regime, because it did not meet the minimum torque required to unscrew the cap without squeezing. Hence, the bottle was easier to open (without squeezing) than it should have been. Still, it had *some* significant ‘child resistance’ effect. The cap was not defective, because the CPA does not require that the public is entitled to expect that the product will function to the full extent of the design standards to which it was manufactured. What ‘persons are generally entitled to expect’ of this cap’s safety features was that the bottle would be more difficult to open than if it had an ordinary screwtop – which it was. It was not as difficult as it would have been if the British Standard had been complied with, but it met the public expectation. In *Bogle v McDonald’s Restaurants Ltd*[^181^], facts previously, the hot drink containers were not defective, but met public expectations of safety. Staff were thoroughly trained as soon as they started employment to cap hot drinks securely, and were regularly appraised about that; were warned (via D’s Health & Safety Manual) that hot drinks could be very dangerous, especially to young children; and were instructed to advise customers tactfully if they thought drinks could be a hazard. The angle at which full cups tipped over was 20 degrees for regular cups, and 18 degrees for large cups – but they were designed and manufactured so that the lids stayed on, even if they tipped over. The general public expected precautions to be taken to guard against the risk of scalding, but given that the staff were trained to cap the drinks securely, and given the capabilities of the cups and lids used, the safety of D’s hot drinks was such as persons generally were entitled to expect.

Turning now to the general law governing defectiveness under the CPA which is to be drawn from the above cases:

§DP.34 When determining whether the product’s safety is such as persons generally are entitled to expect, the assessment: (i) is objective; (ii) is based upon what the general public is entitled to expect (and *not* what a particular sector, or C, was entitled to expect, or what the general public actually expected); (iii) depends upon the knowledge about product safety which is in the public domain; (iv) is *not* determined on the basis of whether the product was ‘standard’ or ‘non-standard’.

Teasing out this principle in segments:

i. The court acts as an informed representative of the public, and must objectively assess the legitimate expectations of that public as to what level of safety persons generally are entitled to expect (per *Bogle v McDonald’s Restaurants Ltd*[^182^]).

Clearly, the fact that D’s product is not manufactured to the full extent of the relevant British Standard (where there is no statutory obligation that it be so) does not mean that the public was entitled to expect that it be manufactured to that standard. If the law were otherwise, and the public did have that legitimate expectation that British Standards would be met, then Tesco would have been liable under the CPA for the screw-top on its dishwashing powder container. However, the screw-top met with public expectations as to safety, because it was more difficult for a young child to unscrew than a normal screw-top. As the Scottish Outer House has stated


since in Chadwick v Continental Tyre Group Ltd,\textsuperscript{183} Tesco v Pollard confirms that, ‘in looking at general public expectation, one does not look at highly technical specifications’.

ii. It is not enough for C to allege that the product failed to meet his expectations – it must fail to meet the expectations of the general public:

In Foster v Biosil,\textsuperscript{184} Ms Foster, C, underwent a bilateral mastectomy in 1994, and then had breast implants inserted, which were manufactured by Biosil, D. C alleged that the left implant ruptured within seven months of the operation, and that the right implant had leaked silicone. Eventually, they were removed. C sued under the CPA, and argued that, to succeed, she only had to show that the implants had failed in a manner that was unsafe and contrary to what she was entitled to expect. \textbf{Held:} the implants were not defective. It was not enough to show that the implants had failed in an unsafe manner contrary to C’s expectations. The public’s expectations were met here, as the statistical evidence showed that D’s implants rarely ruptured.

It is also not enough for C to allege that a specific sector of the public (e.g., the medical profession, or those closely involved in a particular industry) knew about the defect, and hence did not expect the product to be safe – what matters is what the general public expected of the safety of the product:

In A v National Blood Authority,\textsuperscript{185} although there was no public understanding or acceptance of the infection of transfused blood by Hepatitis C, doctors and surgeons knew, at the time, of the risk of contamination of blood by the hepatitis virus, despite screening, but did not tell their patients unless asked, and they were rarely asked. Despite that sector knowing of the risk and not expecting blood stocks to be necessarily uninfected, the risk was not known or accepted by society at the time.

Also, when assessing the public’s legitimate expectation about the safety of a product, the question is not what the public actually expected of the product, but what they were entitled to expect, according to A v National Blood Authority.\textsuperscript{186} There may be a difference between those two measures, where, say, it is a brand new product, of which the public has no actual expectation of safety, but where the law will impose some legitimate expectation as to the safety expected of that product.

Hence, where the court, in Richardson v LRC Products Ltd,\textsuperscript{187} considered only what the public actually expected (of a condom – ‘naturally enough, the users’ expectation is that a condom will not fail’), that approach was disapproved of in A v National Blood Authority,\textsuperscript{188} because the wrong question was asked. Burton J commented that the Richardson court ‘does not then appear to have gone on to consider the actual question, being whether they were entitled so to expect … in any event [the court] concluded, without consideration of the issue of legitimate expectation, that the claim failed’;

iii. the level of knowledge about risk which was in the public domain is very relevant, when assessing whether a product was defective, and what the public was entitled to expect of its safety. Products fall along a spectrum of risk.

Products that are obviously dangerous, with inherent risks that are unavoidable (such as a knife, guns, poison, tobacco, or alcohol), are not defective under the CPA. They are dangerous,
but the consumer fully knows the risks which they pose, and has a free choice whether to expose himself to such inherent and obvious risks (per *A v National Blood Authority*[^189]), provided that it is an informed choice (i.e., that C does not lack capacity) (per *Bogle v McDonald’s Restaurants Ltd*[^190]).

On the other hand, products which do not have risks which are known to the public (e.g., the blood and blood products in *A v National Blood Authority*) are treated quite differently, because in the absence of knowledge and/or appreciation of the risk, the public will be taken to have been entitled to expect that the product was safe.

Hence, the level of knowledge of the risks which was in the public domain is very relevant, when assessing whether a product was defective under s 3.

iv. Some Member States (e.g., Italy and Spain) chose to implement the Product Liability Directive by distinguishing between standard and non-standard products, and by providing that non-standard products will automatically be defective. A non-standard product was defined by Burton J, in *A v National Blood Authority*,[^191] as a product which is different from a standard product, because it was deficient or inferior in terms of safety from the standard product; and where it was the harmful characteristic in the non-standard product which distinguished it from the standard product, and caused C damage. A standard product, on the other hand, is produced as one of a series, and which operates precisely as intended or desired by producer D.

However, as Burton J noted[^192], there is no such distinction drawn in the CPA, and besides, no clearcut designation should be drawn judicially either. A standard product could feasibly be defective, if it was unsafe, or at risk of being unsafe – a standard product would have to be compared (if at all) with other products on the market. However, to prove that a standard product was unsafe would require that some defect in its design or in its systemic manufacture had infiltrated every single standard product, so that every one of D’s products was subject to the same risk of defect. On the other hand, a non-standard product would be defective if the design of the standard product (with which it was compared) was safe, but some isolated manufacturing defect or production error rendered the non-standard product unsafe.

In *A v National Blood Authority*,[^193] held: the infected bags of blood were non-standard products, because they were different from the norm which D intended for use by the public. Where one tyre in one million is defective because of an inherent occasional blip in the strength of the rubber’s raw material, that is a non-standard product too. Where, due to non-negligent quality control, a caterpillar identical in colour, size, density and weight to the peas in a tin, survived the manufacturing process in one out of three million tins, the affected tin would be a non-standard product. For the intended use, most of the bags, tyres and tins would cause no injury, unlike the culpable one-off.

However, any distinction between a standard product which has a design defect, and a non-standard product afflicted by a one-off manufacturing defect, has not been judicially embraced. Rather, the emphasis in the case law has been placed upon the various indicators as to what the public’s general expectations as to safety entail.

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[^189]: [2001] EWHC 446 (QB) [13].
[^190]: [2002] EWHC 490 (QB) [73].
[^191]: [2001] EWHC QB 446, [36].
[^192]: *ibid*, [38]–[40].
[^193]: *ibid*, [65].

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consumption typically gives rise to a general expectation by the public that such an injury will be warned about.

If the warnings provided with D’s product were clearly legible and visible, contained all unambiguous and clearly written material necessary to convey both the warning, and the action required on C’s part to avoid or to reduce the risk of injury, then D will have done all that the public, using that product, were entitled to expect. Furthermore, when deciding whether the legitimate expectations of the public were met by the product, the court will consider the gravity of the injury, should it occur, and the patency or latency of the danger posed by the product. The more serious the injury, posed by a latent danger, the greater the expectation that a suitable warning would be given under s 3(2)(a). However, obvious or patent risks do not need to be warned about – and the fact that warnings about obvious risks were added by D to the product at some date after C’s accident does not necessarily point to a defective product prior to the warnings being added.

In the following cases, instructions and warnings accompanying the product were inadequate to meet the public’s expectations, and the products were defective under the CPA:

In *Palmer v Palmer*,⁹⁴ Kylie Palmer, C, 6, was a front-seat passenger in a car which crashed, due to an epileptic fit suffered by her father, the driver (who died). C was injured by a seatbelt which had a degree of slack that allowed her to move sufficiently to crash her head against the dashboard, and suffered severe brain damage. C was wearing a seatbelt fitted with a device known as a Klunk Klip, fitted by its previous owner, and manufactured by PZ Products Ltd, D. The device was intended to introduce slack into a seatbelt with a view to making it more comfortable. However, the Klunk Klip was a defective product. It had the tendency to lull some members of the public to introduce excessive slack; the instructions issued by D with the product were incomplete, in that they failed to notify the user of the need to disengage the Klunk Klip at the outset, and therefore introduce excessive slack; and what may seem to a user to be safe and reasonable in terms of slack may, in fact, be life threatening for a passenger such as C, in the event of a serious impact. The Klunk Klip compromised the operation of an essential safety feature of the seatbelt, in ‘an insidious fashion' which users could not know to be dangerous. In *Abouzaid v Mothercare (UK) Ltd*,⁹⁵ facts previously, the elastic strap used to fix the Cosytoes fleece to the pushchair was defective, because of the risk of losing control of the elastic strap at a time when it was stretched, and the eye was in the line of recoil. D gave no warning that the user should position himself to avoid that recoil. Given the vulnerability of the eye, and the serious consequences from a blunt injury to the eye, a warning should have been given to avoid recoil to the eyes, and some non-elasticated method of attachment could have been used.

However, in the following cases, the warnings given (if any) were sufficient in all the circumstances to meet the public expectation of safety, and the claim under the CPA failed:

In *Worsley v Tambrands Ltd*,⁹⁶ Alison Worsley, C, suffered from toxic shock syndrome (TSS) from tampon use, and was admitted to hospital in a near fatal condition, but fortunately recovered. C sued the manufacturer of the tampon, Tambrands, D, for breach of the CPA. According to the court, ‘[t]his case turns on the nature and extent of the warning and information accompanying the relevant tampons. Were they adequate to warn [C] of the potential risk associated with tampon use,
having regard to the nature of the risk and the potentially life-threatening consequences of TSS?’. C alleged that D's information and warning leaflet in each box of tampons issued in the UK was designed in such a way that it did not have a sufficient impact upon her, whereas warnings issued by D on their products marketed in the US were more prominent and informative. C argued that D ought to have foreseen that the leaflet could be thrown out, and that a full health warning should have been printed on the box. However, the tampon product was not defective. That C inexplicably failed to remember the contents of the leaflet as to the onset of TSS, having used the product for 20 years, did not render the box or the leaflet defective. D had put a clearly legible warning on the outside of the box directing the user to the leaflet; the leaflet was legible, literate, and unambiguous, and contained information about warnings and what to do if any symptoms manifested. Hence, D 'had done what a menstruating woman was, in all the circumstances, entitled to expect', via its warning, and that D 'cannot cater for lost leaflets or for those who choose not to replace them'. In Bogle v McDonald’s Restaurants Ltd, facts previously, some of the claims in the group action pre-dated 1995. In that year, D’s cups had printed on their sides the words: “Caution: Hot!” and “Caution: Contents Hot!” The cups were not defective under the CPA, whether with or without the warning. Persons generally expected tea or coffee purchased to be consumed on the premises to be hot and for D to take some precautions to guard against the risk of spillage, but not to post warnings as to the obvious risk of scalding.

Where C ignores product warnings altogether, then that may have two legal consequences: either the product will not be considered defective at all (because the product will have met the public’s expectations as to safety nevertheless, as Bogle demonstrates), or the defence of contributory negligence (or perhaps even of volenti) may be invoked (discussed later).

**Element #2: The defect wholly or partly caused C’s damage**

As reproduced earlier, s 2(1) requires that C’s ‘damage is caused wholly or partly by a defect in a product’. With no further provisions governing causation in the CPA, the ordinary principles have been applied, but with some adjustments to fit the context.

$DP.36$ C must prove that the defect in the product caused C’s damage, on the balance of probabilities. However, the predominant judicial view is that C is not required to prove the cause of the defect itself, or (perhaps) even precisely how or when that defect arose in the product.

**General principles**

The burden of proving that the defect in the product caused C’s damage lies on C, to the normal civil standard (it is not for D to prove that the cause of C’s damage was something other than a defect in the product).

Supposedly, as the County Court pointed out in Foster v Biosil, the Product Liability Directive which was implemented by the CPA only replaced negligence with strict liability, in that C did not have to prove a lack of reasonable care in the manufacture of the defective product – but causation was unaffected by the Directive. Undoubtedly, causation is a key element which typically renders claims under the CPA difficult – because where a product has allegedly caused C injury or loss, then other possible causes for that injury or loss are also likely to be ‘in the
mix’. Indeed, where C is involved in an accident, it is quite common to allege that the fracture or defect evident in the product actually occurred in the accident itself, and was not present prior to that accident. It will be for C to prove that it was a pre-existing defect, if he can.

In *Love v Halfords Ltd*, Joseph Love, C, 19, bought a new mountain bike from Halfords, D, together with a 3-year maintenance plan. He returned it for a routine after-sales service, and nothing untoward was found. Several months later, he was riding the bike on a tarmac cycle path when the steerer tube in the mechanism of the bike fractured, causing him to fall off, striking his face on a sharp metal stanchion. C lost an eye and suffered very serious injuries. C alleged that the tube fractured because it was defective. **Held**: causation failed. There were two other explanations which were likely to be the probable cause/s of the accident. First, on some prior occasion, the steerer tube was bent in a high-velocity accident, and was incompetently repaired and weakened by an attempt to re-straighten it. Secondly C’s loss of control was not caused by any component failing, but because he was riding quickly to catch up to a friend, and the steerer tube was fractured in the accident.

In accordance with the usual principle, and as discussed in Chapter 8, the causal link must be proven on the balance of probabilities. The extent to which the exceptional theorems of causation may be relied upon under the CPA is not entirely clear, but the ‘doubling the risk’ test has been applied.

In *XYZ v Schering Health Care Ltd*, the preliminary issue for decision was whether a second generation of oral contraceptives more than doubled the risk of causing deep vein thrombosis or cardiac pulmonary injury that was created by the first generation of oral contraceptives for the women who used them. It was common ground, agreed between the experts and endorsed by Mackay J, that, if Cs in this group litigation could not establish ‘the double the risk’ test, their claims under the CPA were doomed to fail. **Held**: the claim under the CPA failed, because causation failed. C could not prove that the oral contraceptive pill more than doubled the risk of injury to the women who used it. The second generation of contraceptives did not create a significantly greater risk (they did not double the risk) than the risk created by the first generation of contraceptive pill. Epidemiological studies varied between showing no elevated risk and raising the risk of injury of up to 1.7 times only. No studies showed a ‘double the risk’ of injury caused by the second generation pill. Therefore, the actions failed.

The principle of an intervening act may apply, to sever any link between D’s defective product and C’s damage, in accordance with the usual principles governing causation. Two cases may be contrasted:

In *Richardson v LRC Products Ltd*, facts previously, re the failed condom case, Mrs Richardson, C, was aware that there was a ‘morning after’ pill, but failed to take any steps to seek medical or chemist advice within the 72-hours available for its effectiveness. **Held**: the CPA claim failed. Causation failed. Given C’s knowledge, she had failed to act reasonably to avoid an unwanted pregnancy. C could not recover damages for a tort which could have been avoided, if she had sought and followed reasonable medical advice.

In *Palmer v Palmer*, facts previously, **held**: the CPA claim succeeded, and causation proven. Kylie Palmer, C, who suffered brain damage from the car accident, was injured by a seatbelt which

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198 [2014] EWHC 1057, [49]–[52].
199 *Sienkiewicz v Greif (UK) Ltd* [2011] UKSC 10, [2011] 2 WLR 523, [4], [72].
200 [2002] EWHC 1420 (QB) [343]–[345].
201 [2006] PIQR P164 (QB) 172.
202 [2006] EWHC 1284 (QB, Admin) [93].
had too great a degree of slack because of the Klunk Klip device. The slack was inadvertently introduced by C’s mother, who fixed the seatbelt over C. Mrs Palmer did not adjust the Klunk Klip device for C, or if she did, the slack was concealed when she fastened C’s seatbelt. If Mrs Palmer did not notice the slack, that was due to the defect in the Klunk Klip device, and not due to any wrongdoing on Mrs Palmer’s part.

However, one of the conundrums under this element of a CPA claim is whether C must prove that the defect caused his damage, or whether C has to prove the cause of the defect too (a much harder challenge).

**Cause of the damage versus cause of the defect**

The predominant judicial view is that it is not necessary for C to prove the cause of the defect in the product, or even to specify precisely how that defect arose. A product is defective if it does not provide the safety that the public is generally entitled to expect, and what is necessary, under s 2(1), is that a link between the defect and the damage is proven.

Hence, in that regard: ‘[i]n determining whether the loss or injury has been caused by a defect or by some other cause ... the task of the court is simply to determine whether the loss was caused by the defect, and not by another cause’ (per Thomas LJ in *Ide v ATB Sales Ltd*). That means that, in a CPA claim, it is not necessary to prove the actual cause of the defect, nor how or when that defect arose (again stated by Thomas LJ in *Piper v JRI (Manufacturing) Ltd*). Earlier, in *A v National Blood Authority*, Burton J adopted this statement as a correct summary of the position:

> The claim is based simply upon the product being defective ... *What made it defective is not, in the end, of relevance*: it is simply that it does not provide the safety which a person is entitled to expect, just as if it were not of merchantable quality or were unfit for its purpose ... The damage to be compensated to [C] is the damage caused by a defect in a product.

The point directly arose for discussion again subsequently in *McGlinchey v General Motors UK*, where car manufacturer D argued that it was a ‘fundamental problem’ with C’s case that she could never identify the precise nature of the defect which caused the handbrake of her car to fail, and that it was not sufficient merely to prove that the handbrake did not work on this occasion: ‘[t]hat approach is not permissible. [C’s] case had to be tested on the premise that she had to prove that there was a defect in the grip, which caused a “tooth on tooth” application, which, in turn, led to the accident.’ However, the Scottish Inner House did not agree with that submission. Instead, it held that, ‘[t]here will be cases in which the failure of the product to act in a particular way will lead inevitably to the inference that a defect of some sort must have existed ... in such cases, [C] may not have to prove the precise mechanism of how the defect led to the failure.’ The court accepted that, if a handbrake, when properly applied, did not engage at least the rear brakes of the car to stop it moving, then it would be defective, on the basis that the public are entitled to expect that handbrakes do perform this function and should not, suddenly and without warning, fail.

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203 [2008] EWCA Civ 424, [7], [19].
204 [2006] EWCA Civ 1344, [30].
205 [2001] EWHC 446 (QB), [2001] 3 All ER 289, [14] (emphasis added), [178], adopting C’s submissions as the preferential position.
206 [2012] CSIH 91, [28], [39].
Even more recently, in *Hufford v Samsung Electronics (UK) Ltd*,\(^{207}\) the court confirmed that broad, non-specific approach, although importantly, the case illustrated that even such a principle may not save C’s case. Grant HHJ expressly relied on *Ide*, to hold that C ‘does not have to specify or identify with accuracy or precision the defect in the product he seeks to establish, and thus prove. It is enough for C to prove the existence of a defect in broad or general terms, such as “a defect in the electrics of the Lexus [car]”’.\(^{208}\) However, on the evidence adduced, it was equally as likely that the fire which damaged C’s kitchen could have started outside the fridge, than that it started within the machinery compartment at the rear of the fridge (as C had contended), and hence, C was unable to prove the existence of any defect in the fridge.

Hence, whilst there are some judicial statements to the contrary, which indicate that C has to prove both the fact of the defect and *its precise cause* (per *Foster v Biosill*\(^{209}\)), that is not the prevailing view under the CPA. However, albeit that C’s task is made somewhat easier in that respect, causation may still fail.

**No ‘Sherlock Holmes’ approach, where alternative causes alleged**

SDP.37 If all the explanations for how C’s damage may have occurred are ‘extremely improbable’ or ‘virtually impossible’, then C cannot prove causation, and the CPA claim must fail. It is not appropriate to apply ‘the Sherlock Holmes approach’, and conclude that, having ruled out all the impossible explanations, then whatever is left, however improbable, must be the probable cause.

Where C suffers damage following the use or consumption of a product, then the court is often confronted with choosing between various innocent, culpable, and downright unlikely explanations for that damage. Where there are two competing theories as to what caused C’s injury, neither of which is improbable, then the court is permitted to rank those causes in terms of probability, and conclude that one was more probable than the others, and hence, was the probable cause of the event. As Thomas LJ pointed out in *Ide v ATB Sales Ltd*,\(^{210}\) competing explanations as to how the damage came about are frequently put forward, neither of which is improbable; and having rejected one explanation, it is safe for the court to accept the other as being the effective cause *on the balance of probabilities*.

In *Ide v ATB Bates Ltd*, facts previously, one explanation for the fracture in C’s handlebars is that it was caused when C lost his balance in some way and fell off the bike, and the handlebar was fractured, either because C fell hard upon it, or the handlebar hit the ground hard, or a combination of the two (i.e., the handlebar fractured after C lost control, and during his fall). The other possibility was that there was a defect in the handlebar, the result of either manufacturing or fatigue, causing the handlebar to fail when a normal load was applied to it (i.e., the handlebar had a defect causing it to fracture prior to C’s losing control of his mountain bike). **Held:** the CPA claim succeeded; causation proven. The innocent explanation could not prevail, because C had the bike regularly maintained, and there was no suggestion of misuse or damage. The probable cause of C’s losing control and falling off was that the handlebar was defective, and in a weakened state because of the manufacturing fault or fatigue. In *Lexus Financial Services t/a Toyota Financial Services (UK) plc*

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Defective products

on a snowy night, there was a fire at Mrs Russell's, C's, garage, which destroyed her Toyota Lexus sports utility vehicle, another car in the same garage, and two cars parked outside the garage. There were three possible causes of the fire. First: an arson attack, which was described as 'unlikely in the extreme', and ruled out as highly improbable. No arsonist's equipment or materials were found, it was a low crime area, and no motive or culprit was ever pointed to. Secondly: a defect in the electrical wiring in the garage, which was described as possible, because very occasionally, domestic wiring may catch fire as the result of some fault. Thirdly: a defective electrical system in the Lexus vehicle was possible; witnesses stated that the fire was 'pouring' and 'crawling' over the Lexus; and the fire damage started in the Lexus. Held: the CPA claim succeeded; causation proven. Although both defective wiring in the garage or in the Lexus were uncommon causes of fires, both could have been a cause; neither was improbable. Hence, it was legally necessary to analyse as between the two, which was the stronger probability – and that was the Lexus electrical system.

However, if all the explanations for how C's damage may have occurred are 'extremely improbable' or 'virtually impossible', then the court cannot apply 'the Sherlock Holmes approach', and conclude that, having ruled out all the impossible explanations, then whatever is left, however improbable, must be the probable cause. A judge cannot 'fall into the trap' of eliminating improbable causes until he is left with the 'least unlikely cause' as being the cause. Rather, the correct approach ('the Popi M approach') is to say that it is not safe for a court to choose between highly improbable causes, and say that the 'least improbable' must have been the cause; rather, the correct conclusion is that C has not proved his case. Something caused the damage, but it is not known what that cause was. Although Popi M was an alleged negligent-failure-to-maintain-a-ship case, the problem has manifested in the context of a CPA claim too.

In Popi M, a cargo vessel sank in calm weather. The shipowners, C, claimed against underwriters. The question arose, why did it sink? One explanation was that a hole in the side-plating of the vessel had been caused by contact with a submerged and moving submarine. A second explanation was that it sank because of an ingress of sea-water through a hole in the side-plating which had arisen through wear and tear (because the vessel had been unseaworthy). Held (first instance, and CA): the submarine explanation, whilst 'extremely improbable', must be the reason, because the other explanation of wear and tear was ruled out as being so improbable as to be almost impossible, that it had to be rejected. Held (HL): causation failed. A trial judge was not compelled to choose between two theories, both of which he regarded as extremely improbable; he could simply decide the case on the basis that C had not proved his case. Also, the concept of proof on a balance of probabilities had to be applied with common sense – if the judge concluded that the occurrence of an event was extremely improbable, a finding by him that it nevertheless was more likely to have occurred than not, did not accord with common sense. There was a third legal alternative – that the evidence left such doubt as to the cause of the hole in the ship's hull, that C had failed to discharge

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206  Defective products

211  [2008] EWCA Civ 424. This case was heard together with Ide v ATB Sales, because the same issue of causation arose in both – '[i]n each case, the sole issue before the court was whether [C] who had suffered the damage could prove, on a balance of probabilities, that a defect had caused the damage sustained; each [D] contended that the judge had adopted a train of reasoning which the House of Lords made clear in The Popi M was impermissible' (at [1]).


213  The 'Sherlock Holmes approach' was adopted by the trial judge Bingham J (as he then was), and confirmed unanimously by the Court of Appeal (Sir John Donaldson MR, and O'Connor and May LJJ).
the burden of proof which was on them, re the cause of the sinking. In *McGlinchey v General Motors UK*, Lesley-Anne McGlinchey, C, parked her Vauxhall on a 4.4 degree gradient, and put the hand-brake on, but did not leave the car in gear. C got out and went around the back to let her dog out for a walk, when the car rolled backwards, causing her injury. **Held:** the CPA claim failed; causation failed. One explanation was that C did not apply the handbrake properly, which was remote, given that the car did not move backwards immediately. Another explanation (the defective product one) was that the pawl did not engage with the ratchet teeth, sitting 'tooth-on-tooth', but that was described as 'remote' and 'implausible'. A third explanation was that C somehow achieved an unengaged state in the handbrake by the way that she pulled it on, without any defect being present, but that was also very unlikely. This was an instance where all the explanations were implausible (on the evidence adduced at first instance), and hence, C had not proven her claim under the CPA.

**Remoteness difficulties**

As mentioned previously,\(^{214}\) the fact that the damage suffered by C was unforeseeable is no bar to recovery under the CPA. As Chadwick LJ put it, in *Abouzaid v Mothercare (UK) Ltd*,\(^ {215}\) '[i]t is important to keep in mind … that the question under s 2(1) of the Act is “how was the damage caused”; the question is not “was the cause of the damage foreseeable”.' In other words, in that case, once the court was satisfied that the damage to C's eye was caused by ‘features inherent in the Cosytoes product’, i.e., in the features of the fleecy-lined bag, the metal hook and the elastic strap, then the other key enquiry was whether or not the safety of that product which contained those features was such as persons generally were entitled to expect.

A query arises, however, as to what the position is, under the CPA, if C puts the product to an entirely unintended use. It will be recalled\(^ {216}\) that a key element of the *Donoghue v Stevenson* principle is that the consumer, C, must have used D’s product as it was intended to be used, in order for D to be liable in negligence. However, the position under the CPA is not entirely clear. Suppose that C stands on the roof of a soft-roof car to retrieve a ball that has been kicked upwards and comes to rest in a house gutter; the car roof was perfectly sufficient as a protective roof for the vehicle, but it will not withstand C’s weight, and C is hurt in some way when he plunges through the car's roof. Given Chadwick LJ’s comments above, it is hypothesised that: (1) if the car roof was strong enough for the purposes for which it was intended (e.g., to withstand the forces and elements of the weather), then it will contain features such as persons generally were entitled to expect, and no claim under the CPA will be possible; but (2) if the car roof contained some weakness that would not have withstood the forces to which a car roof would ordinarily be put, then it will be defective, C’s damage will have been caused wholly or partly by that defect, and D will liable under the CPA, regardless of whether the car roof was put to an entirely unintended use by C (and subject to any finding of contributory negligence against C in such a scenario).\(^ {217}\)

**Element #3: Relevant damage suffered by C**

§DP.38 C may recover damages for death, personal injury, or any loss of or damage to any property under the CPA, subject to certain statutory limitations. However, common law-type restrictions

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\(^{214}\) Cross cite p 153.  
\(^{215}\) (CA, 21 Dec 2000) [38].  
\(^{216}\) Cross cite p 166  
\(^{217}\) The author wishes to acknowledge her gratitude to her colleague, Mr Ian Yeats, for interesting discussions about this issue and the hypothetical example.
may apply under the CPA in respect of the recovery of damages for pure economic losses and for pure mental injuries.

Section 5(1) of the CPA articulates what ‘damage’ is compensated in a claim brought under the Act – ‘death, or personal injury, or any loss of or damage to any property (including land).’

Express restrictions on damages
Parliament saw fit to impose some statutory limitations upon the type of damage recoverable, and case law has also interpreted the recovery of damages restrictively. The limitations upon the type of recoverable damages consist of the following:

- any damage to property caused by the defective product must be property ‘ordinarily intended for private use, occupation or consumption’, and further, C must intend the damaged property to be mainly for his ‘own private use, occupation or consumption’ (per s 5(3)(a) and (b)). Hence, the protection of the CPA deliberately excludes commercial losses suffered by business entities. The CPA (and the Directive which preceded it\(^{218}\)) are directed towards consumer claims (e.g., the bicycle owner, the tampon user, the cigarette smoker). Where business entities suffer losses from defective products being supplied to them solely (or mainly) in the course of their business, the principle in Donoghue v Stevenson will be that C’s recourse (as in, e.g., Linklaters Business Services v McAlpine Ltd\(^{219}\) and in Finesse Group Ltd v Bryson Products\(^{220}\)), and not a CPA claim;
- a minimum threshold of damage per C applicable under the Act is £275 (per s 5(4)).

Economic losses
Section 5(1) does not refer to damages for economic loss being recoverable. However, economic losses which are consequential or parasitic upon damages for personal injury were cited by Burton J in A v National Blood Authority\(^{221}\) as being recoverable (approving C’s contention) – which could cover, e.g., medical and other expenses incurred by way of special damages, and lost earnings (both past and future) arising from C’s personal injury.

It will be recalled (from Precondition #1) that the cost of replacing the defective product itself is barred by s 5(2), mirroring the common law, and requiring a distinction to be drawn between damage to the defective product (irrecoverable) and to other property (recoverable).

As discussed previously in the chapter,\(^ {222}\) pure economic losses arising from the use of a defective product are not recoverable under the principle in Donoghue v Stevenson, and in light of the wording of s 5(1), this position seemingly applies under the CPA too.

In addition, certain common law restrictions on recovery of economic losses may apply. For example, in Richardson v LRC Products Ltd,\(^ {223}\) it was confirmed that the principle in McFarlane v Tayside Health Board\(^ {224}\) – that the costs of raising a child, following a failed sterilisation procedure, are not recoverable as a matter of policy – applies equally to claims under the CPA as in negligence.
Pure mental harm
As a preliminary point, it will be recalled, from Chapter 5, that where pure mental harm is incurred by C, then the general rule in English negligence law is that only mental harm which qualifies as a recognised psychiatric injury is recoverable. That scenario appears to be repeated under the CPA, given that ‘personal injury’ is legislatively stated therein to include ‘impairment of a person’s … mental condition’ (per s 45(1)). This statutory phrase mimics the legislative wording in the Limitation Act 1980, s 38(1), which Lord Lloyd called, in Page v Smith, a ‘working definition of personal injury’, and in which case the House of Lords reaffirmed that English law required proof of some psychiatric injury of a higher order than mere mental distress. On the other hand, for mental harm which is consequential upon physical injury brought about by C’s use of the defective product, distress and anxiety will be claimable as heads of damage associated with that personal injury.

So far as the author’s searches can ascertain, no case under the CPA giving rise to pure mental injury has yet arisen. Presumably, however, if C were to be psychiatrically-damaged upon seeing damage to his property which was caused by a defective product manufactured by D (per Attia v British Gas plc), or if C suffered from psychiatric injury arising from a defective product which did not cause physical injury immediately, but gave rise to the fear of what disease or impairment may occur in the future (per Creutzfeldt-Jakob Disease litigation; Group B Plaintiffs v Medical Research Council), then were those cases to succeed as defective products under the CPA, in respect of the defective gas heating and contaminated HGH respectively, the mental injuries from which C suffered would potentially be recoverable under s 45(1).

However, the position under the CPA, were a bystander to suffer psychiatric injury from witnessing an accident in which another is injured by D’s defective product, is not clear. There is nothing in the CPA which requires C to be the party who used or consumed the defective product, although clearly that will be the most common scenario. Hence, is a bystander’s mental harm covered by s 45(1)? As mentioned previously, C must have shared a close tie of love and affection with the injured party, per one of the ‘Alcock control mechanisms’, to recover in negligence. However, it is not at all clear whether that (and any other) restrictive control mechanism would also apply under the CPA as a matter of policy, so as to place boundaries around the recovery of damages for mental injury. The Act is silent on the issue. On the other hand, the pro-C strict liability regime imposed on D by the CPA may suggest that it would be anomalous to put similar hurdles in C’s way as he would encounter in a negligence action. Thus far, no case law has provided any guidance on the matter.

STATUTORY DEFENCES UNDER THE CPA

§DP.39 As a quid pro quo for strict liability, D has recourse to a number of possible defences stipulated by the CPA. However, liability arising under the CPA cannot be excluded by contractual term, exclusion notice, or by other means.

226 ibid, 171 (Lord Jauncey: ‘The ordinary emotions of anxiety, fear, grief or transient shock are not conditions for which the law gives compensation’).
Consistently with Art 7 of the Directive, producer D shall not be liable if he proves any one of the ‘statutory defences against liability’. The statutory defences, contained in s 4 of the CPA, are ‘escape clauses for the producer, [with] the onus being upon the producer’ for each of them (per A v National Blood Authority\textsuperscript{229}). However, successful instances of any of these defences succeeding have been very rare.

Notably, D cannot exclude any liability which may arise under the CPA by contract, by notice, or by any other means (per s 7).

**Compliance with mandatory regulations**

§DP.40  D has a good defence, if the defect in D’s product is due to compliance of the product with mandatory regulations issued by public authorities (per s 4(1)(a)).

No domestic case law has yet considered this defence in operation.

**Not put into circulation**

§DP.41  D has a good defence, if D ‘did not at any time supply the product to another’ (per s 4(1)(b)).

This defence requires that D ‘did not put the product into circulation’ (to quote the precise wording of Art 7(a) of the Directive). The defence will apply where the product was circulated without D’s knowledge or authorisation (e.g., where it was stolen, or circulated without D’s consent).

In *Veedfald v Arhus Amtskommune*,\textsuperscript{230} Mr Veedfald, C, required a kidney transplant, and a kidney was donated by his brother. The organ was prepared for transplantation by being flushed with a perfusion fluid. Unfortunately, due to a defect in the fluid, the organ was rendered unfit for transplantation. The fluid had been prepared in D’s hospital, intended for use in another of D’s hospitals where C would be operated upon. D argued that it had not put the product into circulation, because the fluid never left the ‘sphere of control of the unit, consisting of the hospital dispensary and the doctors undertaking the treatment’. **Held:** the defence did not apply. C, by being admitted to D’s hospital to have the operation, had to bring himself within D’s ‘sphere of control’, and that meant that the fluid was ‘put into circulation’.

**Providing the goods in a private capacity**

§DP.42  D has a good defence, if D supplies the product to another person, but did not supply it in the course of D’s business (per s 4(1)(c)(i)), or where D is a producer/own-brander/importer, but his distribution of the defective product was not done with a view to profit (per s 4(1)(c)(ii)).

This defence means that the CPA only exposes business producers/importers/suppliers to liability. A person who sells, distributes or circulates products in a private and non-profiting-making capacity is excused from liability.

Nevertheless, the defence has quite a narrow operation, because of how widely ‘business’ is defined in s 45(1). The definition confirms that those in ‘trades or professions’ are carrying on a

\textsuperscript{229} [2001] EWHC 446 (QB) [48].  
\textsuperscript{230} (ECJ, Case C-203/99, 10 May 2001) [17]–[18].
business; and that the activities of ‘professional or trade associations’, and of ‘a local authority or other public authority’, are carrying on ‘business’ too. They are all excluded from the scope of the defence, and are potentially liable under the CPA for their activities. Moreover, the mere fact that a public authority/governmental entity is providing a non-profit-making service to society does not enable that D to take advantage of the defence.

In *A v National Blood Authority*, facts previously, **held**: D was liable under the CPA. D was required to produce blood and blood products, pursuant to its obligations under the National Blood Transfusion Service, the predecessor to the service provided by D, and had to supply those products to hospitals and patients 'as a service to society'. Burton J held that there was 'no necessary reason why a public authority or a non-profit making organisation should be in any different position [from a profit-making entity] if the product is unsafe'. In *Veedfald*, facts previously, the owner/operator of the hospitals, D, also argued that the defence should apply, where C did not pay for the medical services provided, and where the two hospitals were funded entirely from public funds. **Held**: the defence did not apply. D’s arguments ‘cannot detract from the economic and business character of that manufacture’.

In the absence of any further relevant case law under the defence, it is only possible to speculate as to those parties who could take advantage of this defence. Presumably someone who makes bespoke salad dressings for her friends or work colleagues for no remuneration, or the person who gives home-made Easter chocolates which are contaminated, can take advantage of the defence. Furthermore, where a person sells his unwanted goods in a one-off garage sale or car boot sale, then he is a supplier; and is acting with a profit-making purpose on that particular occasion; but presumably did not supply the goods to the car boot-sale customer in the course of a business, and hence, the defence will apply.

However, for someone who is a manufacturer/producer to whom s 2(2) applies, it is not entirely clear from the wording of the defence whether that person must show both that he did not supply the product in the course of his business and did not distribute it with any profit-making purpose. Arguably, that person can supply something with the intention of making a profit (whether for himself or for another), but not in the course of any business which that person is conducting. For example, what of a mother who prepares jams for a school fete; or a student who makes victoria sponges for a law faculty function in order to raise money for a student law society? Such activities are conducted with a view to some modest profit for the school/university, but are not supplied ‘in the course of a business’ being conducted by the mother or the student. Although the answer is not entirely clear from the face of s 4(1)(c)’s wording, it is hypothesised that the aforementioned parties could bring themselves within the scope of the defence.

### Defect non-existing

D has a good defence, if the defect did not exist in the product at the relevant time (per s 4(1)(d)). The ‘relevant time’ is the date at which the product was put into circulation by D (per s 4(2)).

The defence requires proof that the defect was introduced, or manifested, at some point after D’s manufacturing process ended.

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211 Statutory defences under the CPA

231 [2001] EWHC 446 QB [6], [42]. 232 (ECJ, Case C-203/99, 10 May 2001) [21].

In *Piper v JRI (Manufacturing) Ltd*, C claimed that his hip prosthesis fractured as a result of fatigue failure, arising from a defect in the titanium alloy from which it was made. D, the manufacturer of the prosthesis, argued that the defect did not exist in the prosthesis at the 'relevant time', when D supplied it to the hospital for C's operation, but that the prosthesis failed because it was damaged during the operation. **Held:** the defence succeeded. Certain notches on the prosthesis were caused on its removal, and were not present prior to the operation. Furthermore, ‘this product was subject to vigorous and meticulous process of work and inspection of the highest quality … if a defect of such significance had slipped through the net, it would have required … mistakes or negligence by a number of individuals. On this evidence I am simply not prepared to accept that such a mistake was made with the product. An ultimate failure rate of 5 in some 80,000 supports this point.’ The court was satisfied that the prosthesis left D’s factory without defect.

### The ‘development risks defence’

D has a good defence, if ‘the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect, if it had existed in his products when they were under his control’ (per s 4(1)(e)). The ‘relevant time’ is when the product was put into circulation by D (per s 4(2)).

This defence has been the most controversial, partly because of the way in which s 4(1)(e) was drafted, and partly due to its judicial interpretation. It was not necessary for the defence (contained in Art 7(e) of the Product Liability Directive) to be incorporated in the CPA – the Directive had made the defence optional, per Art 15(1)(b) – but Parliament did so. According to Burton J in *A v National Blood Authority*, the purpose of Art 7(e) was not to discourage or stifle innovation amongst product manufacturers, and hence, producers should not be liable for the development risks that their products contained. Section 4(1)(e) of the CPA sought to transpose that defence, but with some controversy.

Once a risk posed by D’s product is known, or should have been known in light of accessible scientific or technical information, then even if it is unavoidable, the defence in s 4(1)(e) falls away, rendering D liable. In other words, actual knowledge, or discoverability, of the risk (avoidable or unavoidable) which caused the injury to C will lose D the defence. In that event, where a product presents an unavoidable risk, D has three options: (1) withdraw the product from circulation altogether; (2) take whatever precautions he can to prevent the injury to C from arising, or (3) insure against the risk of injury. Of course (as in *A v National Blood Authority*), none of these three avenues may be possible, and yet, still, D cannot rely on the defence. Therefore, s 4(1)(e) has a fairly narrow operation. It ‘protects the producer in respect of the unknown’, but not otherwise (per *A v National Blood Authority*). Indeed, Burton J called the defence, ‘a very restricted escape route, and producers are … unable to take advantage of it, unless they come within its very restricted conditions.’ Known unavoidable risks certainly do not fall within the scope of its protection.

### A disputed transposition of drafting

The issues surrounding the defence become more transparent if its wording is compared with that of Art 7(e):

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233 [2006] EWCA Civ 1344, [22].  
234 [2001] EWHC 446 (QB) [76]–[77].  
235 *ibid*, [49] and [64].
On their face, there are some key differences between these provisions. First of all, typically, D himself will not have actual knowledge of the defect, and so the key question will be whether the defect was discoverable. Art 7(e) suggests that it is enough if it were possible for D to discover the defect, whereas s 4(1)(e) suggests that it must have been reasonable for D to discover the defect. Secondly, whose knowledge should be taken to be discoverable to D? Art 7(e) suggests that it is the knowledge of the scientific community, the world outside of D’s own industry, which is the relevant benchmark – if that knowledge was reasonably discoverable and accessible to D, then the defence will be lost. Section 4(1)(e), on the other hand, suggests that it is the knowledge within D’s industry, amongst those who produce products of the same description as D, whose knowledge is the benchmark. If the industry did not know of the defect, then D has a good defence.

The way in which s 4(1)(e) was drafted was challenged by the European Commission in 1997 in *European Comm v UK*, on the basis that it did not properly transpose Art 7(e) of the Directive. The Commission argued that Art 7(e)’s reference to ‘state of knowledge’ covered whatever was scientifically known, provided that it was accessible at the time that the product was put into circulation – so that the defect, if known to someone outside of D’s industry, say within the scientific community, would lose D the defence. The Commission contended that it was easier for producer D to prove the defence under s 4(1)(e) than what the Directive had intended, because it was enough, under s 4(1)(e), that neither D, nor a reasonable producer of similar products, could reasonably have identified a defect.

Ultimately, the Commission’s challenge was unsuccessful. The ECJ considered that: (1) the wording of s 4(1)(e) did not suggest that the availability of the defence depended wholly upon the subjective knowledge of producer D; (2) the Commission had not pointed to any UK cases in which a purely subjective test (i.e., the knowledge of producer D) had been applied, and hence, there was no judicial decision which had interpreted the CPA inconsistently with the Directive (having said that, there were no UK cases to point to, at the time of this decision!); and (3) UK courts would duly interpret s 4(1)(e) in light of the wording and purpose of the Directive, since that is what s 1(1) of the CPA required courts to do. Furthermore, the ECJ held that it was ‘implicit in the wording of Art 7(e) that the relevant scientific and technical knowledge must have been accessible at the time when the product was put into circulation’, clarifying that it was not enough to prove that the information existed; it must have been reasonably discoverable, to lose D the defence. Hence, s 1(4)(e)’s drafting accorded with that interpretation.

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236 [1997] 3 CMLR 923 (ECJ), with reasoning at [36]–[38], and drawing upon the Opinion of Advocate General Tesauro.
However, whilst the wording of s 4(1)(e) survived this legal challenge (and was not amended in any way after the ECJ handed down its ruling), the fact remains that some uncertainty about the extent of the defence still prevails – a point which was admitted by Mackay J in *XYZ v Schering Health Care Ltd.*

**Key points about the defence**

**Discoverability and accessibility.** To be discoverable, any relevant scientific and technical knowledge has to be reasonably accessible to D, in order that he could have known about it.

For example, if an academic in Manchuria carries out research about a product’s defect and publishes his findings in a Chinese journal, in Chinese, then that study would not be reasonably accessible to a European manufacturer; or if a scientist working in a research laboratory or a research department of a company discovers a product’s defect and shares that knowledge within the laboratory but does not publish it more widely, then it is also inaccessible. D would have a good defence in these scenarios (per examples given in *European Commission v UK* and *A v National Blood Authority*). In the latter, Burton J put the position thus: ‘risk ceases to be a development risk and becomes a known risk, not if and when [D] ... had the requisite knowledge, but if and when such knowledge were accessible anywhere in the world outside Manchuria.’

*Whose knowledge is relevant for the purpose of this defence?* Plainly, D’s own knowledge will always be relevant. When D knows of the risks that manifested in the product, when it was put into circulation, the defence will certainly fail, as it did in both of the following:

In *Abouzaid*, there were no additional information and technological advances about the propensities of elastic, or how it behaves when stretched, that came to light after the injury occurred in 1990. D knew all that there was to know about those propensities, at the time that the injury happened. In *A v National Blood Authority*, the risk of blood contamination was known to D, and known risks could not qualify within s 4(1)(e), even if that contamination was unavoidable in the processed blood, in the absence of any screening tests available in the UK. The risk of infection of blood in some cases by hepatitis virus, notwithstanding screening, was known both within the medical industry and by D itself, at the time of distribution. Hence, D could not take advantage of the protection of the defence.

However, beyond that, the point as to ‘whose knowledge’ has still not, as yet, been dealt with explicitly in any English decision. The ECJ upheld the terms of s 4(1)(e) because it encompassed an *objective* enquiry (and not merely what D himself knew of risks, subjectively), and because s 4(1)(e)’s wording enabled account to be taken of ‘the objective state of scientific and technical knowledge of which the producer is presumed to have been informed.’ However, is D presumed to have been informed of the knowledge possessed by those external, or outside, of D’s industry, provided that such information was reasonably accessible to D? Or is D presumed to have been informed only of the knowledge of risks that is held within the particular industry of which D is a part? Both are objective enquiries, but the second is a less onerous standard, which could feasibly produce a different result. The example given by the Advocate General suggested that it is knowledge available beyond the band of co-producers which is the appropriate...
benchmark: ‘the producer’s conduct should be assessed using the yardstick of the knowledge of an expert in the sector (e.g., if a chemist or a pharmacologist has to keep up to date with the characteristics of a given substance, similar knowledge will be required for present purposes of an industrialist producing pharmaceuticals containing the same substance).’

It is difficult to glean any definitive answer from the English case law to date. In XYZ v Schering Health Care Ltd, Mackay J remarked that one of the ‘key questions’ under the development risks defence is ‘whether it is restricted to what was capable of being discovered about the defect according to the state of technical knowledge prevailing at the time, or does it extend to what [producers in the industry] might reasonably have discovered’. Ultimately, the issue did not require deciding in XYZ, because the combined oral contraceptive pill was held not to be defective. In Abouzaid v Mothercare (UK) Ltd too, the court left open whether Art 7(e) and the defence in s 4(1)(e) entirely mapped each other, referring to their ‘possible differences’. In Richardson v LRC Products Ltd, the court did not shed much light on the question either, with reference to what D ‘could have known, if [D] had consulted those who might be expected to know the state of research and all available literature sources’.

What constitutes ‘scientific and technical knowledge’. It would seemingly not be open to producer D to argue that a public database of comparable product incidents showed no equivalent accident, and hence, that database constituted ‘scientific and technical knowledge’ within the meaning of s 4(1)(e), so that the absence of any such information about comparable accidents meant that D could rely on the defence. That argument was tried in Abouzaid v Mothercare (UK) Ltd, with the Court of Appeal unwilling to accept it. Pill LJ stated that, ‘I am very doubtful whether ... a record of accidents, comes within the category of “scientific and technical knowledge”. The defence contemplates scientific and technical advances which throw additional light, for example, on the propensities of materials and allow defects to be discovered.’

As a final point, the Law Commission of England and Wales (EWLC) was not in favour of a development risks defence, when it considered the topic of product liability almost 40 years ago, and their views bear noting, for these views continue to resonate with some commentators and judges to this day:

**Law reform corner: Development risks defence**

In Liability for Defective Products, the EWLC invited comments as to whether there should be a defence ‘that the product was as safe as the state of the art would allow at the time of production, so as not to discourage producers from developing new products.’ It concluded that there should be no such defence, for the following reasons:

- development risks were the principal risks which strict liability was intended to cover, so that to allow the defence would weaken the concept of strict liability considerably;
- in many cases where there were development risks in the product, the product would not be defective anyway, because it would be as safe as people would generally be entitled to expect;
- however, where a product turned out to be unsafe (citing Thalidomide), then C should be compensated.
The defect was attributable to the design of a subsequent product

§DP.45 D has a good defence, if D's product was incorporated in a ‘subsequent product’ which is defective, and where the defect is ‘wholly attributable’ to the design of the subsequent product or to the instructions given by the producer of the subsequent product to D (per s 4(1)(f)).

No case has thus far considered this defence.

Contributory negligence

§DP.46 Contributory negligence is available to producer D as a defence (per s 6(4)).

The partial defence of contributory negligence, available under the Law Reform (Contributory Negligence) Act 1945, applies to a CPA claim, where the damage to C is ‘caused partly by a defect in a product and partly by the fault of [C]’ (per s 6(4) of the CPA).

The fact that the consumer/user of a defective product can be held to be partially responsible for his own misfortune, where manufacturer D is strictly liable for producing a defective product which has harmed C, may seem somewhat anomalous. If fault does not matter to render D liable, why should it be relevant to C's conduct either? However, the availability of the defence is consistent with the tort of breach of statutory duty, where regardless of the fact that liability can be strict under that tort, the defence is available to D. However, the case law thus far demonstrates that the defence has not been much judicially favoured.

In McGlinchey v General Motors UK,249 facts previously, Ms McGlinchey's, C's, failure to leave the car in gear would have given rise to a finding of 10% CN, had D been liable under the Act (which it was not). In Abouzaid v Mothercare (UK) Ltd,250 a finding of CN against Iman, C, was rejected altogether at trial, and was not appealed.

Volenti

§DP.47 The defence of volenti is not cited in the CPA, rendering its availability unclear.

As considered earlier in Chapter 10, the availability of this defence is very rare in the tort of negligence, given its elements, and its all-or-nothing outcome. In light of the nature of strict liability culpability, noted above, it would seem to be even less likely that the unsympathetic defence of volenti should deprive C of compensation altogether.

However, the CPA says nothing about the defence, and hence, it has not been barred by the Legislature. The English Law Commission certainly favoured its retention:

Law reform corner: Volenti

In Liability for Defective Products,251 the EWLC declared that volenti should be available to a regime imposing strict liability for defective products, for the following reasons:

- many drugs relieve pain and illness, but can bring on unpleasant, even dangerous, side-effects. Provided that suitable warnings have been given to C about those, and that C


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was willing to assume those risks and proceed in any event, ‘it would be wrong to allow him to claim compensation in respect of a risk that he willingly assumed’;

- where C has wilfully misused a product, so that he deliberately and consciously ignored either instructions or warnings about the proper use of the product, then the defence should apply.

So far as the author’s searches can ascertain, however, *volenti* has never been successful in a CPA claim.

**SCHEDULE OF RELEVANT POST-CPA CASES**

<table>
<thead>
<tr>
<th>Case</th>
<th>CPA</th>
<th>Negligence</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>McGlinchey</em></td>
<td>failed</td>
<td>pleaded, but not considered</td>
</tr>
<tr>
<td><em>Lexus v Russell</em></td>
<td>succeeded</td>
<td>not pleaded</td>
</tr>
<tr>
<td><em>XYZ v Schering</em></td>
<td>failed</td>
<td>not pleaded</td>
</tr>
<tr>
<td><em>Tesco v Pollard</em></td>
<td>failed</td>
<td></td>
</tr>
<tr>
<td><em>Carroll</em></td>
<td>N/A (events preceded its enactment)</td>
<td>succeeded</td>
</tr>
<tr>
<td><em>Divya</em></td>
<td>N/A (CPA claim ‘was not available’)</td>
<td>succeeded</td>
</tr>
<tr>
<td><em>McTear</em></td>
<td>N/A (statutorily exempted)</td>
<td>failed</td>
</tr>
<tr>
<td><em>Abouzaid</em></td>
<td>succeeded</td>
<td>failed</td>
</tr>
<tr>
<td><em>A v National Blood Authority</em></td>
<td>succeeded</td>
<td>failed</td>
</tr>
<tr>
<td><em>Bogle v McDonalds</em></td>
<td>failed</td>
<td>failed</td>
</tr>
<tr>
<td><em>Piper</em></td>
<td>succeeded, but a defence applied</td>
<td>not pleaded</td>
</tr>
<tr>
<td><em>Richardson</em></td>
<td>failed</td>
<td>not pleaded</td>
</tr>
<tr>
<td><em>Love v Halfords</em></td>
<td>failed</td>
<td>not pleaded</td>
</tr>
<tr>
<td><em>Foster v Biosil</em></td>
<td>failed</td>
<td>not pursued</td>
</tr>
<tr>
<td><em>Hufford v Samsung Electronics</em></td>
<td>failed</td>
<td></td>
</tr>
<tr>
<td><em>Palmer</em></td>
<td>succeeded</td>
<td>pleaded, but not considered</td>
</tr>
<tr>
<td><em>Worsley</em></td>
<td>failed</td>
<td>pleaded, but not considered</td>
</tr>
<tr>
<td><em>Ide v ATB Sales</em></td>
<td>succeeded</td>
<td>pleaded, but not pursued</td>
</tr>
</tbody>
</table>

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