|  |
| --- |
| 1. Define the following terms:

• the neighbour principle;• pure economic loss;• defective product;• the ‘state of the art’ defence. |

* The neighbour principle derives from the judgment of Lord Atkin in *Donoghue v Stephenson*. It states that the common characteristic in situations where the law imposes a duty to take reasonable care is that the person (called metaphorically a ‘neighbour’) is someone whom one can reasonably foresee would suffer loss arising from one’s actions unless care is taken to avoid it.
* Pure economic loss is loss which is unaccompanied by any physical damage. Typically in English law there can be no recovery of pure economic loss.
* A defective product is one where the ‘safety of the product is not such as persons are generally entitled to expect’ – s3 Consumer Protection Act 1987.
* Defendants to claims made under the Consumer Protection Act 1987 have a defence, called the ‘state of the art’ defence if they can prove that the state of scientific or technical knowledge at the time they put the product into circulation was such that the existence of the defect could not have been discovered.

|  |
| --- |
| **2.** ‘Since the Consumer Protection Act 1987 there is no need to apply the *Donoghue*principle in English law’.Discuss. |

**Introduction**

As with all essays, you should begin with an introduction that sets out what the question is about, why the topic is an important one, and how your essay will go about answering the question set. By providing an outline structure of the discussion to follow, your essay will be clearer and more structured**.**

The question asks you to identify the key issue – liability for goods which cause damage, to outline the neighbour principle and the ways in which the Consumer Protection Act has changed things. However, the focus has to be on the issue which the question raises, namely whether the problems facing a potential claimant at common law are such that in all cases a claim under the statute will have a greater chance of success than a claim in negligence.

**Background**

You will need to give a context for your answer. Page 489 of *Commercial Law* explains that the normal cause of action where a person suffers damage caused by a where goods cause damage is contractual. You could explain why this is so but need to point out that normally only the contracting party can bring such an action. This then leads neatly into a discussion of liability in tort.

**The Donoghue Principle**

It is important to note why the action in *Donoghue* was brought in tort rather than in contract. You might include here a short explanation of the position in the tort(s) of negligence which applied immediately before *Donoghue* pointing out how the’neighbour principle’ of Lord Atkin became recognised as providing a unifying thread in identifying circumstances when a person has a duty to take reasonable care. However, for our purposes the important issue is that *Donoghue v Stevenson* imposed a duty of care on manufacturers. You should probably make reference to the key passage in Lord Atkin’s judgment in which he explains the limits on that liability.

You might then go on to explain by reference to suitable examples, which you can find on pages 489-493of *Commercial Law,* how these limitations were either abandoned or substantially modified in the succeeding years. This section would end with a summary to the effect that it is now clear that each person in the supply chain of any goods owes a duty of care to anyone who might foreseeably be injured by it.

Two particular issues face a potential claimant;first, whether there has been a breach of the duty, that is to say that liability is dependent on the defendant having failed to take reasonable care to avoid causing damage,and second, proving that the breach caused the loss occasioned by the claimant . Since the question focuses on the hurdles facing claimants any answer must analyse these two issues. This involves discussing the burden of proof, and how a claimant might meet it, both in respect of standard and non-standard products. Any conclusion requires an evaluation of the severity of the problems facing a potential claimant. Certainly in relation to damage arising from a non-standard product, the courts seem to be relatively willing to find appropriate defendants liable, though typically not merely those who are intermediaries in a supply chain. In relation to products which meet the manufacturer’s specification but which nevertheless cause damage the problems are more profound with even conscious design compromises being dealt with sympathetically.

**The statutory scheme**

The statutory scheme adopts a non-fault liability approach subject to limited defences, imposing liability on manufacturers, importers, and ‘own branders’. It is important to point out that such defendants are not liable for all damage caused by a product, but only in respect of defective products and s 3(1) Consumer Protection Act states that this requires that ‘the safety of the product is not such as persons are generally entitledto expect’.

It would be appropriate to discuss here the potential problems facing claimants in showing that a product is defectiveand whether the issues, though different, may in many instances be similar to proving a breach of duty of care, especially in respect of ‘standard products’ by reference perhaps to *Richardson v LRC Products Ltd*, though *Iman Abouzaid*suggests that it may be easierto prove ‘defect’ than negligence. Similarly it might well have been arguable in *A v National Blood Authority* that whilst the defendant had taken all reasonable steps to eliminate hepatitis C from the blood, nevertheless it was distributing a product which was potentially dangerous and even at common law would have been liable by virtue of the absence of appropriate warnings. That said, since the transfusions were administered by medical professionals who were or ought to have been aware of the risks, defendants may have escaped liability by arguing that these professionals ought to have made the patients aware of the risks and obtained an informed consent.

**Is the overlap between the statutory and common law schemes complete?**

* It is worth pointing out that s2(6) of the Act specifically preserves liability under both contract and tort and, although the European Court of Justice has held that theDirective which the Act implements is of ‘maximal’ effect, Art 13 allows fault-based or contractual obligations to co-exist with the Directive. Consequently, a claimant in appropriate cases can bring an action pleaded alternatively in contract, tort, or under the Consumer Protection Act.
* Having outlined the two schemes of liability you are now in a position to specifically consider the question itself. Notwithstanding the discussion above, it does seem that the evidential issues facing a claimant under the statutory scheme, although not to be underestimated, are nevertheless less daunting that those facing a claimant at common law. After all, the claim in *A v National Blood Authority* was solely based on the statute and was not pleaded with an alternative claim in negligence, even though there were some difficult problems to surmount even under the Consumer Protection Act, presumably because the Claimants’ legal team had concluded that such a claim had the best (perhaps only) chance of success.
* However, there are some instances where there is no alternative but to bring an action under the *Donoghue* principle:
	+ In relation to loss of or damage to property the Consumer Protection Act only applies to property ordinarily intended for private useor consumption and which is used by the claimant in that way as s5(3) makes clear. Consequently, the Act does not apply to business property so that, as is pointed out on page 510 of *Commercial Law*, the Act would not apply to cases such as *Aswan* or *Muirhead.*
	+ Under the Limitation Act 1980 the limitation period for personal injury claims is 3 years fromthe date on which the cause of action accrued orthe date of knowledge (if later) of the person injuredwhilst in relation to tort claims for damage to property the claim must be brought within 6 years fromthe date on which the cause of action accrued. Under the Consumer Protection Act claims will be time barred unless brought within 10 years of the date when the product was ‘put into circulation by the defendant’. As the asbestosis/mesothelioma litigation has shown it is possible that a person who has suffered personal injury may remain unaware of it for decades so that where a product causes latent long term injury an action under the Act may be time barred. Similarly, although the 10 years under the Act appears more generous in the case of damage to property, time does not run against a claimant under the Limitation Act where there has been either fraud or deliberate concealment of the loss by the defendant, so even here it is possible to imagine instances where the only cause of action is in negligence.
	+ Although it would be comparatively rare it may be that the most attractive defendant in an action is an intermediate member of the supply chain. Where, for example, if the manufacture was inside the EU but the manufacturer is insolvent and there is no ‘own brander’, then there is no suitable defendant under the Consumer Protection Act. However a member of the supply chain could be made liable in negligence as for example in *Watson v Buckley Osborne & Co* where the importer was insolvent and suing the manufacturer was unattractive since he was resident abroad and enforcing a judgment might prove difficult.

**Conclusion**

* Do not forget to conclude your essay. Here the arguments seem to suggest strongly that the Donoghue principle is still of importance even though the Act imposes a non fault liability on the most likely defendants but it is still worthwhile making this point. You might also briefly refer back to the point that in most instances, especially with the defective standard product there may not be much to choose between proving negligence and proving that there is a defect since any sensible manufacturer will provide appropriate warning labels/literature in relation to risks about which he knows which will ensure that the public expectations of safety will be adjusted downwards while the ’state of the art’ defence will provide a safe harbour in relation to risks about which he could not reasonably know.

**3.** Mobilico manufactures two types of equipment—the Mobo Standard and the Mobo

De-Luxe—which were originally designed as mobility aids for disabled people. Bothtypesof equipment are very effective, but the Mobo Standard can cause disorientation

for the very occasional user, often resulting in that person falling. The company will

give a refund where a user has this problem. The Mobo De-Luxe does not cause this

problem but is three times the price. Mobilico supplies its equipment to two types of

purchaser: Reg, who is a specialist retailer of mobility equipment; and Compo, who

adapts the Mobo De-Luxe and installs it in the cabs of heavy industrial machinery for

the driver to sit in.

Reg sells a Mobo Standard to Consuella, who becomes disorientated, falls, and

is very severely injured. Mobilico supplies an instruction booklet with the equipment

in English, which Consuella finds hard to understand and does not read. Compo

sells an industrial machine to Bigg, but a year after delivery the machine goes out

of control when the driver’s seat malfunctions. The machine itself is destroyed and

this means Bigg’s factory is put out of action for six weeks, with consequent loss of

production. Don the driver is also injured. The Mobo De-Luxe has never malfunctioned

before, but the malfunction may be as a result of a programming error in one of the

computer-controlled welding machines thatMobilico has bought and installed in its factory.

Discuss Mobilico’s liability in tort to Conseuella, Bigg, and Don.

**Introduction**

* + Many students think that only essay questions require an introduction, but this is not so. Answers to problem questions should also begin with a lucid and well-structured introduction that clearly highlights the area (or areas) of law to which the question relates. By doing this, you demonstrate immediately that you have understood the question and have clearly identified the relevant legal topics.
* The key issues here are that the question involves consideration of product liability both at common law and under the Consumer Protection Act.This applies to each of the potential claimants and a sensible structure for an answer would be to take each claimant in turn. In doing this it is usually a good idea to break each potential claim up into its constituent parts considering carefully what a claimant must show in order to succeed.
* Consuella v Mobilico – negligence claim
	+ **Does the defendant owe a duty**?At common law Consuella must show that Mobilico broke its duty as a manufacturer arising by virtue of *Donoghue v Stevenson* to her to take reasonable care and that the breach caused her loss. The burden of proof is on her (see *Grant v Australian Knitting Mills*) to show either that there was a lack of care in the manufacturing process, design or in releasing a product which the manufacturer knew to have the potential to cause damage.
	+ **Has the defendant broken his duty?** In all likelihood the issue here is that the product was properly designed and manufactured (though of course we do not know this) and that Consuella must show a breach of the duty of care in respect of a defective standard product. The mere fact that the manufacturer knew that the product could cause disorientation is not sufficient to demonstrate a breach of duty as *Evans v Triplex Glass* shows and you would need to consider other ways in which Consuella might make her case. For example, whether other similar products from other manufacturers had similar problems so that it was an unavoidable side effect at the price, or whether it was a problem only with this particular design. However remember that the side effect – falling – among the likely consumers of the product – people who have mobility and probably orientation problems – is particularly grave. You should consider therefore whether Mobilico ought to have issued clear warnings about the side effects,perhaps including warnings on the equipment itself and whether it ought to have instructed Reg to specifically draw these to Consuella’s attention before she bought the product. The final point is you might consider is whether the warnings (if any) ought to have been in a number of languages.
	+ **Did the breach cause the damage?** There seems little difficulty in showing that, if there was a breach of duty,ie if the product should never have been marketed or should only have been marketed with adequate safety warnings, the breach caused the loss.
	+ **Are there any defences available to Mobilico?** Assuming Mobilico has broken its duty to Consuella there are no obvious defences, in particular she cannot be said to have consented to take the risk if it was not drawn to her attention whilst if it was adequately drawn to her attention then there was no breach of duty. Any attempt to avoid liability for death or personal injury in any contractual arrangements will be ineffective by virtue of s 2 Unfair Contract Terms Act 1977.
	+ **Is the loss of a recoverable type?** There is no issue here of the loss being purely economic even if Consuella’s primary loss is loss of earnings she has suffered physical injury.
	+ **What remedies are available?** Consuella will be entitled to damages to compensate her for any foreseeable financial loss on normal tortuous principles.
	+ Consuella v Mobilico – claim under the Consumer Protection Act
* **Is Mobilico potentially liable under the Act?** Mobilico is the ‘producer’(defined in s1 as including the manufacturer) of the product and so is a potential defendant by virtue of s2(2).
* **Is the mobility aid a product?** S1 defines a product as ‘any goods’ so that the mobility aid is a product.
* **Is the product defective?** A defective product is one whose safety is ‘not such as persons are generally entitled to expect’ – s3(1). This is clearly a matter of fact which you need to consider but bear in mind for whom the product is intended – might the reasoning in *Imam Abouzaid* be applicable here? So too the presence or otherwise of warnings and the price – see s 3(2).
* The issues of the type of loss and the remedy are identical to those at common law.
	+ Bigg v Mobilico negligence claim
* **Does the defendant owe a duty?**Part of the ‘trick’ in answering problems is to spot where the question is inviting you to repeat yourself and avoid doingso, focussing only on new issues. The issues in relation to the existence of the duty are practically identical to those applying to Consuellain thatMobilico owes a duty to take reasonable care in designing, manufacturing and distributing the product so as not to cause reasonably foreseeable loss or damage.
* **Has the defendant broken his duty?**Here Mobilico had no knowledge that the product could malfunction (very different from Consuella’s situation) so that that the breach has to be proved in respect of a non standard product. The burden of proof is on Bigg to show a breach and as *Commercial Law* notes on pages496, normally the very existence of the defect requires some explanation by the manufacturer and showing an effective quality control system is often not enough see *HiIl v James Crowe (Cases)*. However here the situation is analogous to *Evans v Triplex Glass*where, by virtue of the length of time since the product was supplied and the fact that it has been adapted and fitted into another product, there are plausible explanations for the malfunction apart from negligence by the manufacturer. It may well be that even though as the judge said in *Evans* there is no need to eliminate every possible alternative cause,in reality Bigg will have to show that the defect was caused by defective welding and even then will have to show either that the programming error was Mobilico’s or (and probably this would be very difficult) that they ought reasonably to have checked the programming. Alternatively, perhaps that Mobilco’s did not take care in selecting the supplier and ought to have known that the machinery was substandard. It is worth specifically pointing out how fault-based liability can cause substantial problems for claimants.
* The remaining issues of causation and defences raise no new issues except to say that it is theoretically possible to exclude liability for negligent loss or damage to property though any such clause would have to meet the ‘reasonableness test’ under the Unfair Contract Terms Act 1977.
	+ Bigg v Mobilico claim under the Consumer Protection Act
		- As noted above, the trick is not to repeat yourself, but spot new issues and focus on them. Here there appears at first sight nothing new in relation to liability:Mobilico as manufacturer is potentially liable, the mobility aid is a product and it may well be defective. You need say little more.
		- However there is an issue with whether the damage Mobilico has suffered is recoverable. Certainly there has been physical damage to property belonging to Bigg; it is not just the product which has been damaged so there is no issue of there being pure economic loss only. But under the Act loss in respect of property not ordinarily intended for private use or not mainly so used by the claimant is irrecoverable by virtue of s5 and here Bigg’s machine is obviously for commercial use. Consequently he has no claim – he cannot even claim in respect of the damage to the product alone since although intended for private use Bigg was not using it for this purpose.
		- Dan v Mobilico
* Little more need be added here; Dan is in a similar situation to Consuella. He is making a claim in respect of personal injury like Consuella save that like Bigg he is making a claim in respect of a non standard product with all of the attendant difficulties both in negligence and under the statute. His only advantage over Bigg is that since he is making a personal injury claim he is not barred by s5. Certainly Mobilico is potentially liable by virtue of s 2(2) since it supplied a component of the machine which malfunctioned causing his injury However the problem for Dan is that, assuming he can show that the product is defective he may be met with the ‘state of the art’ defence under s4 and read in the light of art 7 of the Directive on Liability for Defective Products 1985. The issue as so understood and as applied in *A v National Blood Authority* is whether the state of scientific and technical knowledge when Mobilico sold the product to Compo was such that they could not have discovered the existence of the defect particularly as In *European Commission v UK*, the ECJ pointed out that scientific knowledgewhich was not, in practice, accessible could be disregarded. A key issue is how wide this defence is and whether it applies to so mundane an issue as whether a weld was effective or not.

**Conclusion**

* You should always include a short conclusion even to a problem question – one possible point to make might be that it is likely if the claimant would have succeeded under the Act (s)he is probably likely to succeed in negligence as well, particularly if thestate of the art defence is widely interpreted.