PRODUCT LIABILITY

There are a number of laws in force which impose both criminal and civil liabilities on those who breach their provisions.
The Consumer Protection Act introduced new criminal offences regarding unsafe products and unfair or incorrect prices.
It also introduced a new route for consumers seeking redress for damage from consumer goods.

Product liability is generally understood to be the civil liability of a manufacturer/producer/distributor for damage or injury caused by a defect in the product.
Traditionally under English law a victim has had two routes under which to pursue compensation:
Contract
Tort

Contract involves some form of binding agreement between the parties, such as a contract for the purchase of goods or services, or some form of credit sale.
There is no need to prove fault by the seller; non-conformance to contract specifications or implied terms is sufficient. Hence even if the seller is not to blame he may still be successfully sued.
The problem with this route is that a party must show privity in order to pursue litigation. In other words only those parties involved in the contract can sue.

Tort: For a victim not party to a contract, for example a bystander, or the recipient of a gift, then a claim must be followed through the law of tort. Generally this will involve negligence. However, to pursue such a claim the injured party must show:
1) that he was owed a duty of care
2) that duty was breached
3) damage was caused by the breach

The main problem with this route is that the litigant must show that on the balance of probabilities there has been a lack of reasonable care.

The system under CPA renders the 'producer' of a defective product strictly liable for personal injury or damage to personal property. Hence no need to prove negligence or show privity of contract.

Let us take a more detailed look:

Primary liability for goods and services is that between the buyer and seller.

Under ss.l3, 14 & 15, Sale of Goods Act 1979 (as amended) goods must:

Match description

Be fit for their purpose

Be of satisfactory quality

Match sample

and if they fail to do so the buyer may end the contract and claim back the full purchase price plus any consequential damages.

Liability then feeds along the contract chain.

Godley v Perry [1960] 1 WLR 9

A young boy bought a catapult from a corner shop. As he pulled back the elastic to let fly a missile, the elastic snapped removing his eye.
He sued the retailer for damages. The retailer in turn was able to sue the manufacturer to recoup his losses.

However, this produces problems if the contract chain is broken, either as the recipient was given the item or one party no longer exists.

A partial solution to the problem was reached as a result of:

Donoghue v Stevenson [1932]

Here the neighbour principal was established by Lord Aitken.

This liability extended very quickly in the 1930's to cover installers, servicers and repairers as well as manufacturers.

There were two problems with this solution:

a) The Duty of Care,

what is reasonable care?

Daniels & Daniels v Tabbard & White [1937]

Mr & Mrs Daniels went to a pub after a walk. Mr D orederd a beer for himself and a shandy for his wife. Unfortunately the lemonade was contaminated with caustic soda used to clean out the lines at the factory and Mrs Daniel was severely injured.

Mrs D sued but the factory established a defence that they employed someone to test if the lemonade was contaminated.

Held: all reasonable care had been taken hence manufacturer was not liable.

b) Economic Loss

Murphy v Brentwood D.C.[1990]

P bought a house from builders. House had a basic design fault & cracks appeared. P sold the house far below its market value because of the faults and sued the Local Authority alleging negligence in passing the plans, which were defective in their design.
HOL held that there must be a close or proximate relationship between P & D. to impose a duty of care: -
it must be foreseeable that negligence would harm P;
it would be just & reasonable to impose a duty of care.
Hence P did not get his award of damages.

A combination of the Thalidomide Case and EC Directive on **Liability for Defective Products (85/374/EEC)** produced change.

CONSUMER PROTECTION ACT 1987

PART 1

This applies to any product supplied from 1 March 1988.

A product means any goods or electricity

The liable party is the producer, defined to include:

Producer

Own Brander

Importer from outside the EC

Supplier: includes any person who supplies the article (s.46)

this includes, selling, hiring, hp, a contract for work and materials, providing goods in exchange for any consideration (e.g. trading stamps, profile points etc.)

providing goods in connection with a statutory function, giving goods as a prize

generally a retailer, distributor, installer will not be liable under pt1 CPA if he can identify from whom he acquired the product concerned.

Hence the keeping of records could be very important.

Once that supplier to you has been identified you are no longer liable under pt1 CPA.

However, the key concept in the Act is that of a defect.

"...There is a **defect** in a product for the purposes of this Part if the safety of the product is not such as persons are generally entitled to expect;...'

As a result of this Courts will be able to set the standard within the context of the risk of damage rather than an absolute objective standard being set.

3. Meaning of 'defect'

(1) Subject to the following provisions of this section, there is a defect in a product for the purposes of this Part if the safety of the product is not such as persons generally are entitled to expect; and for those purposes 'safety', in relation to a product, includes safety with respect to products comprised in that product and safety in the context of risks of damage to property, as well as in the context of risks of death or personal injury.

(2) In determining for the purposes of subsection (1) what persons generally are entitled to expect in relation to a product, all the circumstances shall be taken into account, including-

(a) 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;

(b) what might reasonably be expected to be done with or in relation to the product; and

(c) the time when the product was supplied by its producer to another;

and nothing in this section requires a defect to be inferred from the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question

Few cases have reached the Courts under the Act we need to look for guidance on interpretation to what consumers were entitled to under the Common Law and the experience of other countries.

Specific point to be addressed in examining what a consumer is “entitled to expect” include:

Marketing

The Dune Buggy (an American law suit)

Television commercials showed a Kawasaki three- wheeled ATV riding up and down sand dunes doing “rollovers.”
Jeffrey Black, a minor, emulated the adverts only his ATV had no rollover bar fitted. He suffered severe head injuries while riding an ATV. Mr. Black alleged negligence by Kawasaki, they settled out of court.

Get-up

The Paint Stripper

What does it look like?

Instructions and Warnings

What might reasonably expect to be done

1. Age Group

Moran v Faberge 273 Md. 538 (1975)

Two girls began to discuss whether the candle burning in the room was scented. After agreeing that it was not, one of them said "Well, let's make it scented," impulsively grabbed a "drip bottle" of Faberge's Tigress cologne, which was for use as a laundry deodorant, and began to pour its contents onto the lower portion of the candle somewhat below the flame. Instantaneously, a burst of fire sprang out and badly burned Nancy Moran, as she stood nearby watching. Faberge claimed that everyone was aware that such a product was highly flammable and no reasonable person would use the product in such a manner. The

court contended that young persons would require such a warning and found for the plaintiff.

2. Reasonable Misuse

Crow v Barford (Agricultural) Ltd [1963] The Rotomo

Here, a farmer's toes were cut off when his foot caught in the rotary blades of a lawn mower when he was attempting to start the engine. His claim failed because the manufacturer could not have reasonably foreseen the likelihood of injury and therefore warning labels were not required. The court also held that where the risk of this injury was obvious to the consumer when looking at the product, no damages were recoverable because the accident would have been the plaintiff's own fault.

However, as a result guards were placed on such mowers so that such misuse did not allow the toes to come in contact with the blades.

The Time it was supplied

As technology and standards change so does public expectation. A car with a rigid steering column, cable brakes and no seat belts would now be considered defective and dangerous but 30 years ago it was acceptable.

Roe v Minister of Health [1954]

Roe and another patient underwent surgery in a hospital managed under the general supervision of the Minister of Health. Before entering the operating theatre, an anaesthetic consisting of Nupercaine was administered by means of a lumbar puncture. At that time, it was common practice to store such anaesthetic in glass ampoules immersed in a phenol solution to reduce the risk of infection. Unknown to the staff, the glass had a number of micro-cracks which were invisible to the eye but which allowed the phenol to penetrate. When used, the phenol-contaminated anaesthetic caused permanent paraplegia.
Denning LJ. said, "We must not look at the 1947 incident with 1954 spectacles." It was held that the micro-cracks were not foreseeable given the prevailing scientific knowledge of the time. Thus, since no reasonable anaesthetist would have stored the anaesthetic differently… there was no negligence.

Defence and State of the Art

As in all such areas there are a number of defences to actions but the most important one is going to be the so called "State of the Art" defence. This provides:

"That the state of scientific and technical knowledge at the relevant time was not such that a producer of products...might be expected to have discovered the defect..."

Abouzaid v Mothercare (2001) The Times 20m Feb. CA

In 1990, the claimant aged 12 was helping his mother to attach a fleece lined sleeping bag to a pushchair. An elastic strap with metal buckle slipped from his hand and in to his eye permanently damaging his sight.

The expert jointly instructed by both parties stated
In 1990 no manufacturer could reasonable be expected to foresee that the elastic straps could pose a hazard to the eyes of children or adults. But today in the year 2000 when he examined it he would recognise that a manufacturer would either have to eliminate the hazard or warn consumers of the risk.
Held Claimant entitled to succeed in their claim.
If the product contained a defect (s.3) recognised as existing in 2000 then it existed in 1990.
The development of risks defence (s.4(1)(e)) was not applicable the fact that the defect was not discovered before the accident was not because of lack of scientific or technical knowledge. A simple practical test would have enabled discovery of the defect.
Because of the Expert's opinion Mothercare was not liable in negligence BUT they were under s. 2 of the CPA.

This compares in the Directive with: -
"That the state of scientific and technical knowledge at the time...was not such as to enable the defect - to be discovered;"

See also **QUEEN'S BENCH DIVISION**

A AND OTHERS v NATIONAL BLOOD AUTHORITY AND OTHERS [2001] 3 All ER 289

117 claimants brought an action for damages under the Act arising from their infection with hepatitis C as a result of blood transfusions received after March 1988. The claimants argued that they were entitled to recover damages from the National Blood Authority under the Act, irrespective of fault on the authority's part. The claimants' case was based solely on the fact that they had been supplied with infected blood between 1988 to 1991, when it was generally known that blood could be infected with the virus. They claimed that the infected blood was a 'defective product' within the meaning of the act and that they were entitled to expect that they would be supplied with blood that was safe and free from infection.

The court found in favour of the claimants
The NBA argued that blood is a natural product which carries an inherent risk of viral infection, and that the medical profession knew of the risk which, for at least part of the period, could not have been avoided. The definition of 'defect' under the directive was fundamental to the outcome. The judge referred to the wording of the directive, rather than the Act, as it was accepted that insofar as the wordings may conflict, the UK courts are obliged to give effect to the directive.

The Judge considered that the circumstances referred to in Article 6 of the Directive did not include the issue of whether the producer could have avoided the defect or whether the medical profession was aware of the risk of

hepatitis C infecting blood products. He concluded that the blood products were defective within the meaning of Article 6 because the public at large was entitled to expect that blood given to them in transfusions was free from infection.

The judge considered that the development risks defence was unavailable to the authority because the possible risk of infection was known to it. It was irrelevant that the authority could have done nothing to screen the blood and could not have refused to supply the blood or taken steps that would have prevented the claimants from becoming infected. The mere fact that the authority knew of the risk was enough to render the defence unavailable.

Piper v JRI (Manufacturing) Ltd [2006] EWCA Civ 1344

The claimant, then aged 55, underwent a total hip replacement operation. The operation involved the implantation of a prosthesis, supplied by the defendant to the hospital. The operation was apparently successful, as the claimant gained a significant degree of improvement in his mobility. Subsequently, the prosthesis sheared in two. The claimant sought compensation from the defendant under the Consumer Protection Act 1987 for damage caused by a defective prosthesis.

Held- Where used in a hip replacement operation, the judge had been correct, on the evidence, in finding that the prosthesis had not been defective at the time it had been supplied to the hospital, and that the statutory defence had therefore been established. The appeal would be dismissed.

Damage covered by the Act includes:
Death
Personal Injury
Damage to Property
(over £275) This lower threshold applies only to personal property not personal injury.
This £275 minimum takes in to account contributory negligence so if actual damage was £400 and the victim was found to be 50% contributorily negligent, then damages would be awarded of £200 i.e. below the threshold. The limit stated in the Directive was 500 ECU which at the time it was enacted in the UK was equivalent to £275

The Act excludes:
The Product itself
Property not for Private Use
Liability is limited to - 10 years after supply (Time limit starts when product is supplied not when manufactured) This has an implication for suppliers as records were normally kept (if at all) for 6 years being the normal time for liability under contract & tort.

A further limitation is that proceedings must commence within 3 years from becoming aware of the damage, the defect and identity of the defendant.
So if injury occurs 5 years after the product was supplied the Plaintiff has until year 8. If he is injured after nine years 30 days he has eleven months in which to start proceedings.

Liability cannot be excluded.

The Worst Case Scenario is the deliberately faulty design for which aggravated or exemplary damages can be awarded.

Grimshaw v Ford Motor Co. Inc. The Ford Pinto (1981)

In order to keep down costs the design of the vehicle incorporated a petrol tank situated over the rear axle and a further cost saver was to omit the fire screen protection between the petrol tank and the back seat.

This in itself was not a problem unless and until the vehicle was shunted from the rear.

On impact the petrol tank would rupture releasing petrol on to a very hat axle. Petrol + heat = explosion and/or fire, thus roasting Granny and the children.

Grimshaw was one of several cases that had been to court involving such an incident however, during this case documents were discovered from Ford which detailed that Ford had calculated, on economic terms the cost of paying out for a few roast Grannies versus the 60 dollar saving per car in a very competitive compact car market.

Court awarded punitive damages against Ford of several million dollars. Punitive damages are not covered by insurance and co. had to pay from their own coffers.

Such proof will result in the damage not being covered by insurance and the individual or company will have to pay, probably at the cost of its existence.

DEFENCES

A producer or importer can avoid liability if he can prove any of

six defences:

- he did not supply the product (e.g. it was stolen or is a counterfeit copy of his products);

-the state of scientific and technical knowledge at the time he supplied the product 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 so-called “development risks defence”);

- the defect was caused by complying with the law. Compliance with a regulation will not necessarily discharge a producer from liability; in order to claim the defence he would have to show that the defect was the inevitable result of compliance;

- the defect was not in the product at the time it was supplied (e.g. if a product becomes defective because a retailer handles it carelessly);

- the product was not supplied in the course of a business, for example, the donation of homemade toys for sale at the occasional church bazaar or sales by private individuals of second-hand goods;

- the producer of a component will not be liable if he is able to show that the defect was due either to the design of the finished product, or to defective specifications given to the component manufacturer by the producer of the finished product.