4 NEW SQUARE
CHAMBERS

Product Liability: an overview

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1. The Consumer Protection Act 1987 (the "CPA"): the meaning of "defect"

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In brief: what is the CPA?

The CPA implemented the Product Liability Directive 85/374/EEC;

The following entities are **strictly** liable for defective products which cause damage, s.2(1) and (2) of the CPA:

- Producers
- Those who hold themselves out as producers;
- Importers.

Suppliers are *potentially* liable unless they fail to identify another s.2(2) CPA entity within a reasonable time, s.2(3).

Note that there is a 3-year limitation period for claims (including those just for property damage) and a 10-year longstop (after which a claim cannot be brought) from the date when the product was supplied.

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Definition of "defect"

S.3(1) of the CPA – a product is defective:

"if the safety of the product is not such as persons generally are entitled to expect"

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Definition of "defect" (ctd)?

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 marks in relation to the product;
- Instructions and warnings;
- What might reasonably be expected to be done with or in relation to the product.

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Recent case law on "defect"

Wilkes v DePuy International Limited [2016] EWHC 3096 (QB)

Gee v DePuy International Limited [2018] EWHC 1208 (QB)

Hastings v Finsbury Orthopaedics Ltd [2022] UKSC 19

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What is a defective product?

- Certain products are inherently dangerous but not defective: *B (A Child) v McDonalds* [2002] EWHC 490 (QB)
- Products fail – but not defective: *Richardson v LRC Products* [2000] P.I.Q.R. P164.
- Risk-benefit analysis often key: *Wilkes* and *Gee*.

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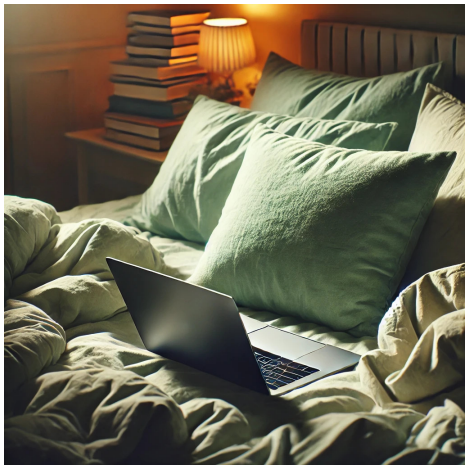
Other factors to consider

- Product recall;
- Standards/regulatory regime;
- The importance of statistics; and
- Foreseeable misuse.



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2. The CPA: causation

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Overview

Will consider:

- Test for causation;
- Warnings;
- Role of learned intermediaries.

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Test for causation

C must show that: (a) the product was defective, and (b) the defect caused the loss, s.2(1) of the CPA.

In theory, unnecessary for the Court to ascertain the precise cause of the defect, see *Ide v ATB Sales Ltd* [2008] P.I.Q.R. P13.

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Often difficult in practice

Need to show defect caused loss, see e.g.:

- *Wilson v Bayer Pharma AG* [2023] EWHC 1282 (QB), where claim failed.

Need to rule out other causes, see e.g:

- *Lexus Financial Services t/a Toyota Financial Services UK Plc v Russell* (handed down with *Ide v ATB*).

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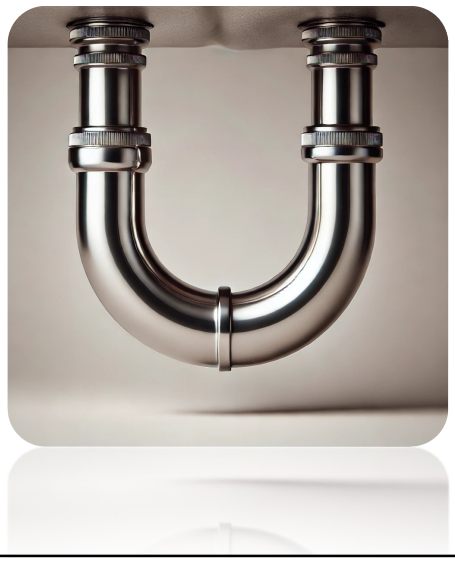
A recent example: *Ayannuga v One Shot Products* [2022] EWHC 590 (QB)

Concerned 'One Shot' drain cleaner.

- Used to clear a drain - said to have led to death/serious injuries.
- In order to succeed, Cs needed to show that One Shot mixed with lime sulphur to create fatal hydrogen sulphide gas.
- D argued that the injuries were caused by sewer gas, released when the u-bend was removed.
- Cs' claim failed.



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'But for' analysis…

Normal position is thought to be for C to show that 'but for' defect, damage would not have occurred.

We should also consider:

- Material contribution;
- Cases involving warnings to C;
- Cases involving "learned intermediaries".

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Material contribution

Possibility that showing 'material contribution' might be sufficient has been left open, see *Wilkes* [137] and *Gee* [186].

'Material contribution' is a term which can mean several different things. Here – reference to *Fairchild v Glenhaven Funeral Services* [2003] 1 A.C. 32.

Mentioned in passing in *Ayannuga*. However, position in *Ayannuga* appears confused.

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Cases involving warnings to claimant

Likely to need to show that warning would have made a difference.

See *Worsley v Tambrands Ltd* [2000] P.I.Q.R. P95 C suffered toxic shock syndrome from use of a tampon (under CPA and negligence).

Warnings on box (pointing consumer to leaflet inside the box) were found to be sufficient.

C's husband had thrown away the leaflet, so C could not say that the wording on the leaflet should have been any different.

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Learned intermediaries (1)

'Learned intermediary principle' forms part of the circumstances which the court must take into account (per section 3(2) of the CPA 1987).

Relates to instructions/warnings given to the expert intermediary.

What causation test should apply where there are learned intermediaries?

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Learned intermediaries (2)

No decided case under the CPA with learned intermediary who failed to read a warning.

C likely to have to show that a warning would have led to a different outcome.

In negligence, see e.g.:

- *Holmes v Ashford* [1950] 2 All E.R. 7
- *Hollis v Dow Corning Corporation* [1995] 4 S.C.R. 634 (Canadian case).

And consider Wright (A Child) v Cambridge Medical Group (A Partnership) [2013] Q.B. 312.

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3. New European product liability directive

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New product liability directive

Why does this matter? We are not in the EU any more….

…. because the UK government is still deciding what its approach is going to be in response.

Key points:

- Clarifies that "software" must be considered to be a product in the scope of the directive;
- Defendant pool is wider, including authorised representatives, fulfilment service providers and online platforms
- Extends the nature of damage to medically recognised harm to psychological health and loss/corruption of data;
- Alleviates the burden of proof in certain circumstances.

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4. Non-consumer claimants and strict liability

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What about non-consumers?

- Non-consumer claimants can bring a claim in (a) contract or (b) tort.

BUT ALSO…

- S.41(1) of the CPA provides that any obligation imposed by "safety regulations" shall be a duty owed to any person who might be affected by a contravention of the regulation.
- S. 11 of the CPA provides that the SoS may make safety regulations.
- The Electrical Equipment Safety Regulations 1994 ("**the EESR**") are "safety regulations".
- Most importantly - a supplier under the EESR must supply electrical equipment which is *"safe"* per reg. 5(1)(a).
- Safe means such that there is no risk, or no risk apart from one reduced to a minimum, that the goods or keeping or use of the goods would cause damage to property and/or people, excluding risk from improper installation or maintenance (s.19(1)-(2) CPA, reg. 3(1) of the EESR.

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5. Recall claims

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Why bring a recall claim?

Some potential advantages over a CPA claim:

- Wider pool of potential defendants;
- Wider range of damage covered (including damage suffered by non-consumer claimants);
- Limitation (e.g. avoiding 10-year longstop under CPA);
- Can avoid certain defences available under the CPA (such as development risks defence and/or whether product was defective at the point of supply).

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What duty is owed?

"In my view, the duty of care owed by Leyland to the public was to make a clean breast of the problem and recall all cars which they could ... I accept, of course, that manufacturers have to steer a course between alarming the public unnecessarily, and so damaging the reputation of their products, and observing their duty of care towards whom they are in a position to protect from dangers of which they and they alone are aware"

***Walton v British Leyland UK Ltd*, per Willis J (1978, QBD)**

"In my view a manufacturer's duty does not end when the goods are sold. A manufacturer who realises that omitting to warn past customers about something which might result in injury to them must take reasonable steps to attempt to warn them, however lacking in negligence he may have been when the goods were sold."

***Hobbs v Baxenden* [1992] 1 Lloyds Rep 54 at 65 (per Sir Michael Ogden)**

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What factors would you look at?

Following are relevant (but not determinative) as to the scope/content of the duty in negligence:

- The regulatory landscape (depending e.g. whether consumer or non-consumer product, what type of product etc);
- Codes of practice (including PAS 7100:2022)
- Regulators including Office of Product Safety and Standards, or for medicines/medical advices MHRA.

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Scope of the duty

- The key is to protect from physical harm and injury;
- Duty is primarily one to WARN;
- Once danger is known – generally no longer any relevant duty;
- What is reasonably required to protect from physical harm and injury will vary.

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6. Liability for putting dangerous products on the market knowingly

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Dangerous and dishonest products

Liability for deliberately putting dangerous/dishonest products on the market is an underdeveloped area in English & Welsh law.

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Overview

Will consider:

- Negligence and deliberate acts
- Deceit:
  - Representations by third parties;
  - Whether silence sufficient;
  - Recent case law on "reliance".

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What about a claim in deceit?

Some advantages of a claim in deceit:

- Likely to be easier to claim for pure economic loss
- Might have other advantages e.g. causation, remoteness and/or limitation, unlikely that contributory negligence would apply.

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Negligence

Could bring in negligence a claim for **deliberately**:

- Putting dangerous products on the market; and/or
- Making false representations.

Tort of negligence is concerned with conduct and not intention.

See e.g. *Emblen v Myers* 158 E.R. 23.

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Deceit: elements required

D makes a false representation,

D knows it to be untrue, or is reckless as to whether it is true;

D intends that C should act in reliance on it; and

C must have been influenced by the misrepresentation, and have suffered loss.

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Silence

General rule is that silence by itself cannot found a claim in deceit.

Number of exceptions:

- Duty to speak;
- Representation by conduct; and
- Implied representations.

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Generally there is no duty to speak: *Ward v Hobbs*

Farmer knowingly sold diseased pigs at auction.

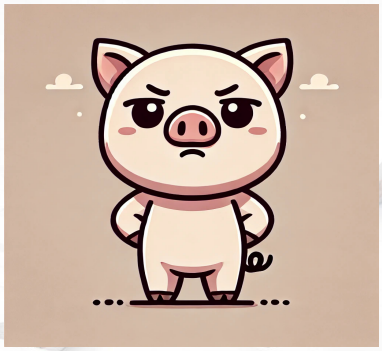
Pigs expressly sold **unwarranted**.

Some pigs died, others infected Buyer's existing herd.

Buyer sued for damages (in contract or in deceit).

Farmer not liable in deceit where no positive representation over and above marketing of pigs.

HoL upheld decision (arguably on the basis pigs sold **unwarranted**).



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But is that right?

Ward v Hobbs doubted in *Hurley v Dyke* [1979] R.T.R. 265:

- C seriously injured when corroded chassis of car in which he was passenger collapsed as a result of collision.
- Driver/owner of car was killed. TP liability insurance was not compulsory - so claim brought against vendor of car.
- Second-hand car had been sold 'as seen with all its faults and without warranty'.
- Vendor not liable in negligence.

See also *Graiseley Properties Ltd v Barclays Bank plc* [2013] EWCA Civ 1372 at [26].

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Is there a duty to speak where the product is dangerous?

Where a person knowingly makes or circulates dangerous chattels, suggested may be liable in deceit, *The Rebecca Elaine* [1999] 2 Lloyd's Rep. 1, per Mummery LJ at 9 col. 1:

"As appears from the judgments in Donoghue v Stevenson knowledge of a dangerous defect in a product may provide a foundation for a case of fraud against a person without warning of the danger of physical damage known to him, see Langridge v. Levy (1837) 2 M. & W. 519"

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Representation by conduct

Examples include:

- Representing that a flat did not suffer from dry rot by covering it up, *Gordon v Selico Ltd* (1986) 18 H.L.R. 219.
- Sitting down and ordering a meal in a restaurant, representing intention/ability to pay, *DPP v Ray* [1974] A.C. 370.
- Participating in an advertising shoot for motor scooters and so representing that none of the group was about to leave, *Spice Girls Ltd v Aprilia World Service BV* [2002] EWCA Civ 15, [2002] E.M.L.R. 27.

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Implied representation

Whether or not representation has been made is fact-sensitive.

Consider the *"helpful test"* in determining whether a representation should be implied (*Property Alliance Group Ltd v RBS plc* [2018] EWCA Civ 355 at [128]-[132]). I.e. whether the representee would naturally assume that the true state of facts did not exist and that, had it existed, he/she would have been informed.

Note Court of Appeal's express caveat at [132]:

"that is not to water down the requirement that there must be clear words or clear conduct of the representor from which the relevant representation can be implied"

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Active concealment

Schneider v Heath 170 E.R. 1462: keeping ship with worm-eaten hull and broken keel afloat so buyers could not see **it**;

Cottee v Seaton [1972] 1 W.L.R 1408: covering up rust on used car so that car appeared to be sound.

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Reliance

C must show reliance.

Four corners of reliance is still a matter of debate.

Particularly pertinent where representation is by conduct/implied.

For recent examples, see:

- *Leeds City Council v Barclays Bank Plc* [2021] EWHC 363 (Comm); [2021] QB 1027, and *Loreley Financing (Jersey) No 30 Limited v Credit Suisse Securities (Europe) Limited* [2023] EWHC 2759 (Comm) (both Cockerill J);
- *Crossley v Volkswagen AG* [2021] EWHC 3444 (QB); [2023] 1 All ER (Comm) 107 (Waksman J) .

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