A SHORT INTRODUCTION TO THE CONSUMER PROTECTION ACT

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Introduction

For many years after the Consumer Protection Act 1987 (the "CPA") came into force, it remained something of an unknown quantity. There was little EU or domestic case law on many of the key provisions, including on the fundamental question of what was meant by 'defect'.

More recently, there have been a number of significant cases which have helped shape our understanding of the CPA, but even now some areas remain surprisingly unclear, given that the CPA is now over 30 years old.

In this 'Short Introduction to the CPA', we will explore the critical parts of the legislation and the effect of recent case law, as well as looking at some of the remaining problem areas. We will also look ahead to consider what effect Brexit will have in this arena.

Strict liability

Under the CPA (which implements the Product Liability Directive 85/374/EEC ("the Directive")), producers are strictly liable for defective products which cause damage, s.2(1) CPA.

What is a product?

S.1(2) provides that a product "*means any goods*[1] *or electricity and… includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise*". The definition is a wide one, and includes, for example, transfused blood, *A v National Blood Authority* [2001] 3 All ER 289 ("*A v NBA*"). Since 2000, liability for damage caused by primary agricultural and fishery produce is also included.[2] There are open questions as to what separates a product from a service (e.g. in relation to the Internet of Things, where services and products interact).[3]

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[1] Goods are further defined in s.45(1) CPA. It should be noted that the definition is wider than the Sale of Goods Act 1979 because it includes goods attached to land, whereas under the Sale of Goods Act 1979 they must be severed before or under the contract of sale (Sale of Goods Act 1979, s.61(1)). S.2(8) Consumer Rights Act 2015 defines 'goods' as any tangible moveable items.

[2] SI 2000/2771, reflecting a change in the Directive itself, Dir. 99/34; OJ 1999 L 141/20.

[3] See for example Clerk & Lindsell 'On Torts' (22nd ed) at 11-49 and the European Commission's Fifth Report on the application of the Directive (2018).

When is a product defective?

A product is 'defective' "*[i]f the safety of the product is not such as persons generally are entitled to expect … in the context of risks of damage to property, as well as in the context of risks of death and personal injury*" (s.3(1) CPA).

This definition has been criticised as being the "*single most difficult*" part of the CPA,[4] and as "*at best circular and at worst empty*".[5] The difficulty was exacerbated by the fact that there was very little judicial consideration of what constituted a defect. For many years, the most important CPA case in England and Wales was *A v NBA*, where Burton J gave a "*monumental*"[6] judgment, albeit one which has been heavily criticised.

However, recently there have been two significant first-instance decisions: *Wilkes v Depuy International Limited* [2016] EWHC 3096 (QB), [2018] QB 627 and *Gee v Depuy International Limited* [2018] EWHC 1208 (QB), where the judges took a starkly different view to Burton J and gave useful guidance on this part of the CPA.[7]

Guidelines

S.3(2) lays down guidelines to be considered as to when a product is defective, and provides that "*all the circumstances*" are to be taken into account, including: how the product is marketed, its get-up, the use of any mark in relation to the product, instructions and warnings, and what might reasonably be expected to be done with or in relation to the product.

The question of what other circumstances should be taken into account will be fact-dependent.[8] However, it is notable that circumstances which Burton J had explicitly or implicitly excluded as *irrelevant* have been considered as *relevant* by Hickinbottom J and Andrews J in *Wilkes* and *Gee* respectively. This is explored in more detail below.

'Entitled to expect'

In *A v NBA* it was common ground that the phrase "*entitled to expect*" should mean what "*the legitimate expectation is of persons generally, i.e. what is legitimately to be expected arrived at objectively.*" Burton J adopted the formulation "*legitimate expectation*" in his judgment.[9]

However, this approach has been criticised in both *Wilkes* and *Gee*. Hickinbottom J stated that he found that Burton J's use of the phrase "*legitimate expectation*" was "*an unnecessary and unhelpful gloss*" on the CPA [71]. He said that the level of safety is "*not to be assessed by reference to actual expectations of an actual or even a notional individual or group of individuals*" [69], and made it clear that the test was an objective one [70]. He concluded that "*in considering whether a product suffered from a defect, the court must assess the appropriate level of safety, exercising its judgment, and taking into account the information and the circumstances before it, whether or not an actual or notional patient or patients, would in fact have considered each of those factors and all of that information*" [72]. Andrews J agreed that it was dangerous to re-describe the test as Burton J had [95].

Following these cases, and the fact that this formulation does not appear in the CPA, it seems unlikely that Burton J's formulation will be adopted in the future.[10]

Avoidability, risk-benefit and cost

It is worth noting that certain products are inherently dangerous, but that does not mean that they are necessarily defective – for example, a chainsaw. See also *B (A Child) v McDonald's Restaurants Ltd* [2002] EWHC 490 (QB), where piping-hot coffee served in substantial polystyrene cups was not considered to be defective.

In order to be defective, there must be something more. These considerations form part of what is known as the

[4] R Goldberg 'Medicinal Product Liability and regulation' (2013).
[5] J Stapleton 'Product Liability' p.234.
[6] See *Wilkes v Depuy International Limited* [2016] EWHC 3096 (QB), [2018] QB 627 [55].
[7] See also the recent Scottish case of *Hastings v (1) Finsbury Orthopaedics Ltd v (2) Stryker UK Limited* [2019] CSOH 96, which closely followed the reasoning in *Wilkes and Gee*.
[8] See *Wilkes* [77-79] and *Gee* [143].
[9] See [31] and [56]. It is noted that the French language version of the Directive uses the phrase "*le grand public peut légitimement s'attendre*".
[10] Although some of Burton J's test set out in [31] of *A v NBA* was cited by Judge Cotter QC in the recent case of *Busby v Berkshire Bed Co* [2018] WLUK 167, the Judge does not appear to have applied the 'legitimate expectation' test.

'*risk-benefit*' analysis.

Burton J had appeared to suggest that a '*risk- benefit*' (or risk-utility) analysis was not relevant to the CPA. However, both Hickinbottom J and Andrews J considered the questions of avoidability,[11] risk-benefit[12] and cost as potentially relevant considerations.

In fact, in *Wilkes*, Hickinbottom J put the question of risk-benefit at the heart of his judgment. Having noted that no medicinal product, if effective, can be entirely safe, he concluded that safety was "*inherently and necessarily a relative concept*" and that "*the potential benefits (including potential utility) of such a product has to be balanced against the risks*" [65]. Hickinbottom J suggested that the "*practicability of producing a product of risk-benefit equivalence must therefore potentially be a relevant circumstance in the assessment of a product's safety*" [82], and cost might be a factor in an appropriate case [83].

Hickinbottom J also considered the question of avoidability (i.e. whether a defect could be removed or reduced). He referred to *B v McDonald's* and concluded that, whilst not determinative, in an appropriate case the ease and extent to which a risk can be eliminated or mitigated may be a circumstance that bears upon the issue of the level of safety that the public generally is entitled to expect.

Andrews J also accepted that in certain cases risk-benefit would be a relevant consideration. She agreed that where a product included a feature which gave it a potential functional advantage or eliminated a perceived deficiency in design, but in doing so necessarily introduced a risk, it would be artificial to prevent the Court from considering an actual or potential benefit introduced by that product [153]. Andrews J appeared to summarise this method as taking a "*holistic approach to the objective evaluation of safety*" [165], citing *B v McDonald's* in support.

However, in relation to avoidability, having accepted the appropriateness of the Court taking this into account,[13] both Hickinbottom J and Andrews J cautioned that a detailed consideration of the discrete question of whether a particular risk is or is not avoidable is "*unlikely to be fruitful*".[14] Precisely how this would play out in an appropriate case, therefore, is unclear.

Standard and non-standard products

In *A v NBA* Burton J divided defective products into 'standard' products (one which performs as the producer intends) and 'non-standard' products (i.e. one which is different to other products of the same model because of, for example, a manufacturing error). In Burton J's view, in relation to non-standard products (of which he found the contaminated blood to be one), the question that should be asked is whether the harmful characteristic was *one which* was socially acceptable. In *A v NBA*, he held that it was not - the public were entitled to expect that transfused blood would be free from infection.

Hickinbottom J considered this approach to be "*unnecessary and undesirable*", "*positively unhelpful and potentially dangerous*" and pointed out this classification did not derive from the Directive or the CPA. Andrews J supported Hickinbottom J's view, see [158-160].

It is therefore doubtful whether Burton J's distinction will survive. Nevertheless, in practice, it still seems likely that it will be easier to bring a successful claim where a particular product does not meet its own specifications (as Hickinbottom J and Andrews J both recognised, see Wilkes [94 and 96] and Gee [159]).

Standards and regulatory regime

Hickinbottom J emphasised the importance to the question of defect of whether or not a product met relevant safety regulations. His view was that it might be difficult for a claimant to prove a product was defective if it complied with the relevant regulations.[15]

However, he did note this was not an automatic defence under the CPA, concluding that "*such approval may be evidence (and, in an appropriate*

[11] This was also addressed (albeit in passing) by Judge Cotter QC in *Busby*.

[12] See *Bailey & Others v GlaxoSmithKline UK Ltd* [2019] EWCA Civ 1924, where the Court of Appeal noted (obiter) the 'guidance' given in *Wilkes* (including the risk-benefit analysis), without expressly endorsing the same. *Bailey* indicates the importance of clear and careful pleadings in CPA cases.

[13] *Wilkes* [89] and *Gee* [166].

[14] *Wilkes* [85] and *Gee* [166].

[15] Wilkes [100].

case, powerful evidence) that the level of safety of the product was that which persons generally were entitled to expect" [101]. Andrews J rejected the claimants' arguments that compliance with regulations or safety standards should be irrelevant to the question of defect [170-175], and agreed with Hickinbottom J's view set out above [176].[16]

However, it should be noted that a Court can come to a different conclusion from that indicated by the regulatory regime or applicable standards. Perhaps surprisingly, in *Pollard v Tesco Stores* [2006] EWCA Civ 393, the claimant's argument that the dishwasher powder bottle (which had been opened and its contents ingested by a toddler) was defective because it did not satisfy the relevant British Standards failed in the Court of Appeal. It is therefore possible for the level of safety the public is entitled to expect to be *lower* than a particular safety standard.

Misuse of a product

There may be cases where products are only unsafe when misused. If misuse was foreseeable and likely to have harmful consequences, it might be that a warning should be provided with a product and/or it should have been produced in such a way so as to prevent or reduce the risk of misuse. For example, if it were foreseeable that a laptop left on a duvet would overheat and/or catch fire, it might be necessary to warn of this risk and its consequences. Equally, if it were foreseeable that a gas canister might be used incorrectly, and this carried with it a risk that the gas canister might explode, it might be necessary to design the gas canister in such a way so as to prevent this.

Potential defect

The question of a *potential* defect was considered by the CJEU in *Boston Scientific Medizintechnik GmbH v AOK Sachesen-Anhalt* (C-503/13 and C-504/13). The case concerned potentially faulty pacemakers and defibrillators, where the fault could only be identified once it had been explanted. Did the claimant have to show that each individual pacemaker/defibrillator was defective, or was it sufficient to prove that pacemakers/defibrillators within that product group had a significantly increased risk of failure?

The Court held that with regard to the specific products in issue, in light of their function and the particularly vulnerable situation of patients using such devices, the safety which patients were entitled to expect was particularly high. The Court noted that if the products did go wrong, there was an "*abnormal potential for damage*".

The Court therefore concluded that where it is found that products belonging to the same group or forming part of the same production series have a potential defect, it is possible to classify all the products in that group or series as defective, without there being any need to show that the particular product in question is defective.

However, in *Gee* the argument put forward that the tendency or propensity (i.e. the potential risk) of the metal-on-metal prosthesis to result in an adverse reaction leading to revision constituted a defect (in and of itself) received short shrift. In essence, Andrews J held that the claimants were trying to characterise the actual or predicted incidence of a manifestation of a *known* inherent risk under normal circumstances of use as a 'defect', and that this was misconceived, and contrary to the spirit of the CPA [119]. She distinguished *Boston Scientific* on the basis that the defect in that case was not simply that the defibrillator/pacemaker might fail, but rather that there was a significantly increased risk of failure, particularly given the particularly serious consequences of any failure (see [126-127]).

Causation

A claimant must establish both that the product was defective, and that the defect caused the loss, s.2(1) CPA.

The Court of Appeal in *Ide v ATB Sales Ltd* [2008] EWCA Civ 424 at [7] held that under the CPA it is unnecessary for the judge to ascertain the precise cause of the defect.

Whilst this sounds simple, in practice causation can often still prove difficult, because a claimant might have to identify a precise defect in order to show a causal link,

[16] However, the question of regulation was less relevant in *Gee* than *Wilkes* as the complaint made did not relate to anything directly addressed in any safety standard or regulation [178].

and/or the court might have to eliminate other possibilities. See for example *Love v Halfords Limited* [2014] EWHC 1057 (QB), where the claimant failed to show that the bicycle was defective (the court finding instead that the part in question had been bent and then repaired by some unknown person), and *Richardson v LRC Products* [2000] PIQR P164 where the claimant failed to show that a condom that had burst was defective (the Court held that condoms sometimes failed for "*inexplicable*" reasons).

Where a claimant's case is based upon a defect causing an increased risk of harm, there is a debate as to what precisely the claimant has to prove. The case of *XYZ v Schering Health Care Limited* [2002] EWHC 1420 (QB) (concerning oral contraceptives) suggested that in such cases a claimant is required to prove that the risk of the adverse event had more than doubled. However, in *Sienkiewicz v Greif* [2011] UKSC 10, in *obiter* comments, the members of the Supreme Court took very different views as to the appropriateness of the doubling of the risk test, and whether further evidence, beyond the risk identified by the epidemiological evidence, is necessary. A different approach (not without its conceptual difficulties) is to say that the court, having been satisfied that the level of safety was less than it ought to be, should find causation proved on the basis of material contribution (relying for example on cases such as *Fairchild v Glenhaven Funeral Services Limited* [2002] UKHL 22). This was specifically left open in *Wilkes* [137] and *Gee* [186].

In the case of *W v Sanofi Pasteur* (C-621/15), the CJEU confirmed that it was for national courts to decide on what evidential rules to apply, as the long as the rules do not displace the burden of proof under the Directive or undermine the effectiveness of the system of liability established by the Directive.

Who can sue under the CPA?

In order to have a right of action under Part 1 of the CPA, the claimant needs to have suffered damage of a kind covered by Part 1 of the CPA.

- S.5 CPA restricts damage to death or personal injury, or any loss or damage to property which is for private use, occupation or consumption.[17] Non- consumers therefore can bring a claim for death or personal injury, but claims for damage to property can only be brought by consumers.
- The CPA does not cover pure economic loss.
- No damages are recoverable under the CPA in respect of damage to property if the claimant's total damage (excluding interest) does not exceed £275 (s.5(4)).
- There is no liability for any loss or damage to the defective product itself (s.5(2)).

Who is liable under the CPA?

S.2(2) CPA makes three categories of person liable automatically:

1) Producers: defined by s.1(2) CPA as the manufacturer,[18] or (if the product is not manufactured) the person who won or abstracted the product, or the one who carried out an industrial or other process which gave the product essential characteristics;
2) Those who hold themselves out as producers; and
3) Importers into a member state.[19]

S.2(3) makes a fourth category potentially liable: suppliers.

The definition of suppliers includes any supplier along the chain of supply. However, suppliers can avoid liability by identifying a person set out in s.2(2) CPA within a reasonable time.[20] Suppliers must do something positive: it is not sufficient merely to identify that they are not a producer under the CPA.[21] It is suggested that suppliers should identify the correct legal person in a form that enables the claimant to sue them.

[17] Ss.5(1) and 5(3) CPA.

[18] There could be more than one manufacturer, because a product is defined in s.1(2) CPA as including "*a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise*". Therefore, where the defect is in a component part of the product which is supplied to the final producer, both the manufacturer of the component part and the manufacturer of the final product will be potentially liable.

[19] Note – it is not the importer into the UK but the importer into the EEA who is liable.

[20] There is some debate as to whether a request is needed (as set out in s.2(3) CPA) because this does not appear in the Directive Art. 3(3) which simply provides that each supplier must inform the injured person or the producer within a reasonable period of time or be treated as its producer.

[21] *O'Byrne v Aventis Pasteur* (C-358/08) [2010] 1 WLR 1375 [57-58].

The CPA therefore makes it relatively straightforward for claimants to identify a party to sue because (a) there a number of different types of persons who can be sued and (b) the supplier must provide appropriate information to the claimant to enable them to sue s.2(2) categories of person. However, there is also a risk that the claimant might follow numerous links of the supply chain only to find it broken in that, for example, the company has ceased to trade.

What defences are available?

S.4 CPA contains six specific defences. The burden is on the defendant to establish any defence.

A defence is available if:

- The defect is attributable to compliance with any requirement imposed by or under any enactment or with any EU obligation (s.4(1)(a)). The person proceeded against did not at any time supply the product to another (s.4(1)(b)), which protects producers where products are stolen or where accidents occur before distribution. The question of when the product was supplied is a factual one.
- The person proceeded against is a non-business party (s.4(1)(c)), e.g. someone who produced home-made cakes neither in the course of their business nor with a view to profit (both limbs of this test must be satisfied).
- The defect did not exist in the product at the relevant time (s.4(1)(d)). The question of what was the "*relevant time*" for each part of the supply chain is set out under s.4(2) CPA, and will be a question of fact in each case.
- Suppliers of component parts have a special defence if the defect constituted a defect in the subsequent product 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 (s.4(1)(f)).

Finally, there is the development risks defence provided for in s.4(1)(e) CPA, which provides a defence where: "*the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control*".

There must have been knowledge of the risks which caused the product to be defective. The state of knowledge is to be considered on an objective basis.[22] However, there is a great deal of debate as to what test the Court should employ when examining this defence. In *European Commission v United Kingdom* (C-300/95) [1997] All ER (EC) 481, the CJEU noted that the knowledge referred to must be scientific and technical knowledge (i.e. not the practices and safety standards in the industrial sector in which the producer was operating) [26].

The Advocate-General noted that:

- If there is one isolated opinion at the relevant time to the effect that the product is defective (whilst most academics do not take that view) the producer cannot rely on this defence. The state of scientific knowledge must be identified by the most advanced level of research, not the majority of learned opinion [21-22].[23]
- However, the accessibility of the scientific and technical knowledge (for example the place of origin, the language in which it is given and the circulation of the journals in which it was published) is also to be taken into account.[24] There is a difference between a study of an American university published in an international English- language journal and similar research carried out by an academic in Manchuria published in a local scientific journal in Chinese which does not go outside the boundaries of the region [23].

As noted above, the limits of the defence and the precise test used are still very much a matter of debate. However, in England to date the defence has been narrowly construed, see e.g. *A v NBA* at 361-365, *Richardson v LRC Products Ltd* [2000] Lloyd's Law Reports (Medical) 280, and *Abouzaid v Mothercare Ltd* [2000] All ER (D) 2436 (Dec) per Pill LJ [28]-[29], and per Chadwick LJ [46].

[22] *European Commission v United Kingdom* (C-300/95) [1997] All ER (EC) 481 [29], and *A v NBA* at 327.

[23] See also [26] and [29] of the CJEU's judgment.

[24] See also [29] of the CJEU's judgment.

Questions of ambiguity

S.1(1) CPA provides "*This Part shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly*". Further, it is a principle of European law that courts should try to interpret the national implementing law so as to comply with the Directive.[25] Therefore, where there is any ambiguity in the national law, the Courts will look to the Directive. This is indeed what Burton J did in *A v NBA* at 308-309.

International scope of the CPA

Importers into a member state can be held liable under the CPA. These importers could be companies which are not domiciled within a member state.

There is some debate as to whether producers who are not domiciled within a member state could be held liable under the CPA, but it is likely that they could be so liable.[26] Where a defendant is domiciled in England, the English Court has jurisdiction as of right and is not entitled to decline jurisdiction, *Owusu v Jackson* (C-281/02) [2005] QB 801. It does not matter if the manufacture, marketing and damage all occurred outside England.

If a victim suffers injury in England, the English court is likely to have jurisdiction over any defendant in a claim brought by the victim pursuant to the CPA under the Judgments Regulation (recast) and at common law even if not domiciled in England on the basis that the harmful event occurred in England – Art 7(2) Judgments Regulation (EU 1215/2012); (CPR PD6B, para 3.1(9)).

Territorial scope of CPA

The territorial scope of the CPA was considered as one of the preliminary issues decided in the case of *Allen & Others v DePuy International Limited* [2014] EWHC 753 (QB), [2015] 2 WLR 442. The claimants alleged that they had suffered injury as result of defective metal-on-metal hip prostheses manufactured by the defendant in England. None of the claimants was domiciled in England; and none had their operation or suffered their alleged injury in England. Most of the claimants were domiciled in New Zealand or South Africa, where they had also had their operations and suffered their alleged symptoms. The claimants sought to argue that English law applied to their claims and relied on the CPA. The defendants argued that English law did not apply, and even if it did, the CPA and/or Directive did not extend to damage suffered outside the EEA.

Stewart J held that English law was not the applicable law.[27] He also held that even if English law had applied, the claimants would not have had the benefit of the CPA. Here the claimants were all non-EEA consumers who suffered damage outside the EEA, in relation to products which had been marketed and supplied outside the EEA. The claims fell outside the territorial scope of the CPA.

However, the judge did not need to decide, and did not decide, the difficult question of whether the CPA is limited only to damage in the UK or also extends to damage within the EEA. He also did not need to decide whether it was necessary in order to fall beyond the scope of the CPA that the goods were marketed outside the EEA, or simply that damage was sustained outside the EEA.

Limitation

There are specific limitation periods in relation to the CPA.

Personal injury claims

Personal injury claims must be brought within 3 years of the date on which the cause of action accrued, or (if later) the date of the knowledge of the injured person, s.11A(4) Limitation Act 1980.[28] The Court also has a discretion to allow an action to proceed if it would be equitable to do so, even if the 3-year period has passed (s.33 Limitation Act 1980).

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[25] *Marleasing SA v La Comercial Internacional de Alimentación SA* (C-106/89) [1990] ECR I-4135.

[26] See e.g. Clerk & Lindsell 'On Torts' (22nd ed) at 11-75.

[27] He held that the mere fact that the product was manufactured in England was not sufficient to displace the general rule under the Private International Law (Miscellaneous Provisions) Act 1995 that the applicable law was the law of the country where the individual was when he sustained the injury.

[28] If an injured person dies before the expiration of the limitation period, the cause of action survives for the benefit of his or her estate. A claim must be brought within 3 years of either the date of death or the date of the personal representatives knowledge (s.11A(5) Limitation Act 1980).

Where there has been a death

If the product causes somebody's death, their dependants might be able to bring a claim under the Fatal Accidents Act 1976.[29] If the deceased's claim was not already time-barred, then a dependant can bring a claim within 3 years of the date of death or the date of knowledge of a person for whose benefit the action is brought, whichever is the later (s.12(2) Limitation Act 1980).

Damage to property

If a product causes damage to property, s.5(5) CPA provides that "*In determining … who has suffered any loss of or damage to property and when any such loss or damage occurred, the loss or damage shall 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[30] about the loss or damage.*"

Such a claim must be bought within 3 years from the date on which the cause of action accrued or the date of knowledge of the claimant or (if earlier) of any person in whom the cause of action was previously vested (s.11A(4) Limitation Act 1980).

10-year longstop provision

S.11A(3) Limitation Act 1980 sets out a 10-year longstop:

- It does not simply impose a procedural bar to an action to which the section applies, but extinguishes the right of action.
- The period of 10 years runs from "*the relevant time*" as defined by s.4 CPA, i.e. in effect when the product was last supplied by someone who was a producer, purported producer, or importer. There are often considerable difficulties in determining when a product is said to be supplied.
- The period starts to run whether or not the claimant's right of action has accrued (i.e. it runs even before the claimant has suffered damage).
- The court in theory has a discretion under CPR r.19.5(1)(a) to allow for substitution of a defendant after the expiry of the 10-year period, *Horne Roberts v SmithKline Beecham Plc* [2001] 1 WLR 1662.
- However, the CJEU has ruled that art.11 of the Directive must be interpreted as precluding national legislation allowing the substitution of one defendant for another during proceedings in a way which permits a '*producer*' (within the meaning of art. 3 of the Directive) to be sued, after the expiry of the 10-year longstop, as defendant in proceedings brought within that period against another person, *O'Byrne v Aventis PasteurSA* (C-358/08).[31]

General provision under the Limitation Act 1980

Certain general provisions of the Limitation Act 1980 are applied to claims under Part 1 of the CPA. For example, s.28 Limitation Act 1980 provides that where someone is under a disability (i.e. while he is an infant or lacks capacity within the meaning of the Mental Capacity Act 2005)[32] the limitation period only starts to run when either that person dies or ceases to be under a disability. There are also provisions for extending the limitation period in cases of fraud, deliberate concealment or mistake (s.32 Limitation Act 1980). However, these periods will not affect the 10-year longstop limitation period set out above. Those representing claimants under a disability will therefore need to bear in mind the 10-year longstop period.

Reviews of the Directive

The European Commission reports every five years on the Directive. It has issued a Green Paper on *Liability for Defective Products* and five reports on product liability. The first four reports broadly concluded that there is a balance between producer and consumer interests, and indicated a reluctance to propose further reform.

The European Commission's Fifth Report concluded that, even though products are more complex today than in 1984 (noting that many of the products we have today

[29] In order to bring such a claim within the Fatal Accidents Act (and despite the fact that the CPA provides for strict liability), the damage is deemed to have been caused by the defendant's wrongful act, neglect or default (s.6(1)(a) CPA).

[30] As defined in s.5(6) CPA.

[31] There is a potential exception identified by the CJEU - in circumstances where to all outward appearances a supplier (which had been sued by the claimant) had decided to put a product into circulation, but where in fact it was the manufacturing parent company (which had not been sued by the claimant) which had determined that the product should be put into circulation, see *O'Byrne v Aventis Pasteur MSD Ltd* [2010] 1 WLR 1412 SC [33]. The House of Lords held on the facts that this did not apply in the *O'Byrne* case.

[32] Per s.38(2) Limitation Act 1980.

have characteristics that were considered the stuff of science fiction in the 1980s), the Directive continues to be an adequate tool. However, it stated that it was not perfect, and would continue to be reviewed. The European Commission has promised guidance on the Directive as well as a report on the broader implications, and potential gaps in and "*orientation for*", the liability and safety frameworks for Artificial Intelligence, Internet of Things and robotics, and (if necessary) an update on certain aspects of the Directive, such as the concepts of 'defect', 'damage', 'product' and 'producer'. Whilst this was due in mid-2019, this has still, at the time of writing, not been published.

Brexit

On 19 December 2019, the government introduced the new European Union (Withdrawal Agreement) Bill ("WAB") to the House of Commons. The WAB could, of course, still be amended during its passage through Parliament.

On the assumption that the WAB is passed, the WAB will implement the provisions of the UK-EU withdrawal agreement into UK law.

- The WAB will amend the European Union (Withdrawal) Act 2018 ("EUWA") to ensure that EU law continues to apply in the UK during the transition period to the extent required by the withdrawal agreement.
- The transition period will start on 31 January 2020 and end on 31 December 2020 (subject to any extension being agreed, albeit the WAB prohibits the UK Government from agreeing such an extension).
- The new body of "retained" EU law will be created at the end of the transition period and will preserve and convert into UK law (subject to any amendments made pursuant to the powers in the EUWA) EU law which applied in the UK at the end of the transition period (section 25).
- Section 26 introduces one of the biggest changes from the earlier withdrawal agreement bill. It would amend section 6 of the EUWA, which provides that after exit day the UK courts must follow retained EU case law (which includes pre-exit-day EU rulings) unless the Supreme Court has decided to depart from those rulings. Section 26 of the WAB would enable the government to set out in regulations the circumstances in which specified UK courts and tribunals would not be bound by retained EU case law after the end of transition period. Whether this will affect the CPA or not remains to be seen.

What about the CPA?

The CPA itself is, of course, an Act of Parliament and as such remains in force in any event, unless repealed or amended.

At the end of the transition period, paragraph 1 of Schedule 5 of the WAB provides that schedule 3 of The Products Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019 will come into force, and will amend the CPA in order to address certain issues that would arise once the transition period has come to an end.

Importers under the new regulations

The key change in relation to importers is that liability will attach to an importer into the UK rather than an importer into a member state. There are no transitional provisions.

This is significant as previously these UK entities were often 'suppliers' of a product imported by another company into the EEA and as such were not automatically liable under the CPA scheme.

Compliance with EU obligations

S.4(1)(a) CPA provides for a defence when complying with an EU obligation. However, this will only serve as a defence after the end of the transition period where that obligation has been retained by domestic law after the end of the transition period.

Other consequences

If the transition period ends with no further agreement as to jurisdiction, the Judgments Regulation and the Lugano Convention (of which the UK is only a party through the EU) will cease to apply. Instead the common law rules of jurisdiction would apply in all cases.

Other causes of action

A claimant might of course also have a claim in contract, negligence or for breach of statutory duty. Frequently such claims are found in combination with a claim under

the CPA.

The advantage of such claims is that claimants do not have to be consumers in order to be able to have a cause of action for damage to property. Further, they might (in claims which do not involve personal injury) have longer to bring a claim, and are not subject to the longstop. Additionally, claims in contract can be brought for pure economic loss.

Claims in contract (where available) may be particularly attractive as a claimant must only prove that the product was not of satisfactory qualify (which will normally be similar to defectiveness) under the Sale of Goods Act 1979 or under the Consumer Rights Act 2015, as opposed to showing negligence on the part of the defendant. However, a claim in negligence is open to a broader category of person, in that it is not limited to the contracting party, and may encompass liability for matters arising after the product is put into circulation, such as a failure to implement a recall.

Further, non-consumer claimants might be able to bring a claim under Part V of the CPA (which is separate from Part I which enacts the Directive) for breach of statutory duty in relation to various safety regulations.[33] The High Court recently held such claims are not open to consumer claimants, *Wilson v Beko* [2019] EWHC 3362 (QB), on the basis that this would circumvent Part I of the CPA.

Importantly, the CPA/ Directive provides, within the matters it regulates, a harmonised system of civil liability for defective products. This precludes a member state from maintaining a system of liability for defects different from that provided for by the Directive itself if the national measures fall within the sphere of the Directive: *Commission v France* (C-52/00), [21]. It does not matter in this regard whether the national system purports to provide more extensive or more restrictive liability than that under the Directive. However, the Directive does not "*affect any rights which an injured person may have according to the rule of the law of contractual or non-contractual liability or a special system existing at the moment when this Directive is notified*" (30th July 1985).

[33] See *Stoke-on-Trent College v Pelican Rouge Coffee* [2017] EWHC 2829 (TCC), [2017] All ER (D) 149 (Nov) where the commercial claimant was successful in its claim against a vending machine supplier, operator and maintainer of a vending machine which had suffered an electrical fault which caused a fire.

Disclaimer

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