PRODUCTS LIABILITY – TIME TO RECONSIDER INTERMEDIATE EXAMINATION*

Table of Contents **Page**

Introduction

M'Alister (Donoghue) v Stevenson[1] is undoubtedly the best-known tort decision in the common law community outside the U.S. It is not far off the century mark in age and is still treated as the

---

*Hillel David, Howard B. Borlack, and M. Gosia Bawolska. Hillel David and Howard Borlack are with McCague Borlack LLP in Toronto. Gosia Bawolska is with Cadence Litigation in Toronto. *In memory of my beloved Marion: HD*.

[1] [1932] A.C. 562, H.L.

foremost authority insofar as the classic duty of care "neighbour principle" is concerned in claims made against the manufacturer of a product which causes harm to an end user.[2] The neighbour principle was, however, qualified in *Donoghue* by a subrule: No duty of care was owed by a manufacturer to the end user of its product if (as currently expressed) "an effective intermediate examination was reasonably probable at the time the product was released by the manufacturer".[3] As originally stated, the test was whether there was a "reasonable possibility of intermediate examination".[4] Within several years, "probability" was substituted for "possibility".[5]

Although that limitation was originally conveyed by way of *obiter dicta*[6] it has, over the years, taken on much the same authority in the field of products liability as the more general neighbour principle. But why should a manufacturer escape liability when the danger that ultimately materializes and results in foreseeable harm to a foreseeable victim can be directly connected to its careless conduct, particularly where the "reasonably probable" intermediate examination ("IE" - sometimes referred to as "intermediate inspection") never actually took place?

There has been surprisingly little consideration of the potential problems created by, and more generally the validity of, the IE defence.[7] As outlined below, a strong argument can be made that the defence should be discarded. It has, however, been adopted so often,[8] and over such a long period of time, that it might be difficult to undo in a single stroke. It is an established principle that changes to the common law should be made on an incremental basis,[9] although it is difficult to envisage or identify incremental changes that might be made on this issue. We nevertheless outline the rationale for the elimination of this defence, an issue that, at a minimum, deserves serious consideration.

Intermediate examination: Precondition? Condition subsequent? Neither?

While much of this paper will be devoted to the argument that the IE defence is an anachronism that should be abandoned, so long as it remains in play we must first ask: Is it a precondition of a manufacturer's duty of care to the end user of its product that there is no reasonable probability of an effective IE? Or does an IE defence take effect by way of a condition subsequent, in that a *prima facie* duty of care arises from the nature of the relationship and the foreseeability of harm, subject however to the duty being negatived (extinguished) if the probability is present?[10] Stated

---

[2] *1688782 Ontario Inc. v Maple Leaf Foods Inc.* 2020 SCC 35 at para. 81.
[3] *Viridian Inc. v Dresser Canada Inc.* 2002 ABCA 173 at para. 44.
[4] *Donoghue v Stevenson*, *supra*, footnote 1 at p. 599.
[5] *Paine v Colne Valley Electricity Supply Co.* [1938] 4 All E.R. 803, C.A.; *Viridian Inc. v Dresser Canada Inc.*, *supra*, footnote 3 at para. 31.
[6] *Viridian Inc. v Dresser Canada Inc.*, *ibid,* at para. 31.
[7] In *Murphy v Brentwood District Council* [1990] 2 All E.R. 908, H.L., Lord Keith said (at para. 29): "There may be room for disputation as to whether the likelihood of intermediate examination and consequent actual discovery of the defect has the effect of negativing a duty of care or of breaking the chain of causation."
[8] In addition to numerous lower court decisions and *Viridian Inc. v Dresser Canada Inc.*, *supra*, footnote 3, see *Mathews v Coca-Cola Co. of Canada Ltd.* [1944] O.R. 207, C.A. at para. 11, affirmed [1944] S.C.R. 385; *Shields v Hobbs Manufacturing Co.* [1962] O.R. 355, C.A. at paras. 7-8, affirmed [1962] S.C.R. 716; *Rivtow Marine Ltd. v Washington Iron Works* [1974] S.C.R. 1189 at para. 32.
[9] *Nevsun Resources Ltd. v Araya* 2020 SCC 5 at paras. 225-26 and 256.
[10] See Lord Keith's remark, *supra*, footnote 7.

differently, is the absence of a probability of an effective IE a necessary constituent element of a *prima facie* duty of care? We say the answer to the latter question is No.

The modern (and governing) *Anns/Cooper* test for a duty of care involves both preconditions and a condition subsequent. The first stage of the test sets out two preconditions: it asks whether there is "a sufficiently close relationship between the parties, or proximity, to justify imposition of a duty [of care],"[11] and whether "the harm that occurred was [a] reasonably foreseeable consequence of the defendant's act".[12] If "the requisite close and direct relationship is shown…the first stage of the *Anns/Cooper* framework will be complete, as long as the risk of injury was reasonably foreseeable".[13] "Under the *Anns/Cooper* framework, a *prima facie* duty of care is established by the conjunction of proximity of relationship and foreseeability of injury."[14]

Thus, if the two preconditions – proximity of relationship and foreseeability of injury - are satisfied, the first stage of the *Anns/Cooper* test establishes a *prima facie* duty of care. The second stage of the test then introduces a condition subsequent by asking whether there are policy considerations which ought to negative or limit the scope of that *prima facie* duty, the class of persons to whom it is owed, or the damages to which breach may give rise.[15]

Stated in context, the first precondition (proximity) asks whether the relationship between a manufacturer and an end user is sufficiently close and direct to justify imposition of a duty of care. But did *Donoghue* establish a further precondition for a manufacturer's duty of care, one which is now to be applied under the first stage of the *Anns/Cooper* test, that being the absence of a reasonable probability of an effective IE? We say the answer to that question is No. There is a *prima facie* duty of care regardless of whether there is a reasonable probability of an effective IE. That is shown by the passages reproduced below, in none of which is there even a hint of any such additional precondition:

> *Donoghue v Stevenson* stands for the proposition that "the manufacturer or distributor of a product that is defective or unfit for its intended use and the end user of the product is a relationship of sufficient proximity to found a duty of care".[16]
>
> Assuming a finding that the design [of the product] was defective in that it presented a serious and unnecessary risk of harm to consumers, the duty of a manufacturer was surely not to manufacture at all if he knew or ought to have known of it….A manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm. No

---

[11] A fuller description is: "Proximity arises in those relationships where the parties are in such a 'close and direct' relationship that it would be 'just and fair having regard to that relationship to impose a duty of care in law upon the defendant'": *Nelson (City) v Marchi* 2021 SCC 41 at para. 17.
[12] *Design Services Ltd. v Canada* 2008 SCC 22 at paras. 46 and 48.
[13] *Nelson (City) v Marchi*, *supra*, footnote 11, at para. 19.
[14] *1688782 Ontario Inc.*, *supra*, footnote 2 at para. 30.
[15] *Design Services Ltd. v Canada*, *supra*, footnote 12 at para. 46.
[16] *1688782 Ontario Inc.*, *supra*, footnote 2 at para. 80.

> amount or degree of specificity of warning will exonerate him from liability if he does.[17]
>
> Manufacturers owe a duty to consumers of their products to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use.[18]

As for the second precondition (foreseeability of injury), "The reasonable foreseeability inquiry requires the court to ask whether the type of injury to the plaintiff, or to a class of persons to which the plaintiff belongs, was reasonably foreseeable to someone in the defendant's position".[19] As implicitly indicated by the passages noted above, and as a matter of simple common sense, a risk of injury of the type sustained due to use of an (unnecessarily)[20] inherently dangerous product will generally be foreseeable to the manufacturer.

As both proximity of relationship and foreseeability of injury are present, a manufacturer's *prima facie* duty of care to the end user of its product is established under the first stage of the *Anns/Cooper* test. Frankly, it would be astonishing were it otherwise. Can it seriously be argued that the relationship between a manufacturer and the end user of its product is not one of proximity? Or that the first stage of the *Anns/Cooper* test implicitly incorporates a further precondition which severely limits the scope of that initial test and which applies only to manufacturers?

As between precondition and condition subsequent, the latter therefore is the correct alternative. As already noted, however, it is our view that the presence or absence of a probable IE is neither a precondition nor a condition subsequent; it is irrelevant to the duty of care issue.

Regarding the condition subsequent spelled out at the second stage of *Anns/Cooper*, for reasons outlined below there is no basis for the IE issue to result in the negation of a manufacturer's *prima facie* duty of care, or the limitation of its scope; to the contrary, residual policy considerations firmly support a fulsome duty of care regardless of the presence or absence of a probable IE.

Onus of proof

The distinction between precondition and condition subsequent can have consequences under the current state of the law, as in regard to the matter of onus of proof: Which party has the onus of proof on the issue of whether there was, at the time the product was released by the manufacturer, a reasonable probability that an effective IE would be conducted? If (as we maintain) there is a *prima facie* duty of care under the first stage of *Anns/Cooper*, but (as to which we disagree) that *prima facie* duty is subject at the second stage to being negatived if that

---

[17] *Nicholson v John Deere Ltd.* (1986) 58 O.R. (2d) 53, Ont. H.C.J., at paras. 11 and 26, affirmed 68 O.R. (2d) 191, C.A.
[18] *Lambert v Lastoplex Chemicals Co.* [1972] S.C.R. 569 at para. 11.
[19] *1688782 Ontario Inc.*, *supra*, footnote 2 at para. 131.
[20] Some products, such as weapons and drugs, are necessarily inherently dangerous.

probability was present, then the onus of proof on whether the probability was in fact present rests with the manufacturer which seeks to set aside the *prima facie* duty of care.

Does the probability of intermediate examination obstruct proximity?

The *Donoghue* principle leads to the following result if it has been shown that there was a reasonable probability of an "effective" IE, meaning one in which the inherent danger would be revealed and eliminated:

> If there be such a probability, the relationship between manufacturer and ultimate user or consumer will not be proximate. Something is interposed which prevents the forging of a link between the two.[21]

The argument can be made (although we do not accept it) that where an IE was in fact conducted, and the hidden danger was in fact removed, the proximity of relationship (or, when the concept of intervening cause is instead employed, the chain of causation)[22] is severed. A mere probability which does not eventuate into actuality, however, is far from sufficient to erase the proximity inherent in the relationship between a manufacturer and an end user. Where (as considered in greater detail below) the "probable" IE, and the "probable" discovery and removal of the danger, do *not* occur, there is no change in the relationship between the parties; it remains one of proximity (nor has there been any break in the chain of causation). A theory which fails to take into account those inevitable instances where a *probable* effective IE does not materialize into an *actual* effective IE is deeply flawed.

It is no answer merely to say that the time at which the manufacturer's conduct is to be assessed is the time when it releases its dangerous product (which has been described as the "critical time"),[23] and not the time when it becomes known whether an effective IE was in fact conducted. Definition alone dictates that an inevitable consequence of a "reasonable probability" is that there will be instances where an effective IE will *not* be conducted. That fact is known to all, the manufacturer included. Furthermore, that response amounts to shutting one's eyes to reality. There is no magic to the likelihood of an effective IE where no IE actually occurs.

As outlined below, even if the failure to conduct an IE was not due simply to chance, but was instead due to wrongdoing on the part of some third person, that would not be a valid basis either in law (the defence of intervening cause would not apply, and the manufacturer would not be entitled to delegate its duty of care regarding an inherently dangerous product – see below as to both) or, from a policy standpoint, to wipe away the liability arising from a manufacturer's negligent conduct and require the innocent victim to bear the risk of having no other effective

---

[21] *Paine v Colne Valley*, *supra*, footnote 5 at pp. 808-09. That does not, however, appear to have been the reasoning in *Viridian Inc. v Dresser Canada Inc.*, *supra*, footnote 3 at para. 40: "Although the trial judge spoke in terms of the intermediate inspection negating a duty of care, he was really addressing the issue of whether any duty owed by the manufacturer extended to [the end user]. The real question before him was whether a duty of care was owed." For reasons outlined above, we disagree with that analysis. As stated by Lord Keith, *supra*, footnote 7, the issue is whether an intermediate examination has the effect of "negativing a duty of care".

[22] The comment made by Lord Keith, quoted *supra*, footnote 7, is relevant here as well. As indicated both there and in the passage from *Paine v Colne Valley*, *ibid*, both concepts have been employed, sometimes interchangeably.

[23] *Viridian Inc. v Dresser Canada Inc.*, *supra*, footnote 3 at para. 48.

recourse to compensation, or to require another wrongdoer to shoulder full responsibility for the loss or harm.

What if the "probable" intermediate examination is not actually conducted, or is not effective?

The IE defence does not take realistic (in fact, inevitable) situations into account and is contrary to sound policy. It is also contrary to modern legal principles.

First, from a factual standpoint, what if – for whatever reason, including negligence – the theoretically probable, and theoretically effective, IE does not in fact occur, or is not in fact "effective", with resulting harm to end users (and perhaps others as well, such as situations where the harm involves a fire)?

A "reasonably probable" IE is not a *certain* IE. In fact, the term "reasonably probable" virtually guarantees that there will be occasions in which an IE will not occur. A bare probability consists of 50% plus one. A "reasonable probability" connotes something more than that. The uncertainty of the term is a trade-off for the flexibility that is necessary in the application of most principles of law; the sometimes-slippery concept of reasonableness, for example, is a thread that runs through the law of tort.

Let's assume there is a 70% probability that an IE will occur. In most circumstances it would be difficult to argue that that level of likelihood does not constitute a "reasonable probability". Yet in that situation there would be no IE a full 30% of the time; of any ten new products introduced with that "reasonable probability" of an IE, three in actuality would *not* undergo an IE. Even with a 90% probability, there would be no IE for one in ten. Thus, when applying the reasonable probability test, the scenario of no *actual* IE being undertaken is not merely a fanciful possibility; it is a situation that, to the knowledge of the manufacturer, is bound to occur, in which event any inherent danger in the product will not be caught and corrected. Why should the manufacturer escape liability in those unlikely but entirely possible, and in fact inevitable, situations if the danger was the result of its failure to have exercised reasonable care?

Another real possibility is that the IE, whether due to negligence or otherwise, will not be the predicted (and assumed) "effective" examination, here too with the result that the consumer will be provided a product that is inherently dangerous because of the manufacturer's negligent conduct.

Some of these concerns were recognized almost immediately after *Donoghue* was released. In a 1932 article, F.C. Underhay said the following:

> The balance of opinion [in *Donoghue*] thus inclined to the view that an opportunity of intervening inspection absolved the manufacturer.
>
> Presumably an effective inspection is meant. Where a defect is so latent as to be undiscoverable by such inspection as can practically be made, there is no real opportunity. The test becomes barren of all reason. Even upon this assumption,

> the result is, however, unsatisfactory. The third party may refrain with impunity from conducting the examination or, having done so, he may neglect to take reasonable measures to make his findings effective. The consumer is then no better protected than if the examination had never been made. In such a case the means of inspection is an uncertain criterion which sacrifices the social interest of the consumer to a faulty device for determining legal remoteness.[24]

While concerns were readily apparent from the outset, it appears that they largely disappeared from consideration and discussion, although in a later article, Dean Cecil A. ("Caesar") Wright made some pointed comments:

> Such a limitation [referring to the IE defence] is lacking in the American cases, and it is difficult on principle to understand why this should operate to insulate from liability a negligent defendant. It is likely a carry-over from the old notion of "last wrongdoer". But, granted the "risk" notion, it is obvious that the possibility of a person, with that opportunity of examination, "slipping up" is not so foreign to the risk created as to require a court to say the risk had ceased.[25]

The following questions arise:

- As mentioned, why should a negligent manufacturer be exempt from liability on the basis of a reasonable probability in those bound-to-occur instances where the probability was not realized? What justification is there in those circumstances for transferring the burden of the loss from a wrongdoer to the innocent victim, or for imposing it entirely upon another, perhaps (in fact probably) less blameworthy, wrongdoer?

- The IE defence effectively provides to a manufacturer, because of the absence of concern about liability, a licence to be careless. A manufacturer with that defence in its back pocket is more likely to cut corners or to be lax in its operations, with resulting increased likelihood of hidden danger and injury. Why should end users (and others) be exposed to that increased risk of harm?

- What if other wrongdoers (if any) have inadequate insurance coverage, or are otherwise unable to satisfy the judgment awarded to the injured victim(s)? The injured victims should not be disentitled from looking for recovery to a person so obviously connected to the harm. The careless manufacturer, not the injured victims, should bear the loss.

Those are not sensible results and are contrary to sound policy.

Legal issues

Second, from a legal standpoint:

---

[24] F.C. Underhay, *Tort Liability of Manufacturers*, (1932) 10 C.B.R. 615 at p. 622.
[25] Cecil A. Wright, *The Law of Torts: 1923-1947*, (1948) 26 C.B.R. 46 at p. 63.

- The IE defence is a form of the discredited "last clear chance" doctrine.[26] Just as that doctrine is now viewed as an anachronism,[27] so too ought this defence.

- It is also an indirect form of the *volenti non fit injuria* (or voluntary assumption of the risk) defence, perhaps best exemplified in the following remark made in the decision which cemented in place the historic import of *Donoghue*:

  > [T]he man who consumes or uses a thing which he knows [because of an intermediate examination] to be noxious cannot complain in respect of whatever mischief follows, because it follows from his own conscious volition in choosing to incur the risk or certainty of mischance.[28]

  In modern times the *volenti* defence has been so circumscribed[29] as to have almost vanished from sight. Furthermore (and again), what of the situation where the "probable" IE was not in fact conducted, or did not in fact reveal the hidden danger? The injured plaintiff in that situation would not know that the product was "noxious", yet would not be owed a duty of care.

- It is contrary to the principles underlying the *Negligence Act*. Where there has been negligent conduct on the part of two or more persons, each of which is causally connected to foreseeable harm, the statute provides that liability should be shared and apportioned, not allocated entirely to only one of those wrongdoers. A manufacturer which carelessly creates and markets a product that is inherently dangerous is indisputably a key part of the chain of causation leading to the foreseeable loss (foreseeable certainly in those bound-to-occur instances where no effective IE has in fact been conducted) and, under modern principles, ought not to be excused from its share of liability.[30] A complete bar to recovery from that wrongdoer is "anomalous in an age of apportionment".[31]

- *Donoghue* asks the question whether there was, at the time the product was released by the manufacturer, a reasonable probability that an effective IE would be conducted. The appropriate question, however, is whether an effective IE was actually made. If (as we believe) the question under *Donoghue* is not "Is there a duty of care?", but rather "There is a *prima facie* duty of care, but has it been negatived?", then it is the reality of whether the hidden danger was identified and removed that is critical, not whether there was a

---

[26] See the comments of Dean Cecil A. Wright, *ibid*. The doctrine has been abolished in Ontario: *Rizzi v Mavros* 2008 ONCA 172 at para. 93, Laskin J.A. dissenting on other grounds.
[27] *Wickberg v Patterson* 1997 ABCA 95 at para. 30.
[28] *Grant v Australian Knitting Mills Limited* [1936] A.C. 85 at p. 105.
[29] *Nelson (City) v Marchi*, *supra*, footnote 11, at para. 101; *Waldick v Malcolm* [1991] 2 S.C.R. 456 at paras. 46-47.
[30] See *Brown v Ford Motor Co. of Canada* (1979) 27 N.B.R. (2d) 550, Q.B., at paras. 24-25.
[31] *Crocker v Sundance Northwest Resorts Ltd.* [1988] 1 S.C.R. 1186 at para. 31. "Apportionment permits a sensible distribution of the financial burden of negligent conduct": *Dube v Labar* [1986] 1 S.C.R. 649 at para. 12. The "contributory negligence approach to damages [is] now prevalent in virtually all areas of tort law": *Sunrise Co. v Lake Winnipeg (The)* [1991] 1 S.C.R. 3 at para. 85 (*per* McLachlin J. dissenting).

probability of that happening.[32] Why deal with suppositions rather than facts, and why provide a defence which reality shows not to be warranted? If no effective IE has taken place, then there is no justification for negating the negligent manufacturer's *prima facie* duty of care.

Is the manufacturer's duty to the end user non-delegable?

Another way of considering the matter is to ask whether a manufacturer's duty of care to the ultimate users of its products is delegable. It is an established principle that a duty of care is non-delegable where the undertaking to which the duty applies is inherently dangerous or fraught with risk.[33] In *Savage v Wilby*,[34] for example, a tenant retained an independent contractor to remove paint by means of a flammable substance, the use of which required special care. Rand J. said: "Since [the tenant] has, in fact, imposed the dangerous agencies and their hazards on [the leased] property, it would be repugnant to principle that he should be permitted to relieve himself of responsibility by the introduction of an intermediary."[35]

It is equally "repugnant to principle" to permit a manufacturer which, by its negligent conduct, "imposed" the inherent danger in its product on the end user "to relieve itself of responsibility by the introduction of an intermediary". Having created the danger by its negligent design or manufacture, and having activated the danger by marketing an inherently dangerous product for ultimate use by the public, the manufacturer cannot then wipe away its negligent conduct by delegating its duty of care to some third person.

Is the failure to conduct a probable and effective intermediate examination an intervening cause?

The defence has also been applied, in a roundabout manner, as a form of *novus actus interveniens* or, more simply, intervening cause.[36] An intervening cause is a contributing cause of the harm or loss, one whose causal impact overwhelms that of an earlier contributing cause, thereby breaking the chain of causation.[37]

---

[32] The *Donoghue* principle can be likened to a version of the fable about the tortoise and the hare. Just as the hare is unable to overtake the tortoise because the element of time is artificially curtailed, so too the injured victim is unable to rely on the fact that the "probable" effective intermediate examination was never actually conducted because the time element here too has been artificially curtailed. A bit of whimsy, but an apt analogy.

[33] *Saint John (City) v Donald* [1926] S.C.R. 312. There is a narrowly-applied exception to this rule, but only insofar as the duty to warn is concerned, *via* the "learned intermediary rule": see *Hollis v Birch* [1995] 4 S.C.R. 634 at paras. 27-29. That rule generally applies to products that are *necessarily* inherently dangerous, such as drugs, whereas this paper is concerned with products that are unnecessarily inherently dangerous; where the danger is due to negligent conduct on the part of the manufacturer, rather than being built-in by the very nature of the product.

[34] [1954] S.C.R. 376.

[35] *Savage v Wilby*, *ibid*, at para. 5.

[36] "[A] non-finding of duty of care [will be made only] if the facts are clear enough to give rise to a complete defence such as a *novus actus interveniens*…The scope for this type of approach in negating a duty of care is very narrow": *Wainwright (Town) v G-M Pearson Environmental Management Ltd.* 2007 ABQB 576 at para. 254, affirmed 2009 ABCA 18.

[37] In *Smith v Inglis Ltd.* (1978) 83 D.L.R. (3d) 215, N.S.C.A., the court (at para. 59) cited the following definition: "[A] *novus actus interveniens* [is]…some overwhelming supervening event which is of such a character that it relegates into history matters which would otherwise be looked on as causative factors". A similar meaning was applied in *R. v Maybin* 2012 SCC 24 (a criminal law decision) at paras. 57 and 59.

An effective IE is not, of course, a contributing cause of the harm; to the contrary, it prevents foreseeable harm. It is the *failure* to catch and correct the inherent danger when there was a reasonable probability of an effective IE that (under *Donoghue*) arguably constitutes an intervening cause. Does, however, the causal impact of that failure overwhelm the causal impact of the manufacturer's preceding negligent design or manufacture, and release, of an inherently dangerous product? Our response is: Certainly not. From a causal standpoint, the careless creation of danger is at least as significant as the subsequent failure to detect and remedy it;[38] and that is even before account is taken of the fact that there will inevitably be instances in which there will be no "failure" to catch and correct a hidden danger, for the simple reason that no IE will have been conducted and where, perhaps, the only wrongdoing will be that of the manufacturer.

There are other serious problems with the intervening cause rationale. From a legal standpoint, the defence of intervening cause will not protect a negligent actor where "the operation of an intervening force…can fairly be considered a not abnormal incident of the risk created by him".[39] Another term that has been employed is "within the ambit of the risk".[40] Stated differently, foreseeability of a contributing cause will usually preclude it from being an intervening cause.[41]

The "intervening force" – either the failure to conduct what had been considered, at the time of release by the manufacturer of its product, a reasonably probable IE or, if conducted, the failure to discover and address the danger – would be "a not abnormal incident of the risk created by the manufacturer".[42] Not only would the failure to conduct an effective IE be a reasonably foreseeable event, the very fact that the IE was no more than a reasonable probability, not a certainty, would itself be sufficient to make the failure to conduct it "a not abnormal incident of the risk created by the manufacturer", one that was "within the ambit of the risk" created by the manufacturer.

Another impediment to the application of the intervening cause defence is that one of the conditions for its application is that "the causal link between the fault and the injury must be *completely* broken".[43] The injury to the end user would not occur without the manufacturer's negligence; the failure to conduct an IE of a safe product would not result in injury. The causal

---

[38] This is, to some degree at least, analogous to seatbelt cases where apportionment of liability to any large degree to the injured plaintiff "in effect benefits the real tortfeasor, the person whose fault caused the accident in the first place": *Bulmer v Horsman* (1987) 82 N.B.R. (2d) 107, C.A. at p. 113, followed in *Snushall v Fulsang* (2005) 78 O.R. (3d) 142, C.A. at para. 31. To similar effect is the reference in *Heeney v Best* (1979) 28 O.R. (2d) 71, C.A. (at para. 14) to a defendant who had been "wholly to blame for the negligent act which set in train the events that caused the ultimate injury".

[39] *Derksen v 539938 Ontario Ltd.* 2001 SCC 72 at paras. 33-34. See the comment of Dean Cecil A. Wright, *supra*, footnote 25.

[40] As in, for example, *Smith v Inglis Ltd.*, *supra*, footnote 37, at para. 63; *Williams v New Brunswick* (1985) 66 N.B.R. (2d) 10, C.A. at paras. 53 and 55.

[41] "An intervening act that is reasonably foreseeable will usually not break or rupture the chain of causation so as to relieve the offender of legal responsibility for the unintended result": *R. v Maybin*, *supra*, footnote 37, at para. 30. See also *Booth v City of St. Catharines* [1948] S.C.R. 564 at para. 55.

[42] See the comment of Dean Cecil A. Wright, *supra*, footnote 25.

[43] *Salomon v Matte-Thompson* 2019 SCC 14 at para. 91 (emphasis added).

link between the manufacturer's negligence and the injury therefore is not completely broken merely because an expected IE has not been conducted.

It might also be of interest to note that the intervening act which is being considered here is not an "act" at all, or at least not in the positive sense of the word. It is rather a failure to act, and comment has been made on the distinction between the two.[44] There is a hint in one decision that a failure by one person to act so as to correct earlier wrongdoing by another will not trigger the defence of *novus actus interveniens*: "The real position is that the [ship repairer's] negligence continued even though [an officer of the ship] failed to intervene. The [ship officer] did not *do* anything which permits it to be said that that original negligence ceased to operate."[45]

More generally, when a foreseeable loss would not have occurred but for a defendant's wrongdoing, the courts are slowly but surely (as by the abandonment of the last clear chance doctrine) sealing the principle that it would neither be sensible nor fair (absent contractual or statutory considerations) to relieve that defendant of liability. The relative strengths of causal factors is a matter to be taken into account when considering blameworthiness of conduct and, ultimately, apportionment of liability; it ought not to be the basis for a complete shield under the rubric of intervening cause.

A built-in inconsistency

There is an inconsistency at the core of the IE defence. The defence is of no use to a negligent manufacturer in those instances where an IE was conducted and the hidden danger was discovered and remedied. In those situations, there would generally be no loss and therefore no claim. A negligent manufacturer has cause to call upon the defence only where an expected IE either was not conducted or failed to reveal and address the inherent danger. The defence is predicated on the likelihood that the manufacturer's negligence will be rectified before any harm occurs, yet in reality the only circumstances in which the defence is raised are those in which it is already known that the inherent danger caused by the manufacturer's negligence was in fact not addressed. The defence, in other words, is generally invoked and applied only in those situations where the underlying premise upon which the defence is justified has disappeared. It is illogical and unjust to apply the defence in those anomalous circumstances.

Depending on the circumstances, the likelihood of an IE might have some application on the issue of apportionment of liability; the manufacturer might have an argument that its negligent conduct was less blameworthy than would otherwise be the case where there was a reasonable probability of an effective IE (although even that might be viewed as an implicit toleration of substandard practices leading to the release of hazardous products).

Intermediate examination and foreseeability of harm

In *Viridian*, the point was made that the determination of the question whether a duty of care is owed turns (at least partly) on the element of foreseeability of harm, and that the probability of

---

[44] *Childs v Desormeaux* 2006 SCC 18 at para. 31.
[45] *Australian Newsprint Mills Ltd. v Canadian Union Line Ltd. (No. 2)* [1954] S.C.R. 307 at para. 15 (emphasis added).

an IE that would discover and remedy the defect goes directly to the issue of foreseeability.[46] In effect, the court reasoned that the probability of an IE, one which presumably would identify and remove any inherent danger, makes ultimate harm considerably less likely. The lower the likelihood of harm, the lower the foreseeability of harm. A lowered foreseeability of harm in turn undercuts the existence of any duty of care owed by the manufacturer to the end user.

Here again, however, that reasoning simply writes off the reality of those inevitable situations where no IE is in fact conducted or, if conducted, does not reveal and lead to the removal of the hidden danger. As the manufacturer is relying on a probability, not a certainty, it knows that those situations are bound to occur. Foreseeability of a real likelihood of harm in that situation cannot be doubted and there is no justification for exempting the careless manufacturer from a duty of care, perhaps leaving an injured end user with either no, or a diminished, remedy.

Licence to market unsafe products

From a policy standpoint, the most serious criticism that can be directed at the IE defence is one that is touched upon above, that being that it implicitly grants licence and free rein to manufacturers to be lax in the design and manufacture of their product, secure in the knowledge that they will escape liability for injury caused by an inherent danger so long as there is a reasonable probability of an effective IE. A manufacturer might treat this as a cost-saving opportunity, eliminating the need for careful inspection and testing, those obligations having been transferred to another person.[47] The obvious and inevitable result is increased risk to the public, precisely the opposite of what is called for by robust and informed policy. "Our tort law should not be held to contemplate such an anomalous result."[48]

Sound common sense

It is ironic that Lord Atkin said in *Donoghue*: "It will be an advantage to make it clear that the law in this matter, as in most others, is in accordance with sound common sense."[49] For the reasons outlined above, it is our view that the IE defence does not accord with "sound common sense". To the contrary, common sense dictates that a manufacturer - whether of a component or a final product – ought not to be effectively relieved of the duty to take reasonable care not to design, build, or market an inherently dangerous product, and ought not to escape liability for foreseeable harm resulting from breach of that duty.

In a rare critical comment, Wright J. was openly, even derisively, skeptical of the IE defence. He described it as "a doctrine of forgiveness of sin by inspection" and added "I must say I marvel at the redemptive effect of intermediate inspection." He preferred "the sensible proportionate rule of the *Negligence Act*".[50] To be blunt, both the "no duty of care" and "broken chain of

---

[46] *Viridian Inc. v Dresser Canada Inc.*, *supra,* footnote 3 at paras. 40, 48, and 53.
[47] Viewed from the opposite perspective, the potential for liability "acts as a stimulant to care": *Brown v Ford Motor Co. of Canada*, *supra*, footnote 30 at para. 25, citing Linden, *Canadian Negligence Law*.
[48] *Hollis v Birch*, *supra*, footnote 33 at para. 60.
[49] *Donoghue v Stevenson*, *supra*, footnote 1, at p. 599.
[50] *Ives v Clare Brothers Ltd.* [1971] 1 O.R. 417, H.C.J. at para. 15. Those comments were adopted in *Dominion Chain Co. v Eastern Construction Co.* (1976) 12 O.R. (2d) 201, C.A. at para. 25, affirmed [1978] 2 S.C.R. 1346. In *Brown v Ford Motor Co. of Canada*, *supra*, footnote 30, Creaghan J. (at para. 25) quoted from Linden, *Canadian*

causation" approaches now appear, in sum and substance, to be artificial and baseless manoeuvres – a bit of legal hocus-pocus - to avoid the application of the statute.

This not a counsel of perfection, nor are we discussing a form of no-fault liability. We are dealing with a situation where a manufacturer's negligent conduct has led to the release, for ultimate use by the public, of an inherently dangerous product. The suggestion that the manufacturer should not be entitled to escape liability in those circumstances, and particularly in those inevitable instances in which a reasonably probable effective IE was in fact not conducted, is fully consonant with policy and principle and is altogether warranted.

The appropriate test and when it should be administered

In our view, there is no convincing rationale for an IE defence. If, however, the defence is to be available at all, it should be on the following test:

> Was an intermediate examination conducted and, if so, did it result in the discovery and removal of the inherent danger?

As previously mentioned, there is very little likelihood that harm would have been suffered, and a claim made, in those cases where there is a Yes answer to that question. Flimsy or false claims are not, however, unknown, and there may be other circumstances as well where a claim is made notwithstanding an affirmative answer. In large part, however, the need to raise this defence will rarely arise in the event of an affirmative answer, making it essentially a meaningless issue (other than perhaps, as indicated above, for apportionment of liability purposes).

Summary of reasons for discarding the defence

There are good reasons why the IE defence should be jettisoned. In no particular order, they are:

First: A complete bar to a claim against a wrongdoer runs contrary to the modern view, as embodied in, and mandated by, the *Negligence Act*, that those whose negligent conduct was causally connected to a foreseeable loss ought not to escape their fair share of liability. That is why the last clear chance defence has been repudiated, and why *volenti* and intervening cause now rarely succeed; nor, absent extraordinary circumstances, should they. The availability of a complete defence to a careless manufacturer (who is likely to be the most blameworthy, perhaps the only, wrongdoer) is unreasonable and unjust. The argument that when there is a reasonable probability of an effective IE there is either no duty of care, or the chain of causation is broken, is a flimsy and unsatisfactory ground for avoiding the reach of the statute.

Second: As the defence is based on the reasonable probability, rather than certainty, of an IE, there will inevitably be cases where there is *no* IE. There is no justification for absolving a manufacturer of liability, perhaps leaving the injured victim without remedy, in situations where the manufacturer's negligent conduct was not subsequently neutralized. The hope or trust that

---

Negligence Law: "The *Ives* decision makes it clear that intervening negligence by failure to inspect or failure to warn does not exculpate a negligent manufacturer. Instead of losing the original defendant, the plaintiff gains an additional defendant. Such a development is welcome…".

the inherent danger will be addressed before it results in harm amounts in truth to nothing more than an odds-based gamble, with the risk being borne by the innocent victim, rather than the negligent manufacturer.

Third: Entitlement to this defence tends to weaken or remove the public's first, and in some cases (where no IE is in fact conducted) only, layer of protection against the dissemination of products carrying hidden dangers.

Fourth: If (as we submit) a manufacturer has a *prima facie* duty of care to the end user arising from the nature of the relationship and the foreseeability of harm, then even if (as to which we disagree) there is a basis for negating that duty, the annulment of the duty should rest on the fact of an effective IE actually having been conducted, and not on a mere supposition arising from the reasonable probability of that being done.

Fifth: There should be no nullification of a manufacturer's duty of care in those cases where an IE is conducted but is not "effective" – where, for whatever reason, including negligence,[51] the hidden danger is not caught and remedied. The manufacturer is not entitled to delegate to another person its duty to take reasonable care not to create and market an inherently dangerous product, nor can it rely on the foreseeable failure of an IE to identify and remedy a hidden danger as constituting an intervening cause.

Sixth: Intermediate examination should be a non-issue. It is a defence that is unnecessary where an effective IE was conducted (because there would generally be no harm and no claim in those circumstances). It is meaningful only where the inherent danger remains in place and causes harm to the end user (and perhaps others). It is, in other words, a defence that generally has meaning and purpose only in those inevitable instances where a "probable" IE was in fact not conducted, or where a "probably effective" IE was in fact not effective; but those are precisely the circumstances in which the defence ought not to be available. The defence is, after all, based in large part on the premise that the manufacturer's negligence will be rectified through an effective IE.

Generally: The *Anns/Cooper* test imposes a duty of care where it is "just and fair" to do so.[52] Viewed from the opposite end, there is no cogent justification for relieving from liability a manufacturer (or any other wrongdoer) whose negligent conduct was a necessary cause of foreseeable harm to foreseeable victims, perhaps leaving innocent victims without recourse to full or even any compensation for their injuries and losses, or imposing liability for the loss fully on another wrongdoer whose negligence was likely less blameworthy than that of the manufacturer.[53] That is unreasonable and unjust.

---

[51] Here again the brief comments of Dean Cecil A. Wright, *supra*, footnote 25 are relevant. In addition, "[N]egligence in such intermediate examination goes only to the questions of *volenti* or contributory negligence, whether it is the negligence of the 'consumer' or of a third party": *Dominion Chain Co. v Eastern Construction Co., ibid*, at para. 25.

[52] *Supra*, footnote 11. On a similar note, "The overarching consideration is the interests of justice": *Barendregt v Grebliunas* 2022 SCC 22 at para. 3 (see also para. 31).

[53] The following statement is instructive: "If the mere fact of [substitute an IE for illegal behaviour] could eliminate a duty, this would effectively immunize negligent defendants from the consequences of their actions. Seriously

Conclusion

Continued adherence to a flawed approach, venerable and revered though the decision which introduced it may be, is unjustifiable. The IE defence is out of step with modern principles; it is a relic and should be treated as such. Most importantly, it leads to unjust results. A serious reconsideration[54] is long overdue.[55]

injured victims would be entirely denied recovery, even when the defendant bears most of the fault": *Rankin (Rankin's Garage & Sales) v J.J.* 2018 SCC 19 at para. 63.

[54] Something considerably more extensive than the brief comment made by Lord Keith in *Murphy v Brentwood District Council*, *supra*, footnote 7, and one unhampered by trepidation arising from the origin and duration of the defence.

[55] The decision in *Burr v Tecumseh* 2023 ONCA 135 was released after submission of this paper for printing. Only a brief comment can therefore be made. The circumstances of the case were tailor-made for consideration of the IE issue, but although some *obiter* comments (at paras. 104-07 and not directly relating to IE) may usefully be reviewed, the part of the appeal which involved the matter of the liability of a component manufacturer was resolved on the basis of another issue.