A Practical Guide to THE CONSUMER PROTECTION ACT

A guide from the 2TG Product Liability Group

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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 'Practical Guide 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 explore what effect Brexit has had and will continue to have in this arena.

Strict liability

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

The CJEU recently held that inaccurate health advice published in a hardcopy newspaper was a service, not a product.[3] The provision of health advice was distinct from the medium via which it was communicated, i.e. the newspaper. Neverthless, there remain 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).[4]

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 or personal injury*" (s.3(1) of the CPA).

This definition has been criticised as being the "*single most difficult*" part of the CPA,[5] and as "a*t best circular and at worst empty*".[6] The difficulty was exacerbated by the fact that for a long time there was very little judicial consideration of what constituted a defect.

More recently, however, there have been two key first instance judgments on the question of defect: *Wilkes v Depuy International Limited* [2016] EWHC 3096 (QB), [2018] QB 627 and *Gee v Depuy International Limited* [2018] EWHC 1208 (QB). The approach in *Wilkes* and *Gee* were very recently approved (albeit *obiter*) by the Supreme Court in *Hastings v Finsbury Orthopaedics Ltd* [2022] UKSC 19, [2022] S.L.T. 771. All three cases concerned metal-on-metal hip prostheses, which were said to be defective.

Guidelines

S.3(2) of the CPA 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.[7] 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'

It is now relatively clear[8] that the "*test of whether a product is defective is whether the safety of the product is not such as persons generally are entitled to expect. The test is not what is expected but one of entitled expectation*", *Hastings* at [15(ii)]. Whilst this was an *obiter* comment, it follows the analysis in *Wilkes* and *Gee*[9] and is (in our view) correct.

As noted above, what persons generally are entitled to expect is assessed having regard to all the circumstances which are factually or legally relevant to the evaluation of safety, including

1 Goods are further defined in s.45(1) of the CPA.

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

3 *VI v KRONE-Verlag Gesellschaft mbH and Co KG* (Case C-65/20). This judgment is a post-Implementation Period Completion Day CJEU judgment and so is not binding in England and Wales, see further below, p.6.

4 See for example Tettenborn (ed.) *Clerk & Lindsell on Torts* (23rd edn. Incorp. 2nd Supplement, Sweet & Maxwell, 2022) [10-52] and the European Commission's Evaluation of the Product Directive, SWD(2018))157. The EU Commission's draft new EU Product Liability Directive (in contrast) explicitly includes software within the definition of a product, see further below, p.6.

5 R Goldberg *Medicinal Product Liability and Regulation* (1st edn., Hart Publishing, 2013).

6 J Stapleton *Product Liability* (1st edn. Butterworths, London 1994) p.234.

7 See *Wilkes* [77]-[79] and *Gee* [143].

8 There had been historic confusion about this test following *A v NBA* where Burton J had adopted the formulation "*legitimate expectation*" in his judgment (see [31] and [37]). This approach was heavily criticised in *Wilkes* [69]-[72] and *Gee* [95].

9 As above, see *Wilkes* [69]-[72] and *Gee* [95].

the matters identified in s.3(2). This must be evaluated at the time when the product was supplied by its producer to another. The assessment of risks associated with a product, which might inform entitled expectations as to its safety, must be done at the time the product is supplied and not with the benefit of hindsight.[10]

In determining whether a product met the level of safety persons generally were entitled to expect, the court is entitled to have regard to everything now known about it that is relevant to that enquiry, irrespective of whether that information was available at the time it was put on the market or has come to light subsequently.[11]

Risk-benefit, avoidability and cost

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 a substantial polystyrene cup used to serve piping-hot coffee was not considered to be defective.

In *Hastings*, the Supreme Court noted that the nature of the product (a medical device) was such that there could be no entitlement to an absolute level of safety (following *Gee* at [117]). It was natural for a metal-on-metal hip prosthesis to wear and shed metal debris that could cause soft tissue damage, such that this by itself could not be a defect.[12]

Thus in order to be defective, there must be something more. These considerations form part of what is sometimes known as the *'risk-benefit'* analysis.[13]

Burton J in *A v NBA* had appeared to suggest that a *'risk- benefit'* (or risk-utility) analysis was not relevant to the CPA. However, both Hickinbottom J in *Wilkes* and Andrews J in *Gee* considered the questions of risk-benefit,[14] avoidability,[15] and cost as potentially relevant considerations.

Hickinbottom J concluded 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 (see [88-89]).

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,[16] 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"*.[17] 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 (i.e. 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 (see [94]). Andrews J endorsed Hickinbottom J's view, see [158]-[160].

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][18] 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.[19]

However, he did note that this was not an automatic defence under the CPA, concluding that *"such approval may be evidence (and, in an appropriate 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].[20]

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, the claimant in *Pollard v Tesco Stores* [2006] EWCA Civ 393 was unsuccessful in arguing 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. It is therefore possible for the level of safety the public is entitled to expect to be *lower* than a particular safety standard.

10 See *Hastings* at [15(iii)] following *Gee* at [84].
11 See *Hastings* at [15(iv)], following *Gee* at [84].
12 See further below under 'Potential defect'.
13 Albeit Andrews J urged caution with this label, see *Gee* at [144]ff.
14 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.
15 This was also addressed (albeit in passing) by Judge Cotter QC in *Busby*.
16 *Wilkes* [89] and *Gee* [166].
17 *Wilkes* [85] and *Gee* [166].
18 N.B. The Supreme Court cited [96] in *Hastings* with approval (see [15(v)]) but this might be simply in relation to the part of that paragraph which dealt with causation, rather than the 'non-standard' product point.
19 *Wilkes* [100].
20 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].

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"* [40].

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, if a product has a known inherent risk, that does not (in and of itself) render it defective, see *Hastings* at [19] citing *Gee* at [117]. In *Gee*, Andrews J 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) of the CPA.[21]

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, 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 of the CPA restricts damage to death or personal injury, or any loss or damage to property which is for private use, occupation or consumption.[22] 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) of the CPA makes three categories of person liable automatically:

1) Producers: defined by s.1(2) of the CPA as the manufacturer,[23] 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;

21 The Supreme Court reiterated this point in *Hastings* at [15(v)].

22 Ss.5(1) and 5(3) of the CPA.

23 There could be more than one manufacturer, because a product is defined in s.1(2) of the 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.

2) Those who hold themselves out as producers;[24] and

3) Importers into the United Kingdom. Before 31 December 2020 the CPA defined an importer as an importer into a Member State.[25] The secondary legislation that changed the definition of an importer[26] did not contain any transition provisions. As such, it is unclear who the relevant importer will be if one person imported the defective product into the European Union and another then brought it to the United Kingdom pre-31 December 2020 if the defective good causes damage post-31 December 2020.

S.2(3) of the CPA 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) of the CPA within a reasonable time.[27] Suppliers must do something positive: it is not sufficient merely to identify that they are not a producer under the CPA.[28] It is suggested that suppliers should identify the correct legal person in a form that enables the claimant to sue them.

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 relevant company has ceased to trade.

What defences are available?

S.4 of the 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 retained EU obligation (s.4(1)(a) of the CPA).
- 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 homemade 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), 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) of the 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.[29] 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].[30]
- 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.[31] 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].

Questions of ambiguity

S.1(1) of the 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.[32] This continues regardless of Brexit (see below). Therefore, where there is any ambiguity in the national law, the Courts will look to the Directive.

24 I.e. any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product. For a recent interpretation of this by the CJEU, see *Keskinäinen Vakuutusyhtiö Fennia v Koninklijke Philips NV* (C 264/21), where the producer which had appended its trademark to the product was held liable, even though it was clear it was not the manufacturer of the product. This judgment is a post-Implementation Period Completion Day CJEU judgment and so is not binding in England and Wales, see below.

25 Therefore, under the old law *"it [was] only an importer into the Community who [was] liable. Thus a UK importer who [imported] goods from the United States, Hong Kong, or wherever [would] be potentially liable under the Act, but [would] not be so liable if he [imported] goods from France or Spain, etc"* (see Fairgrieve and Goldberg *Product Liability* (3rd edn, OUP, 2020), [8.27])

26 Regulation 6 and paragraph 3 to Schedule 3 of the Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.

27 There is some debate as to whether a request is needed (as set out in s.2(3) of the 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.

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

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

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

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

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

International scope of the CPA

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.[33]

The question of jurisdiction falls outside the scope of this guide. Nevertheless, in summary:

- Where a defendant can be validly served in England, the English Court has jurisdiction as of right.[34] This includes if a foreign defendant nominates solicitors within the jurisdiction to accept service of the claim form without any reservation as to jurisdictional rights.[35] It does not matter if the manufacture, marketing and damage all occurred outside England. The Court is, however, entitled to stay the claim if it can be shown that there is clearly a more appropriate forum for the dispute.
- If a defendant is domiciled outside the jurisdiction, permission to serve out of the jurisdiction may be necessary. In practice, 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: CPR PD6B, para 3.1(9).
- Special (more generous) jurisdiction rules apply to claims relating to consumer contracts.[36]

Territorial scope of the 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.[37] 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.[38] 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).

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.[39] 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) of the 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*[40] *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) of the Limitation Act 1980).

10-year longstop provision

S.11A(3) of the 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 of the 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 a defendant in proceedings brought within that period against another person, *O'Byrne v Aventis Pasteur SA* (C-358/08).[41]

33 See e.g. *Clerk & Lindsell* at [10-76].

34 Collins et al *Dicey, Morris, and Collins: The Conflict of Laws* (16th edn, Sweet & Maxwell, 2022) [11R-037].

35 *Manta Line Inc v Sofianites* [1984] 1 Lloyd's Rep 14.

36 Section 15B of the Civil Jurisdiction and Judgments Act 1982.

37 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.

38 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 representative's knowledge (s.11A(5) of the Limitation Act 1980).

39 In order to bring such a claim within the Fatal Accidents Act 1976 (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) of the CPA).

40 As defined in s.5(6) of the CPA.

41 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.

General provisions 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 of the 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)[42] 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 of the Limitation Act 1980). However, these periods will not affect the 10-year longstop limitation period set out above. Those representing claimants under a disability therefore need to bear in mind the 10-year longstop period.

Brexit[43]

On 31 January 2020 the United Kingdom ceased to be a member of the European Union and entered the Implementation Period, during which, generally, European Union law operated as if the United Kingdom were still a member state. The key legislation was and is the European Union (Withdrawal) Act 2018 as amended ("EU(W)A 2018").

The Implementation Period ended at 23:00 on 31 December 2020 ("IP Completion Day")[44] and there is now a new category of domestic law: Retained EU Law.[45] Included within Retained EU Law is all EU-derived domestic legislation, which includes the CPA.[46]

A consequence of forming part of Retained EU law is that the CPA continues to have effect in the United Kingdom post-IP Completion Day in the same way as it did pre-IP Completion Day. Likewise, the *Marleasing* principle (outlined above at footnote 32) as a general principle of EU law also likely continues to have effect post-IP Completion Day.[47]

However, there are some differences to the treatment of EU law post-IP Completion Day. A domestic court is not bound by any decisions of the CJEU post-IP Completion Day albeit it *"may have regard to anything done on or after IP Completion Day by the European Court…so far as it is relevant to any matter before the court"*.[48] Likewise, whilst domestic courts are bound to apply the CPA in line with any relevant CJEU judgments delivered pre-IP Completion Day,[49] the Supreme Court[50] and Court of Appeal[51] are not so bound. These courts can depart from CJEU case law *"when it appears right to do so"*.[52] There is currently little guidance on when the Court of Appeal or Supreme Court will depart from CJEU case law, but what guidance there is suggests that they will be slow to do so.[53] Clearly, whether or not to depart from CJEU case law will always depend on the facts of each individual case.

European Commission's draft new product liability directive

On 28 September 2022, the European Commission published a draft of a new product liability directive (COM(2022) 495). This would repeal the existing Directive.

The proposed new directive would not directly affect the UK. It may also still be subject to further amendment. However, it is noteworthy as (a) it seeks to bring product liability into the twenty-first century and (b) it is more consumer-friendly than had been anticipated. Exploring the impact of the new draft could easily be the subject of its own Practical Guide – at present we note (on the current draft) merely that:

- The proposed new directive will now specifically apply to software (which includes artificial intelligence systems).[54]
- Those potentially liable for defective products will expand to include: software developers;[55] non-EU businesses' authorised representatives; a person that substantially modifies a product already on the market; and (in certain circumstances) fulfilment service providers.[56] Secondary liability will expand to include online platforms.[57]
- The list of relevant factors in assessing defect has been expanded (see art. 6).[58]
- Whilst explicitly stating that the claimant will still have to prove defect, the required causal connection between product defect and damage will be presumed in certain circumstances.[59] Most significantly, this will be presumed where the claimant faces excessive difficulties, due to technical or scientific complexity, to prove the defectiveness of the product or the causal link between the defectiveness and the damage, or both; where the defendant fails to comply with disclosure obligations; or where the claimant establishes that the damage was caused by an obvious malfunction of the product during normal use or under ordinary circumstances. This is evidently likely to make it easier for consumers to bring successful claims.[60]
- The 10-year longstop is weakened in cases involving latent injury, and starts to run afresh from any substantial modification to a product.

Whether this proposed new directive will result in the CPA being amended, after the Law Commission next looks at it, remains to be seen.

Other causes of action

A claimant may 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.

42 Per s.38(2) Limitation Act 1980.

43 Members of 2TG have produced a Practical Guide giving an overview of Brexit and Retained EU law (https://www.2tg.co.uk/wp-content/uploads/2021/08/2TG-Practical-Guide-to-Retained-EU-Law-Summer-2021.pdf). This section only provides the main points as they apply to the CPA.

44 S.1A EU(W)A 2018 and s.39 European Union (Withdrawal Agreement) Act 2020.

45 S.6(7) EU(W)A 2018.

46 S.2 EU(W)A 2018.

47 See ss.5(2) and 6(3) EU(W)A 2018 as well as paragraph 104 of the Explanatory Notes to the EU(W)A 2018. This has been expressly confirmed in *Haymarket Media Group Ltd v The Commissioners for HMRC* [2022] UKFTT 168 (TC), [12] and *Crooks and Sayers v Cohen* [2022] EWHC 402 (Ch), [57].

48 Ss.6(1)-(2) EU(W)A 2018. Domestic courts have sometimes declined to follow CJEU case law promulgated post-IP Completion Day, see e.g. *Tower Bridge GP Limited v The Commissioners for HMRC* [2022] EWCA Civ 998, [119].

49 S.6(3) EU(W)A 2018.

50 S.6(4) EU(W)A 2018.

51 Reg. 3 European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525.

52 S.6(5) EU(W)A 2018 and Reg 5 European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020/1525 when read with the House of Lords' Practice Statement of 26 July 1966 (Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 and *Austin v Mayor and Burgesses of the London Borough of Southwark* [2010] UKSC 28, [24] – [25].

53 *Tuneln Inc v Warner Music UK Ltd and Sony Music Entertainment UK Ltd* [2021] EWCA Civ 441, Arnold LJ at [75]–[83], the Master of the Rolls at [197]–[200], and Rose LJ (as she then was) at [184].

54 Such liability might continue beyond the point of placing the product on the market or putting it into service where products are substantially modified through software upgrades, see art. 10.

55 Albeit some argue they are included under the Directive in any event.

56 See art. 7 of the draft directive.

57 See art. 7 of the draft directive.

58 Including an apparent element of subjectivity (see art. 6(h) of the draft directive) which seems to run counter to the objective test for determining whether a product is defective.

59 See art. 9 of the draft directive.

60 There are also proposals in relation to disclosure which favour consumers (and are unknown in certain jurisdictions), and in relation to quantified entities being entitled to bring a representative action for compensation, repair or price reduction.

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 proper 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.[61] The High Court 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).

61 See *Stoke-on-Trent College v Pelican Rouge Coffee* [2017] EWHC 2829 (TCC) 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.

About the Authors

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Charles is noted for his exceptional product liability practice, focused in particular on complex cases, often with an international element. Recent cases have involved prosthetic hip implants, white goods, pumps, cars, tyres, batteries, electrical plugs, child car seats, pacemakers, contaminated food, pharmaceuticals, breast implants, vehicle emissions and fridges.

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Isabel acts for both claimants and defendants, and her product liability practice includes construction products, automotive products, white goods, medical implants, bicycles, toys, gas products, domestic electrical appliances, industrial machinery and even parts of a nuclear fusion reactor. She has also provided an 'expert' opinion on English product liability law for a foreign court.

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