

## **OVERVIEW: UK**

### **I. INTRODUCTION**

"Product liability" refers to the civil liability of manufacturers, suppliers and other players (e.g. distributors and retailers) for personal injury or damage to property caused by a defective product. It should be distinguished from "product safety", which is a separate regulatory regime imposing criminal penalties for unsafe products. Both regimes have consumer protection as their common aim.

Product liability law can be split into 3 regimes: contractual liability; common law tort of negligence (fault-based liability); and statutory strict liability. These regimes operate concurrently and, depending on the facts of the case, one, two or all three may be employed by a claimant in an attempt to recover compensation for loss.

The UK refers to the laws of England & Wales, Scotland and Northern Ireland. Each has a separate legal system with differences in terminology, approaches to common law and application of legislation, although there are overlaps and common approaches.

The main analysis is in respect of England & Wales and main differences in Scotland and Northern Ireland are also explained.

### **II. THE PRODUCT LIABILITY REGIME**

#### **A. CONTRACT**

The relevance of contract law to contemporary product liability may not be immediately obvious. Nevertheless, and in particular prior to the inception of consumer protection regulation, contractual liability plays an important role in ensuring that the manufacturer or retailer sells products that meet the required - or contractually guaranteed - standard. While contract law is primarily aimed at the recovery of pure economic loss (i.e. a diminution in value of the product from the purchase price), it plays a product liability role where damages are awarded for consequential loss i.e. personal injury and property damage.

Contractual liability may lie under: express terms (e.g. as to defect and remedies) in a contract of sale or supply, guarantee/extended warranty or pre-contractual statements (constituting misrepresentation or negligent misstatement); and implied terms as to quality, fitness for purpose and description under the Sale of Goods Act 1979 **[future LINK]**.

#### **1. Privity of contract**

The scope of protection afforded by contract law is limited by the doctrine of privity of contract: someone who is not a party to a contract cannot acquire rights or incur obligations under it. Recourse to damages is therefore limited to claims by the consumer (and not any third party who may also have suffered loss) against the supplier (and not, in the absence of a guarantee, the manufacturer actually responsible for the defect)<sup>1</sup>. The resultant liability gap may be filled by a tort law or strict liability claim, although the former requires fault and the latter may be frustrated by an applicable defence or exception.

The Contracts (Rights of Third Parties) Act 1999 [future LINK] in principle softens the privity of contract doctrine by allowing third parties to enforce a contract term in certain situations<sup>2</sup>. However, these would rarely be satisfied in the product liability context and in any event there is no right to enforce if the parties did not intend the term to be enforceable by the third party<sup>3</sup>.

In practice, the supplier liable to the consumer may seek to recover, or invoke an indemnity, from the producer. Manufacturers could also be joined in to legal proceedings as a co-defendant (in third-party proceedings) or in contribution proceedings by the liable supplier under the Civil Liability (Contribution) Act 1978 [future LINK]<sup>4</sup>.

## **2. "Defective product": Implied terms as to quality etc.**

The Sale of Goods Act 1979 ('SoGA') [future LINK] (as amended) implies certain terms into contracts of sale<sup>5</sup>. The focus is on conformity with description<sup>6</sup> or quality/fitness for purpose<sup>7</sup> and not, ostensibly, "defect".

Section 14 provides that, where goods are sold "in the course of a business", there is an implied term that the goods are of "satisfactory quality" (section 14(2)) and that they are fit for a purpose that the buyer has made known to the seller (section 14(3)). Goods will be of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking into account any description, the price and all other relevant circumstances (section 14(2A)).

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<sup>1</sup> See *Winterbottom v Wright* [1842] 152 Eng. Rep. 42

<sup>2</sup> Where the third party is expressly identified in the contract (section 1(3)) or if the contract purports to confer a benefit on him/her (section 1(1)).

<sup>3</sup> Section 1(2)

<sup>4</sup> Section 1(1): any person liable in respect of any damage suffered by another person may recover from any other person liable in respect of the same damage (whether jointly or severally or otherwise).

<sup>5</sup> Similar terms are implied into supply contracts by the Supply of Goods (Implied Terms) Act 1973 and Supply of Goods and Services Act 1982.

<sup>6</sup> Section 13(1): in a contract of sale by description, the goods must conform to that description.

<sup>7</sup> Section 14 - see text above.

"Quality" includes state, condition and fitness for purpose of the goods and, significantly, "freedom from minor defects" and "safety" are explicit aspects of quality (section 14(2B)<sup>8</sup>). The satisfactory quality standard, imbued with the concept of reasonableness, is arguably a lower standard of safety than under the CPA (which protects safety "as persons are generally entitled to expect").<sup>9</sup> It therefore may be an attractive route where the CPA does not apply<sup>10</sup>, or where the lack of quality (i.e. the defect) may not be sufficiently serious to establish liability under the CPA.

A significant expansion of the concept of satisfactory quality and applicable remedies for breach has been made by the Sale and Supply of Goods to Consumers Regulations 2002<sup>11</sup> **[future LINK]**, which entered into force on 31 March 2003 and amend SoGA. The Regulations implement Directive 1999/44/EC on Certain Aspects of the Sale of Consumer Goods and Associated Guarantees **[future LINK]**. In assessing whether consumer goods are of satisfactory quality, account must now be taken of "any public statements on the specific characteristics of the goods made about them by the seller, the producer or his representative, particularly in advertising or on labelling" (Regulation 3, amending section 14 SoGA). This could incorporate leaflets and brochures supplied directly to the consumer (or via the supplier) and extend to general (mass) media advertising<sup>12</sup>. New consumer remedies are set out in Regulation 5 (see 'Damages' below).

By virtue of the Unfair Contract Terms Act 1977 (UCTA) **[future LINK]**, SoGA implied terms cannot be excluded or restricted in consumer contracts<sup>13</sup> and are subject to a test of reasonableness in commercial (non-consumer) transactions<sup>14</sup>. As contract terms, they are also subject to the fairness test set out in the Unfair Terms in Consumer Contract Regulations 1999 **[future LINK]** (implementing Directive 93/13 on unfair terms in consumer contracts **[future LINK]**).

### 3. *Strict Liability*

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<sup>8</sup> Inserted into the 1979 Act by the Sale and Supply of Goods Act 1994, section 1.

<sup>9</sup> See Chris Willett, *The Role of Contract Law in Product Liability*, in Grubb & Howells (eds.), *The Law of Product Liability* (2000) at page 77.

<sup>10</sup> I.e., where the defective goods result in pure economic loss; where property damage is £275 or less; or where one of the defences available under the Consumer Protection Act 1987 applies (see "Strict Liability" below).

<sup>11</sup> SI 2002/3045

<sup>12</sup> For an analysis of the impact of the Regulations see Willet, Morgan-Taylor and Naidoo, *The Sale and Supply of Goods to Consumers Regulations* [2004] J.B.L 94.

<sup>13</sup> UCTA sections 6(2) and 7(2)

<sup>14</sup> UCTA section 6(3)

Liability for breach of an implied term is strict (i.e. there is no requirement to prove fault), although the concept of reasonableness in the definition of "satisfactory quality" relaxes - to a certain extent - the strictness.

The following exceptions apply: where the defect has been specifically drawn to the buyer's attention before sale and where the buyer examines the goods before sale and the examination ought to have revealed the defect (section 14(2C)).

Liability is also strict for breach of an express contractual term, guarantee/extended warranty and misrepresentation.

#### **4. Damages**

If the goods fail to conform to description or fail to meet the satisfactory quality standard then the consumer will be entitled to reject them, terminate the contract and sue for damages or take advantage of the new remedies of repair, replacement, price reduction or rescission<sup>15</sup>. Normal causation rules apply i.e. the burden of proof is on the claimant to establish on the balance of probabilities that the breach caused the alleged damage.

Contractual damages are assessed in order to put the buyer in the position s/he would have been had the contract been properly performed. The remoteness principle applies so that seller will be liable for damages "arising naturally from the breach" and those "in the reasonable contemplation" of the parties at the time of contract as likely to result from breach<sup>16</sup>.

Therefore, although contractual damages are primarily aimed at recovering pure economic loss (i.e. a reduction in the value of the goods from the purchase price due to the defect), they may also be available for compensation for consequential loss, including personal injury<sup>17</sup>, death and property damage.

#### **5. Limitation**

An action in contract cannot be brought after the expiration of 6 years from the date on which the cause of action accrued (section 5 Limitation Act 1980) i.e. from the time of supply. This is

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<sup>15</sup> Introduced into SoGA by the Sale and Supply of Goods to Consumers Regulations 2002

<sup>16</sup> *Hadley v Baxendale* (1854) 9 Exch 341

<sup>17</sup> *Godley v Perry* [1960] 1 WLR 9 (child lost his sight due to defective catapult ); *Grant v Australian Knitting Mills* [1936] AC 85 (claimant contracted dermatitis from woollen underwear).

more restrictive than the limitation periods in tort and under the Consumer Protection Act 1987, which run from the date the damage occurred.

## **B. TORT**

Product liability in tort refers to breach of a duty of care (negligence) and breach of statutory duty.

### ***1. Negligence/Breach of duty of care***

A largely inescapable side-effect of the privity of contract doctrine was that a manufacturer's breach of contractual duty to his contracting party (supplier) could not at the same time amount to a breach of a tort duty owed to a third party (ultimate consumer)<sup>18</sup>. There were three exceptions to this: the manufacturer made a fraudulent representation as to safety<sup>19</sup>; failed to disclose a known danger<sup>20</sup>; and the product was "dangerous in itself"<sup>21</sup>.

*Donoghue v Stevenson*<sup>22</sup> [**future LINK**] - the pivotal case - transformed the exception-to-the-rule status of manufacturer liability by allowing a consumer of a bottle of ginger beer that contained a decomposed snail to recover damages for personal injury against the manufacturer. The House of Lords (HL) famously ruled that a manufacturer of products: (1) sold in a form intended to reach the ultimate consumer in the form in which they left him; (2) with no reasonable possibility of intermediate examination; and (3) with the knowledge that the absence of reasonable care in the preparation of the products will result in personal injury or property damage, owes a duty to the consumer to take that reasonable care.

#### ***a. Potential defendants***

The scope of potentially liable actors is wide: manufacturers, producers and anyone directly involved in the manufacture of a product including designers, assemblers, repairers, retailers of second-hand goods with latent defects and retailers and distributors marketing a defective product without adequate warnings or without conducting safety tests.

It can also extend to inspectors, regulatory/certification bodies and governmental departments<sup>23</sup>.

#### ***b. Potential claimants***

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<sup>18</sup> *Winterbottom v Wright* (op cit.)

<sup>19</sup> *Langridge v Levy* (1837) 2 M & W 519, 150 ER 863

<sup>20</sup> *Heaven v Pender* (1883) 11 QBD 503

<sup>21</sup> *Dixon v Bell* (1816) 5 M & S 198, 105 ER 1023

<sup>22</sup> [1932] AC 562

<sup>23</sup> See *Davies v Eli Lilly & Co Ltd* [1987] 3 All ER 94, *Nash v Eli Lilly & Co* (1991) 2 Med LR 169 ('Open litigation'); *Re HIV Haemophilic Litigation* (1990) 140 NLJ 1349; and *A v National Blood Authority* [**LINK**]

Under Lord Atkin's "neighbour principle", a duty of care will be owed to all "persons who are so closely and directly affected by [the defendant's] act that [s/he] ought reasonably to have them in contemplation as being so affected"<sup>24</sup>.

Consumers, third party users ('non-buyers'), donees and bystanders all fall into this category.

**c. Type of product**

The duty embraces all products and liability has been imposed in respect of a wide range including defective drinking water, hair-dye, cars and underwear<sup>25</sup>. Importantly, the duty extends to labelling, warnings and instructions<sup>26</sup>.

**d. Fault-based liability**

Liability in negligence is based on fault.

The claimant must prove on the balance of probabilities that: (1) the defendant owed him/her a duty of care; (2) the defendant breached that duty (by failing to meet the required standard of care); (3) causing damage (which must not be too remote i.e. which was or ought to have been foreseeable at the time of breach). The standard of care required is objective (i.e. that of the "reasonably competent" person) and must be exercised at all stages i.e. design, production, testing and marketing.

Breach of this standard of care will render the product "defective".

**e. Types of Defect**

It will be clear from the existence of the duty of care at all stages that there are different types of duty. These have been classified as follows:

*Manufacturing defect* i.e. where raw materials/components or the manufacturing process itself are defective<sup>27</sup>.

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<sup>24</sup> *Donoghue v Stevenson* [1932] AC 562 at 580

<sup>25</sup> Respectively, *Read v Croydon Corpn* [1938] 4 All ER 631; *Watson v Buckley* [1940] 1 All ER 174; *Herschthal v Stewart and Arden Ltd* [1940] 1 KB 155; *Grant v Australian Knitting Mills Ltd* [1936] AC 85. See Hird, *Negligence in Grubb & Howells, The Law of Product Liability* (2000) at page 148

<sup>26</sup> *Distillers Co (Bio-Chemicals) Ltd v Thompson* [1971] 1 All ER 694

<sup>27</sup> *Carroll v Fearon* [1999] ECC 73

*Design defect* i.e. where the product has been manufactured according to specification but there was a defective design at the pre-production or design stage. Where the defect was discoverable (and caused the alleged damage), liability will attach<sup>28</sup>.

*Marketing defect* i.e. a failure to adequately warn all reasonably foreseeable users<sup>29</sup> or the intermediate supplier/distributor<sup>30</sup>. Where the manufacturer knows or ought to have known about a risk in the product in respect of which a reasonable consumer would wish to be warned, there is a duty to give such information (i.e. warnings, instructions for use) as will make the use of the product safe. The duty does not arise where the product risk is obvious to foreseeable users.

Whether there is a defect is assessed on balancing the risks in the product against its potential benefits. There is no liability if an intermediate examination was probable (as opposed to possible) and could have revealed the defect, although there are complex issues here in relation to causation and remoteness of damage<sup>31</sup>. Compliance with safety standards may indicate that there is no defect, but not always<sup>32</sup>.

#### ***f. Causation***

The factual burden of proof is on the claimant to establish on the preponderance of the evidence (the "more probable than not" standard) that the defendant's breach of duty of care caused or materially contributed<sup>33</sup> to the alleged damage.

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<sup>28</sup> *Vacwell Engineering Co Ltd v BDH Chemicals Ltd* [1971] 1 QB 88

<sup>29</sup> *Hazeldine v CA Daw & Sons Ltd* [1941] 2 KB 343

<sup>30</sup> *Holmes v Ashford* [1950] 2 All ER 76

<sup>31</sup> For an analysis see Hird, *Negligence*, in Grubb & Howells (eds.) (2000) at pages 163 to 165

<sup>32</sup> See the Irish case of *Best v Wellcome Foundation* [1992] IRLM 609, where the court held that the applicable regulations only laid out a minimum standard and a higher degree of care may be required depending on the circumstances.

<sup>33</sup> *Wilsher v Essex Health Authority* [1988] AC 1074

In complex personal injury cases - and in particular in the context of pharmaceuticals<sup>34</sup> and so-called toxic torts - it is frequently impossible for the claimant to satisfy the required standard of proof<sup>35</sup>. Causation may be frustrated by lack of scientific evidence as to the risks associated with the product (to establish general causation i.e. that the drug can cause the damage), evidence as to the design or manufacturing process, the state of scientific knowledge at the time of design or manufacture and the problem of multiple defendants and multiple claimants (which may frustrate claimants' ability to show specific causation i.e. that the drug caused the claimant's damage).

The main causal analysis is the but-for test i.e. but for the defendant's negligence, the claimant would not have suffered damage. Different tests may step in to soften the causal framework where, on the facts at issue, the but-for test would prevent recovery: substantial factor (where there are two or more independent and individually sufficient causes); *res ipsa loquitur*; burden shifts (where claimant has been injured by one of two or more negligent actors)<sup>36</sup>; material contribution where there is a possible "guilty" cause and an "innocent" pre-existing cause<sup>37</sup> and where there are two possible "guilty" cumulative causes<sup>38</sup>; and loss of chance<sup>39</sup>. Whether any will be permitted by the court largely depends on the facts of the individual case and the willingness of the court to relax the burden on the claimant.

### **g. Damages**

Damages in negligence are assessed in order to put the claimant in the position s/he would have been in but for the breach. The damage must not be too remote<sup>40</sup> i.e. it must be of a type that was foreseeable.

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<sup>34</sup> Where, even if the claimant can prove on the basis of statistical evidence that the drug causes damage of the kind suffered, s/he cannot prove which of several manufacturers supplied him/her the drug. See the proportional liability solution in the US in *Sindell v Abbott Laboratories* 607 P 2d 924 (Cal. 1980). There is as yet no equivalent in the UK.

<sup>35</sup> See Goldberg, *Causation and Risk in the Law of Torts* (1999)

<sup>36</sup> See *Summers v Tice* 199 P. 2d 1 (Cal. S.C. 1948); *Cook v Lewis* [1952] 1 D.L.R. 1 (S.C.C.) (Canada)); see also DES litigation in the Netherlands [future LINK]

<sup>37</sup> *McGhee v National Coal Board* [1972] 3 All ER 1008 (HL)

<sup>38</sup> *Fairchild v Glenhaven Funeral Services & Ors* [2002] UKHL 22

<sup>39</sup> *Hotson v East Berks AHA* [1987] 2 WLR 287 (CA); 1 AC 750 (HL); *Gregg v Scott* [2002] EWCA Civ 1471; *Normans Bay Ltd v Coudert Brothers (A Firm)* [2003] EWCA Civ 215

<sup>40</sup> The test of remoteness was introduced in *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co., The Wagon Mound No 1* [1961] AC 388

The claimant may recover compensation in respect of personal injury (including loss of earnings, medical costs, pain and suffering and psychiatric harm), death and/or damage to property owned by him/her at the time of damage.

Pure economic loss (i.e. diminution in the value of the defective product itself, as opposed to damage to other property owned by the claimant) is not actionable in negligence. There is ambiguity where a defective component causes damage to property: whether that constitutes recoverable property damage (to the property in which the defective component is incorporated) or irrecoverable pure economic loss depends upon the degree of incorporation.

#### ***h. Defences***

Contributory negligence<sup>41</sup> may act as a defence to liability, if it is shown the claimant should have known of the defect but negligently failed to recognise it, negligently used the product, or ignored instructions for use. If this is accepted by the court, the defendant producer may be entitled to a reduction of any damages awarded commensurate with the claimant's negligence.

Voluntary assumption of risk (*volenti non fit injuria*) by the claimant may also be available. However, in product liability cases this may be rare on the basis that if a claimant knows of the risk or defect, s/he may be unlikely to use the product and, if s/he does, that will usually break the causal chain between defect and damage.

#### ***i. Limitation***

Tort claims must be brought within six years from the date on which the cause of action accrued (section 2 Limitation Act 1980) i.e. from the date the damage occurred.

This is reduced to three years for personal injury claims from the accrual of the cause of action or from the date on which the claimant first had knowledge of the injury<sup>42</sup> i.e. the date on which the claimant has knowledge that the injury was significant; attributable in whole or part to the defendant's negligence; identity of the defendant or other person and additional supporting facts (section 14(1)).

Under section 33 Limitation Act the court may disregard the limitation period in cases of personal injury or death.

## ***2. Breach of statutory duty***

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<sup>41</sup> Leading to apportionment of damages under the Law Reform (Contributory Negligence) Act 1945

<sup>42</sup> Section 11 Limitation Act 1980 defines date of knowledge as the date on which the claimant has knowledge that the injury was significant; attributable in whole or part to the defendant's negligence; identity of the defendant or other person and additional supporting facts.

To claim breach of statutory duty, the claimant must establish a breach of a statutory obligation (including EC legislation) which, on its proper construction, was intended to be a ground of civil liability to the class of persons to which the claimant belongs. The damage must be of a type that the statute was intended to prevent. Normal causation rules apply.

The liability is not strict, as such, since the concept of duty implies a duty of care, albeit statutory. The same damage may give rise to a claim in negligence and breach of statutory duty.

An express civil ground of action is not required: whether a statutory provision is intended to be a ground of civil liability is assessed on an individual basis. The court will be more willing to construe a statutory provision as providing a civil cause of action where it relates to the safety and health of persons as opposed to pure economic loss<sup>43</sup>. Such provisions are set out in the Health and Safety at Work etc. Act 1974 (where a civil claim lies unless regulations provide otherwise) and would include regulations on asbestos and product safety (including medical devices and pharmaceuticals).

### ***3. Post-marketing duties***

The duty of care owed by the manufacturer/producer (etc.) to the consumer (etc.) continues once the product is on the market: the test remains whether the defendant has acted as a reasonable person would have acted in the circumstances. The continuing duty recognises that manufacturers are commonly in the best position of knowledge about risks associated with a product (through incident reports, consumer/retailer feedback, new R&D and scientific evidence) and the design and manufacturing process.

Where a manufacturer discovers, or has reason to believe, that a product that is on the market is unsafe, it must take appropriate action to minimise the risk. Such action includes modification, warnings and extends to product withdrawal or recall<sup>44</sup>. There is thus a duty to continue to keep up to date with scientific information/knowledge with respect to product safety and act accordingly.

The continuing duty applies to all types of defect i.e. manufacturing, design and marketing.

Post-marketing duties are not covered by the Consumer Protection Act 1987, making this aspect of the negligence claim important. However, manufacturers, producers and others in the supply chain are under statutory post-marketing duties under Directive 2001/95/EC on general product safety and UK implementing regulations (which, at the time of writing, are due for publication

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<sup>43</sup> *Richardson v Pitt-Stanley* [1995] QB 123 at 132

<sup>44</sup> See Hird (supra) at page 151 citing *Wright v Dunlop Rubber Co Ltd* (1972) 13 KIR 255; *Walton & Walton v British Leyland UK Ltd* (1978) Times, 13 July QBD

for consultation in Summer 2004). Breach of such a duty would constitute breach of statutory duty.

### **C. STRICT LIABILITY: CONSUMER PROTECTION ACT 1987**

It is commonly acknowledged that ensuring consumer protection via contractual remedies is unsatisfactory to the extent that recourse is limited to the contracting parties. Negligence is problematic since the claimant needs to show fault, evidence of which is frequently with the defendant.

The Thalidomide crisis fuelled pre-existing dissatisfaction with the state of play and academic, judicial and legislative developments in strict liability in the US<sup>45</sup>, the UK<sup>46</sup> and European Commission<sup>47</sup> pointed the way to an alternative regime.

Directive 85/374/EEC on Liability for Defective Products ('Directive'), introducing a strict product liability regime, was adopted on 25 July 1985 [future LINK]. The Directive is implemented in the UK (the first Member State to implement) by Part I of the Consumer Protection Act 1987 (CPA) [future LINK], which entered into force on 1 March 1988 and applies to products supplied after that date. The CPA covers the position regarding strict liability for defective products in the UK but it does not affect the availability of other common law remedies (i.e. contractual liability and negligence)<sup>48</sup>.

The CPA is significant in two ways. First, as implementation legislation, it is distinct in that it (in line with the UK approach to implementation) does not bear great similarity to the provisions of the Directive. Thus, much of the CPA's provisions are for the most part much more intricate in detail than those found in other EU Member States' implementing legislation. Second, it represents an important development in that it introduced the notion of strict liability for products, a concept which generally did not exist under prior domestic law.

The thrust of the CPA/Directive is that a person who is injured, or whose personal property is damaged, by a product will be able to claim against the manufacturer or supplier of that product and certain other parties if it can be shown that the product was defective. There is no need to show fault.

#### ***I. Product***

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<sup>45</sup> *Henningsen v Bloomfield Motors Inc.*, 161 A 2d 69 (N.J. 1960); Second Restatement of Torts, section 402A

<sup>46</sup> The English and Scottish Law Commissions and the Pearson Commission published reports in the late 1970s recommending a strict liability regime for personal injury caused by defective products. See Law Com No 82, 'Liability for Defective Products' (1977); Royal Commission on Civil Liability and Compensation for Personal Injury (1978), Cmnd 7054, Vol I, ch. 22

<sup>47</sup> Commission proposal for a directive on product liability, OJ 1976 C 241/9

Product is defined in section 1(2) as any goods, electricity or substances and includes a product which is comprised in another product (e.g. a component part or raw material). "Substances" are defined in section 45(1) as any natural or artificial substance in solid, liquid or gaseous form.

*Agricultural products:* initially, the CPA (section 2(4)), in line with the Directive (Article 2), exempted primary agricultural products from its provisions, although processed food was covered. In part due to calls for reform following the BSE crisis, the Commission issued a proposal to include primary agricultural produce. The resultant Directive 1999/34/EC [**future LINK**] amended the Directive by requiring food sold in its raw state (agricultural produce) to be included. This was implemented in the UK by the Consumer Protection Act 1987 (Product Liability) (Modification) Order 2000 (SI 2000/2771) [**future LINK**]. The current position is that agricultural produce and game supplied after 4 December 2000 is subject to strict liability under the CPA. Such products supplied before that date are exempt, provided that they have not undergone an "industrial process" prior to supply (section 2(4) CPA).

*Blood/blood products:* the previous uncertainty over whether blood or blood products could fall within the definition of product has now been settled by *A and others v National Blood Authority and another*<sup>49</sup> [**LINK**], which confirmed that such products are covered.

*Software/intellectual products:* a distinction should be drawn between liability for faulty/defective software comprised in a final product (for which the producer of the final product is liable) and liability for the software package itself. As for other intellectual products (e.g. book/advice), the as yet unresolved question is whether this is a product in its own right covered by the Directive/CPA.<sup>50</sup>

## 2. **Producer**

Those primarily liable are: (1) the producer of the product; (2) any person putting his name on the product or using a distinguishing mark, or who has held himself out to be the producer of the product ('own brander'); (3) or any person who has imported the product into the EU/European Economic Area in the course of any business to supply it to another ('first importer') (section 2(1) and (2) CPA).

'Producer' is in turn defined as: (1) the person who manufactured it; (2) if not manufactured, the person who won or abstracted it; and (3) if essential characteristics of the product are

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<sup>48</sup> Section 2(6) CPA

<sup>49</sup> [2001] 3 All ER 298

<sup>50</sup> For an analysis of intellectual products and the Commissions and DTI's opposing views, see Geraint Howells, *Strict Liability*, in Grubb & Howells (eds) at pages 199-203.

attributable to an industrial or other process having been carried out, the person carrying out that process (section 1(2)).

Suppliers of the product (to the person who suffered damage or to the producer in which the product is comprised) may also be liable (in the form of subsidiary liability) if: (1) the person who suffered the damage requests the supplier to identify the producer; (2) within a reasonable period after the damage occurs; and (3) the supplier fails within a reasonable time to comply or identify the person who supplied the product to him (section 2(3) CPA). The rationale behind this provision is to protect the claimant from producers who conceal themselves behind a chain of suppliers. The supplier can avoid liability by informing the consumer of the identity of the producer/importer.

Where two or more persons are liable for the same damage then they are jointly and severally liable (section 2(5) CPA).

### **3. Supply**

Supply, or time of supply, is relevant to suppliers' liability (section 2(3)), the analysis of defect (section 3(2)(c)), the defence of not supplying the defective product in question (section 4(1)(b)) and limitation (section 11A(3) Limitation Act 1980). Whereas the Directive refers to the product being "put into circulation" (which it does not define), the CPA refers to the arguably narrower concept of "supply".

Section 46(1) defines supply as the selling or hiring of goods, hire purchase, performance of contract for work and materials to furnish the goods, providing goods in exchange for consideration other than money, or in the performance of any statutory function, or as a gift.

### **4. Defect**

Defect is essential to liability under the CPA. The burden of proof is on the claimant to show on the preponderance of the evidence that a defect existed (see *Foster v Biosil*<sup>51</sup> [LINK]).

A defect exists where "the safety of the product is not such as persons generally are entitled to expect" (section 3(1)). The standard of defectiveness is therefore based on consumer expectations (or expectations of "persons generally"), rather than a risk:utility analysis. Consumer expectations are subject to a reasonableness test (see *Richardson v LRC Products Ltd*<sup>52</sup> [LINK]).

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<sup>51</sup> (2000) 59 BMLR 178

<sup>52</sup> (2000) 59 BMLR 185

Factors to be taken into account in assessing consumer expectations of a product's safety are set out in section 3(2):

- 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 (cf mere "presentation" in Article 6 Directive);
- reasonably expected use;
- the time that the product was supplied by its producer to another.

In addition to factors to guide the analysis of whether there is a defect, there is also the question of what standard of defect is required for the product to be unsafe and for liability to attach. Undoubtedly this will differ depending on the circumstances of the individual case.

Although case law is as yet relatively minimal and therefore the concept of defect and applicable standard of defectiveness needs to be refined, the three types of defect identified in negligence case law (manufacturing, design and marketing) form an appropriate model and it may be expected that future case law will follow this classification.

Manufacturing defect (i.e. the product is defective because it fails to conform to design specification) is clearly covered by the CPA. In simple cases, a comparison of the allegedly defective product to one that conforms to the design will establish defect. In considering whether blood and blood products taken from donors infected with the Hepatitis C virus were defective, Burton J in *A v National Blood Authority* [LINK] drew a distinction between standard and non-standard products i.e. those that differed from the standard that the producer intended for use by the public. Since the majority of blood supplied was not infected, Burton J held that the infected products were non-standard, unsafe and, in the absence of warnings to the public about the risk of infection, were not what the public was legitimately entitled to expect and were therefore defective. The fact that infection was unavoidable (due to the lack of screening tests available at the relevant time) was irrelevant to the analysis of defect.

In determining what persons are generally entitled to expect, the question to be answered is whether the public at large accepts that a proportion of the products are likely to be defective, or where the defect is due to some error in design or flawed system, and whether the product is safe for its foreseeable use. In *Bogle and Others v McDonald's Restaurants Ltd*<sup>53</sup> [LINK], it was held that consumers' expectations of coffee were that it should be served hot and therefore the

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<sup>53</sup> [2002] EWHC 490

product (coffee in a Styrofoam cup with lid) was not defective merely because it could scald when spilled.

Design defects (i.e. the design itself is defective) may be more problematic since there is no "standard" product against which to compare the allegedly "non-standard" product. All products involve inherent risk and the benefits of the product must be weighed against its potential benefits. A product will be defectively designed if its risks outweigh its benefits (or "utility") and if such risks could have been avoided by an alternative design. Compliance with regulatory standards may indicate that there is no design defect, although this cannot be guaranteed. Where the design permits the risk to arise and there is no warning to the user, the product's safety will fail the consumer expectations test. The defect is present whether or not previous damage due to the defect has occurred: see *Iman Abouzaid v Mothercare (UK) Ltd*<sup>54</sup> [LINK].

Marketing defect/failure to warn: this type of defect is clear from section 3(2)(a) CPA. In the absence of adequate warnings of associated risks or instructions to avoid their materialisation, the product will be defective (see *Worsley v Tambrands Ltd*<sup>55</sup> [future LINK]).

#### **5. Proof of defect, damage and causation**

The burden of proof is on the claimant to establish on the preponderance of the evidence the damage, defect and causal link between the two (*Foster v Biosil* [LINK]; *XYZ & Ors v Schering Health Care Ltd & Ors*<sup>56</sup> [LINK]).

For further detail see 'Causation' in 'Negligence' (above).

#### **6. Damage**

"Damage" covers death, personal injury (defined in section 45(1) as "including any disease and any other impairment of a person's physical or mental condition" and would include nervous shock) and the loss of or any damage to property (including land) (section 5(1)).

The CPA does not cover the following types of property damage:

- damage to the product itself or another product of which the defective component was a part (section 5(2)) (i.e. pure economic loss);

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<sup>54</sup> [2002] WL 1918530

<sup>55</sup> (High Court) 3 December 1999

<sup>56</sup> [2002] EWHC 1420

- damage to property not ordinarily intended for private use (section 5(3)) (i.e. 'non-consumer products');
- property damage of £275 or less (section 5(4)).

Loss of or damage to property is to be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss or damage (section 5(5)).

"Knowledge" includes knowledge which a person might reasonably have been expected to acquire from facts observable or ascertainable by him; or from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek (section 5(7)(b)). However, section 5(7) is clear in that a person is not taken to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain, and where appropriate to act on, that advice.

## 7. *Defences*

Section 4(1) sets out defences that are available where liability has prima facie been established:

- The defect is attributable to compliance with mandatory rules;
- The defendant did not at any time supply the product;
- The defendant only supplied the product otherwise than in the course of business;
- The defect did not exist in the product at the relevant time (defined in section 4(2) as the time of supply) (see *Richardson v LRC Products Ltd* [\[LINK\]](#));
- The state of scientific and technical knowledge at the time of supply 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 while they were under his control (the 'development risks defence' - see below).

The defect constituted a defect in a product ('subsequent product') in which the product in question had been comprised and was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product (the 'component supplier's defence').

*Development Risks Defence:* a development risk is one that was not discoverable when the product was supplied. There is a recognised tension between the development risks defence as articulated in section 4(1)(e) CPA and that in Article 7(e) Directive and the Commission has alleged (unsuccessfully) that the UK had failed properly to implement the development risks

defence and brought infringement proceedings under Article 169 (*Commission v UK*<sup>57</sup> [**future LINK**]). The Commission argued that section 4(1)(e) CPA called for a subjective assessment in that the phrase "...might be expected to have discovered the defect" placed an emphasis on the conduct of a reasonable producer, having regard to the standard precautions in use in the industry in question. It argued that this wording broadened the objective defence as expressed in Article 7(e) Directive, which was based on the state of scientific and technical knowledge as opposed to the capacity of producers to discover defects.

Section 1(1) CPA provides that the relevant provisions are to be construed in conformity with the Directive.

*A v National Blood Authority* [**LINK**] has since established that the development risks defence is only available if the producer can show that there was no objectively accessible scientific or technical knowledge existing anywhere in the world which would have enabled the existence of the defect to be discovered [*ref*]. Further, "knowledge" refers to knowledge of the existence of the defect in the generic product (not the particular defective product) and, where the producer has such knowledge he continues to supply the product at his own risk. It refers to scientific and technical knowledge about the risks, which does not include knowledge based on accident reports (*Iman Abouzaid v Mothercare (UK) Ltd* [**LINK**]).

#### **8. Limitation period**

There is a basic limitation period of three years from the accrual of the cause of action or, if later, from the date the claimant had knowledge of the damage (sections 11A(4) and 14(3) Limitation Act 1980). In addition, there is a "long-stop" period of ten years from the date at which the product was last supplied by the producer, apparent producer or importer (section 11A(3) Limitation Act 1980). While the basic limitation period may be extended by the courts (section 33 Limitation Act 1980), the long-stop may not (section 33(1A)(a) Limitation Act 1980).

See *Horne-Roberts v SmithKline Beecham plc and another*<sup>58</sup> [**LINK**].

#### **D. STATE COMPENSATION SCHEMES**

State compensation schemes come into play in the context of mass torts i.e. a large group of persons who have been exposed to a product or toxic agent suffer damage which is allegedly caused by that exposure. The UK approach continues to tend towards government inquiries (e.g. Gulf War Syndrome and BSE) and there have been a number of ex gratia compensation

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<sup>57</sup> C-300/95 [1997] ECR I-2649

<sup>58</sup> [2001] EWCA Civ 2006

schemes (e.g. the Family Fund set up in 1973 for Thalidomide victims and the Macfarlane Trust in 1988 for HIV-Haemophilia victims). State-funded compensation schemes step in where there is a perceived need for compensation, although predominantly only where the causal connection between exposure and damage is clear.

However, in part due to the development of manufacturer liability and the strict liability regime under the CPA, and also due to contemporary notions of individual responsibility for collective risk, attempts at private compensation mechanisms via multi-party litigation play an increasing role.

### **III. PRACTICE AND PROCEDURE**

#### **A. Pre-Trial or Pre-Action Discovery**

Since Lord Woolf's reform of civil procedural rules in the late 1990s, culminating in the Civil Procedure Rules 1998 (CPR), pre-action protocols play a major part in shifting much of the documentary disclosure (e.g. exchange of information on the nature of the claim/defence, witness and expert evidence) to the pre-action stage. There is a General Protocol and a number of specific pre-action protocols, including one specifically on personal injury claims (Personal Injury Protocol **[future LINK]**).

The Protocol sets out the steps that must be taken prior to the initiation of any proceedings, including a letter of claim from the claimant to the defendant setting out a summary of the facts, injuries alleged and financial loss and the defendant's reply within 21 calendar days identifying the insurer (if any). Only if there is no such reply may the claimant then start proceedings. Failure to comply with the Protocol will have adverse cost consequences in the event of litigation.

A large part of disclosure is therefore conducted at the pre-action stage. There is also a general power under CPR Part 8 for the court to order pre-action discovery. Parties must disclose all documents which are or have been in their control (1) on which each relies and (2) which adversely affect his/her own case or another party's case or support another party's case. "Documents" include e-mails, computer data, photographs and sound recordings. "Privileged" documents (e.g. between lawyer and client) need not be disclosed.

#### **B. Expert Evidence**

The CPR introduced new rules on expert evidence (Part 35) and restricts it to that reasonably required to resolve the proceedings (Part 35.1).

Proceedings are adversarial and each party will usually want to present its own expert. The court can direct that evidence on a particular issue be given by one expert only and that a single joint

expert selected by the parties (or by the court if the parties cannot agree) be appointed. The expert owes a duty to the court, not to any party, and should assist the court by providing objective, unbiased opinion on matters within his/her expertise (see Practice Direction - Experts and Assessors CPR Part 35).

### **C. Trial on preliminary issues/admissibility**

Under Part 3 CPR, courts have increased and formalised case management powers, including the power to direct a separate trial of any issue and to decide the order in which issues are to be tried (CPR 3.1). It will depend on the individual case whether a court will make use of these powers.

English courts do not conduct an in-depth assessment of evidence at an admissibility stage, in contrast to the position in the US<sup>59</sup>. Evidence will be admitted on a relatively light assessment of whether it has "relevance" and "probative value" with respect to the matter in issue.

### **D. Fee Arrangements and Legal Costs**

Legal aid for personal injury cases was withdrawn in April 2000 (Access to Justice Act 1999, Schedule 15), although public funding may be available for multi-party actions where a significant number of people may be affected.

Conditional fee arrangements (CFAs) or "no win no fee" arrangements (to be distinguished from US contingency fees) have been allowed for all civil cases except family cases since 30 July 1998 (Courts and Legal Services Act 1990, section 58, substituted by the Access to Justice Act 1999, section 27). The level of fees depends on the outcome of the case and the form of agreement and recovery of the "success fee" are regulated. There is currently a maximum "uplift" (i.e. compared to normal fees to reflect the risk) of 100%. A CFA that does not comply with the rules is prohibited and unenforceable. US-style contingency fees are unlawful.

Part 44 CPR sets out the rules on costs. The general rule is that the unsuccessful party will be ordered by the court to pay the other party's costs and the court has discretion as to the award, amount and time of payment. The court must take into account the conduct of the parties (pre-action and during the litigation); whether a party has succeeded on part of his/her case even if not successful overall; and any payment into court under Part 36 or other admissible settlement offer.

### **E. Class or Representative Actions**

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<sup>59</sup> See admissibility guidelines for expert evidence set out in *Daubert v Merrell Dow Pharmaceuticals, Inc* 113 S.Ct.2786 (1993) ("*Daubert I*")

The CPR introduced multi-party actions in the form of Group Litigation Orders (GLO) (Part 19.III) and representative parties (Part 19.II). Prior to formalised group litigation structures, the approach had been ad hoc judicial case management using a variety of co-ordination, consolidation and lead claimant techniques (see *Opren*, *Benzodiazepines*, *tobacco*, *Norplant* and *HIV-Haemophilia and CJD litigations*)<sup>60</sup>.

A GLO is an order made under 19.11 CPR to provide for the case management of claims which "give rise to common or related issues of fact or law" ("GLO issues"). Claimants are making increasing use of GLOs both in the product liability context (see e.g. *Sabril litigation GLO* made on 13 February 2004 in respect of ant-epilepsy medication) and in other areas (a list of current GLOs is published on [www.courtservice.gov.uk/notices/queens/GLO.htm](http://www.courtservice.gov.uk/notices/queens/GLO.htm)).

An application for a GLO may be made by either claimant or defendant at any time before relevant claims have been issued. The granting of a GLO by the court is not automatic and the court has discretion. Although there is no minimum number of claimants, a court will generally not make a GLO if there are fewer than ten claimants. Factors the court takes into account are: whether there are, or are likely to be, a sufficient number of claims; what issues of fact or law arise; whether such issues are common or related; and whether the court can specify the GLO issues so as to identify those claims which are, and are not, to be managed within the group. If the court makes a GLO, it must specify the management court responsible for the management of the claims and hearing the GLO issues and direct the entry of all claims onto the Group Register. Joining the group is on an opt-in basis (as opposed to opt-out in the US) and the court will usually specify a cut-off date for entry onto/removal from the Group Register. Judgment in relation to one or more of the GLO issues binds all claims entered onto the Group Register at the time of judgment with respect to those issues. Non-GLO issues (e.g. individual exposure) must be resolved for each individual case. The management court may give directions for a claim to proceed as a test or lead claim and appoint a lead solicitor to take control of the conduct of the litigation on behalf of the claimant group.

If the court refuses a GLO, claims must be brought on an individual basis.

Part 19.II CPR provides for representative actions for parties with the "same interest" in the claim.

Government proposals for "representative claims" (i.e. claims brought by a representative that does not in itself have *locus standi* in respect of a class of claimants) now appear to have been shelved following criticism from industry and defendant lawyers in the consultation responses.

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<sup>60</sup> For an analysis of these previous multi-party actions and the new rules see Christopher Hodges, *Multi-Party Actions* (2001)

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