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Tech Errors and Omissions

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Structure

- Forms of liability:
  - Contract
  - Tort
  - Product liability legislation

- Product Liability insurance

What is ‘tech’?

- Hardware
- Software
- Services
- In combination, or in isolation

Structure

- Forms of liability:
  - **Contract**
  - Tort
  - Product liability legislation

- Product Liability insurance

Contract: issues

- Terms and implied terms
- Standard expected
- Limitation of liability

Contract: terms

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- Each contract has to be assessed on its own merits.
- There may be express terms as to the agreed standards and duties.
- And/or, terms may be implied.
- Depends on what the contract is for.

Contract: terms

Express terms:

- Can distinguish:
  - Absolute duties (to achieve a particular outcome or functionality)
  - Duties to take reasonable care

- A single contract may contain both

Contract: terms (hardware)

Sale of Goods Act 1979

- s2(1) A contract of sale of goods is a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price.

- s14(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.

- s14(3) Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known … any particular purpose for which the goods are being bought, there is an implied term that the goods supplied under the contract are reasonably fit for that purpose

Contract: terms (services)

Supply of Goods and Services Act 1982

- s13 In a relevant contract for the supply of a service where the supplier is acting in the course of a business, there is an implied term that the supplier will carry out the service with reasonable care and skill.

- s14(1) Where, under a relevant contract for the supply of a service by a supplier acting in the course of a business, the time for the service to be carried out is not fixed by the contract, left to be fixed in a manner agreed by the contract or determined by the course of dealing between the parties, there is an implied term that the supplier will carry out the service within a reasonable time.

Contract: terms (software)

- Is there a sale?

- Is software 'goods'?

Contract: terms (software)

Is there a sale?

Southwark v IBM UK Limited [2011] EWHC 549 (TCC)

- *97. … one will need always to examine the contractual terms pursuant to which the customer acquires the software. If, as here, it is simply a licence to use that is being granted albeit for a money consideration, there may be no transfer of property. In principle, a licence to use, if that is all it is, may well not transfer any property or title in the goods in question.*

Contract: terms (software)

Is software 'goods'?

St Albans DC v International Computers Ltd [1996] 4 All ER 481

- Sir Iain Glidewell at pp.493-4:
  - *"… it is necessary to distinguish between the program and the disk carrying the program."*
  - *"In both the Sale of Goods Act 1979, s 61, and the Supply of Goods and Services Act 1982, s 18, the definition of goods includes 'all personal chattels other than things in action and money'. Clearly, a disk is within this definition. Equally clearly, a program, of itself, is not."*

- Sir Iain Glidewell (cont'd):
  - Where it is supplied with a disk: *"If the disk is sold or hired by the computer manufacturer, but the program is defective, in my opinion there would prima facie be a breach of the terms as to quality and fitness for purpose implied by the 1979 Act or the 1982 Act."*

  - Where it is supplied without a disk, there is no transfer of goods and no statutory implied terms.

  - But: *"In the absence of any express term as to quality or fitness for purpose, or of any term to the contrary, such a contract* [for the transfer into a computer of a program intended by both parties to instruct or enable the computer to achieve specified functions] *is subject to an implied term that the program will be reasonably fit for, ie reasonably capable of achieving the intended purpose."*

Contract: terms (software)

The Software Incubator Ltd v Computer Associates UK Ltd [2018] EWCA Civ 518

- Gloster LJ:
  - *"3. The appeal concerns the important question as to whether a licence to use electronically supplied software amounts to the "sale of goods" under the Regulations."*
  - *"19. Despite the challenges posed by this analysis, and my concern that such an approach might appear to be outmoded in light of technological advances, the weight of authority on this issue compels me to conclude that, on a proper construction of the language in the Regulations, the Software did not constitute "goods" within the meaning of regulation 2(1)."*

Contract: terms (software)

- Gloster LJ (cont'd):
  - *"25. … the distinction between tangible property which has been held to be "goods", and intangible property, which authority on the whole has not held to be "goods", is widely recognised"*
  - *"41. Mr Segal attempted to convince this court that many of these cases were limited in their applicability to the present context and enacted at a time when the sale of software did not exist. While I see the attractiveness of the submission, I do not consider it changes the reality that the distinction between tangible property, which has been held to be "goods", and intangible property which authority has not defined as "goods", is widely recognised in a number of different contexts."*

Contract: terms (software)

- Gloster LJ (cont'd):
  - *"49. … At the core of [the first instance judge's] conclusion was the view that the court should ensure the law keeps abreast of recent developments in technology by giving an expansive interpretation of "goods" to accommodate electronically supplied software."*
  - *"50. I have sympathy with this approach, given what I perceive to be the various difficulties with maintaining the tangible/intangible distinction."*
  - *"51. … the judge had a point when he stated that there is no logic in making the status of software as "goods" (or not) turn on the medium by which they were delivered or installed."*
  - But nonetheless, *"55. … This court cannot simply ignore the weight of judicial authority that supports maintaining the tangible/intangible distinction."*

Contract: terms (software)

Consumer Rights Act 2015

- s2(8) “Goods” means any tangible moveable items …

- s2(9) “Digital content” means data which are produced and supplied in digital form.

- Consumer Rights Directive 2011/83/EU:
  - Recital 19: *“Digital content means data which are produced and supplied in digital form, such as computer programs, applications, games, music, videos or texts, irrespective of whether they are accessed through downloading or streaming, from a tangible medium or through any other means.”*

Contract: terms (software)

- Gloster LJ:
  - The CRA and CRD have created *"66. … a new category of legal contract, namely a contract to supply digital content."*
  - *"67. … The novel legislative solution demonstrates to my mind that this is clearly an area in which reform must come from the European legislature and/or the UK Parliament and not via judicial interpretation."*
- So: she accepts there is 'no logic' to the law, but considers this is a question for Parliament.

Contract: terms (software)

The Software Incubator Ltd v Computer Associates UK Ltd (Case C-410/19) EU:C:2021:742

- *"34. In the first place, as regards the term "goods", according to the court's case law, that term is to be understood as meaning products which can be valued in money and which are capable, as such, of forming the subject of commercial transactions."*

- *"35. It follows that that term, as a result of its general definition, can cover computer software, such as the software at issue, since computer software has a commercial value and is capable of forming the subject of a commercial transaction."*

- *"36. Furthermore, it must be stated that software can be classified as "goods" irrespective of whether it is supplied on a tangible medium or, as in the present case, by electronic download."*

Contract: terms (software)

- But after the CJEU made their pronouncement, the case settled; so the Supreme Court never got a chance to look at it.

- Where does that leave matters? Somewhat unclear:
  - Strictly the CJEU's view is just a judgment about the Regulations.

  - The CJEU applied a definition of 'goods' which is at odds with the English tangible/intangible distinction.

  - It is also at odds with the approach of the EU's own Consumer Rights Directive, which created a new category of contract covering digital content, rather than declaring software to be 'goods'.

Contract: standard expected

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- When is software not good enough?

Contract: standard expected

Saphena Computing Ltd v Allied Collection Agencies Ltd [1995] FSR 616

- p.652: *"it is important to remember that software is not necessarily a commodity which is handed over or delivered once and for all at one time. It may well have to be tested and modified as necessary. It would not be a breach of contract at all to deliver software in the first instance with a defect in it."*

Contract: standard expected

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Tata Consultancy Services Ltd v Disclosure and Barring Service [2024] EWHC 1185 (TCC)

- Tata had to comply with 'Good Industry Practice', defined as *'the exercise of that degree of skill, care, prudence, efficiency, foresight and timeliness as would be expected from a leading company within the relevant industry or business sector'.*

- *"510. … the evidence given by the experts jointly in their statement that 'the simple existence of defects or problems in a design is not in itself evidence of a failure to meet Good Industry Practice, but that poor practice makes it likely there will be more such problems in more areas of the system'."*

Contract: standard expected

St Albans (Nourse LJ at p.487, commenting on *Saphena*):

- *"Parties who respectively agree to supply and acquire a system recognising that it is still in the course of development cannot be taken, merely by virtue of that recognition, to intend that the supplier shall be at liberty to supply software which cannot perform the function expected of it at the stage of the development at which it is supplied."*

- So it is likely that much will depend on the context:
  - The level of minor defects acceptable in a large and complex piece of software may not be acceptable in a smaller project.
  - The more that a software system is sold as 'tried and tested', the more ready the courts will be to find that a bug is a fault.

Contract: limitation of liability

Triple Point Technology Inc v PTT Public Co Ltd [2021] UKSC 29

- Triple Point agreed to supply a software system for PTT.

- The work was very late and eventually the contract came to an end.

- Triple Point sued for unpaid fees; PTT counterclaimed liquidated damages for delay, and other loss.

- PTT won; but a question arose about an exclusion clause.

Contract: limitation of liability

- Triple Point's obligation: *"12.1 Contractor shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognized international professional standards . . ."*
- The exclusion clause: *"The total liability of Contractor to PTT under the Contract shall be limited to the Contract Price received by Contractor with respect to the services or deliverables involved under this Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for Contractor, upon written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to Contractor for the Services or Deliverables related to the breach. This limitation of liability shall not apply to Contractor's liability resulting from fraud, negligence, gross negligence or wilful misconduct of Contractor or any of its officers, employees or agents."*

Contract: limitation of liability

- Triple Point's obligation: *"12.1 Contractor shall exercise all reasonable skill, care and diligence and efficiency in the performance of the Services under the Contract and carry out all his responsibilities in accordance with recognized international professional standards . . ."*
- The exclusion clause: *"The total liability of Contractor to PTT under the Contract shall be limited to the Contract Price received by Contractor with respect to the services or deliverables involved under this Contract. Except for the specific remedies expressly identified as such in this Contract, PTT's exclusive remedy for any claim arising out of this Contract will be for Contractor, upon written notice, to use best endeavor to cure the breach at its expense, or failing that, to return the fees paid to Contractor for the Services or Deliverables related to the breach. This limitation of liability shall not apply to Contractor's liability resulting from fraud, negligence, gross negligence or wilful misconduct of Contractor or any of its officers, employees or agents."*

Contract: limitation of liability

- Did the carve-out for ‘negligence’ include contractual negligence, or only freestanding tortious negligence?

  - *“52. The first point to make is that the word negligence has an accepted meaning in English law, which was the governing law of the CTRM Contract. It covers both the separate tort of failing to use due care and also breach of a contractual provision to exercise skill and care.”*

  - *“54. … the contract was not solely about the provision of services. It included important obligations on Triple Point’s part for the provision of defect-free software and the ‘Deliverables’. It was clear from the opening sentence of article 12.3 that there were certain matters which Triple Point agreed to do or provide as an absolute covenant, not merely one of skill and care.”*

Contract: limitation of liability

- *“63. … in a software contract, where the provision of software may result in damages of a considerable amount without any fault on the part of the designer and installer of the software, it is understandable that claims for damages for breach of the requirement that software be defect-free should in those circumstances be subject to the cap.”*

- *“68. … the cap carve-out in the final sentence of article 12.3 for all the reasons given above should be given its natural and ordinary meaning of removing from the cap all damages for negligence on Triple Point’s part, including damages for negligent breach of contract.”*

- So: the cap did not apply, and PTT could recover.

Contract: limitation of liability

Soteria Insurance Ltd v IBM United Kingdom Ltd [2022] EWCA Civ 440

- A similar issue, this time about whether wasted expenditure fell within a limitation of liability for loss of profits (it did not).

- Coulson LJ:
  - *"1. The primary issue in this case concerns the proper construction of an exclusion clause. Whilst that may sound a little unexciting, the parties are agreed that at least £80m turns on the construction of that one clause of the contract."*

Structure

- Forms of liability:
  - Contract
  - **Tort**
  - Product liability legislation

- Product Liability insurance

Tort

- Distinguish:
  - Manufacturers’ liability
  - Professionals’ liability

Tort: manufacturers

- Liability for defective products: *Donoghue v Stevenson*
- A manufacturer owes a duty of care to those likely to be harmed by a defect in a product.
- Clearly covers hardware.
- Apparently no decided cases concerning software.

Tort: professionals

- In general, there is likely to be a contract.

- Where there is a contract, the scope of duty in tort typically reflects the contract ("coextensive").

- In *Triple Point*, the difficulty of identifying an 'independent' tort was a reason to find that the exclusion clause did not cover contractual duties of care.

- If not, well-established principles:
  - Typically, voluntary assumption of responsibility (reasonable reliance by the client on the professional)

Tort: professionals

IT professionals likely to owe a coextensive duty in tort:

- Suppliers (if advising)

- Systems integrators

- Project assurance and test consultants

- Cyber-security consultants

Structure

- Forms of liability:
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  - **Product liability legislation**

- Product Liability insurance

Product Liability legislation

- Consumer Protection Act 1987
  - Liability for defective products
  - What is a ‘product’?

- New Product Liability Directive 2024/2853

- Both are aimed at protecting private individuals

- But the approach to what constitutes a ‘product’ is relevant

Consumer Protection Act 1987

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- s1(2)(c): “product” means any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise

- s2(1): … where any damage is caused wholly or partly by a defect in a product, every [producer or importer] shall be liable for the damage.

- s3(1): … 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, shall include 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.

Consumer Protection Act 1987

- A defect = unsafe in respect of property damage or personal injury.

- Software defects eg:
  - An automated medical reference tool which prescribes the wrong dose
  - An air traffic control system that causes a crash
  - A driverless car which goes haywire

- But is software a ‘product’?

Consumer Protection Act 1987

- s1(2)(c): “product” means any goods or electricity and (subject to subsection (3) below) includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise

- Is software ‘goods’?

EU: New Product Liability Directive 2024/2853

- Art 4(1): ‘product’ means all movables, even if integrated into, or inter-connected with, another movable or an immovable; it includes electricity, digital manufacturing files, raw materials and software;

- Art 7(1): A product shall be considered defective where it does not provide the safety that a person is entitled to expect or that is required under Union or national law.

EU: New Product Liability Directive 2024/2853

- Recital 3: *"Directive 85/374/EEC has been an effective and important instrument, but it would need to be revised in light of developments related to new technologies, including artificial intelligence (AI), new circular economy business models and new global supply chains, which have led to inconsistencies and legal uncertainty, in particular as regards the meaning of the term 'product'."*

EU: New Product Liability Directive 2024/2853

- Recital 13: *"Products in the digital age can be tangible or intangible. Software, such as operating systems, firmware, computer programs, applications or AI systems, is increasingly common on the market and plays an increasingly important role for product safety. Software is capable of being placed on the market as a standalone product or can subsequently be integrated into other products as a component, and it is capable of causing damage through its execution. In the interest of legal certainty, it should be clarified in this Directive that software is a product for the purposes of applying no-fault liability, irrespective of the mode of its supply or usage, and therefore irrespective of whether the software is stored on a device, accessed through a communication network or cloud technologies, or supplied through a software-as-a-service model."*

Product Liability legislation

- So:

- The position in England and Wales appears to be that software is (generally) not a product.

- The EU has:
  - Sidestepped all the questions about how software is provided (on a disk, online, etc).
  - Decided that software is a product.
  - NB the New Product Liability Directive uses the term ‘movables’, so it has not addressed the question of whether software is ‘goods’.

Structure

- Forms of liability:
  - Contract
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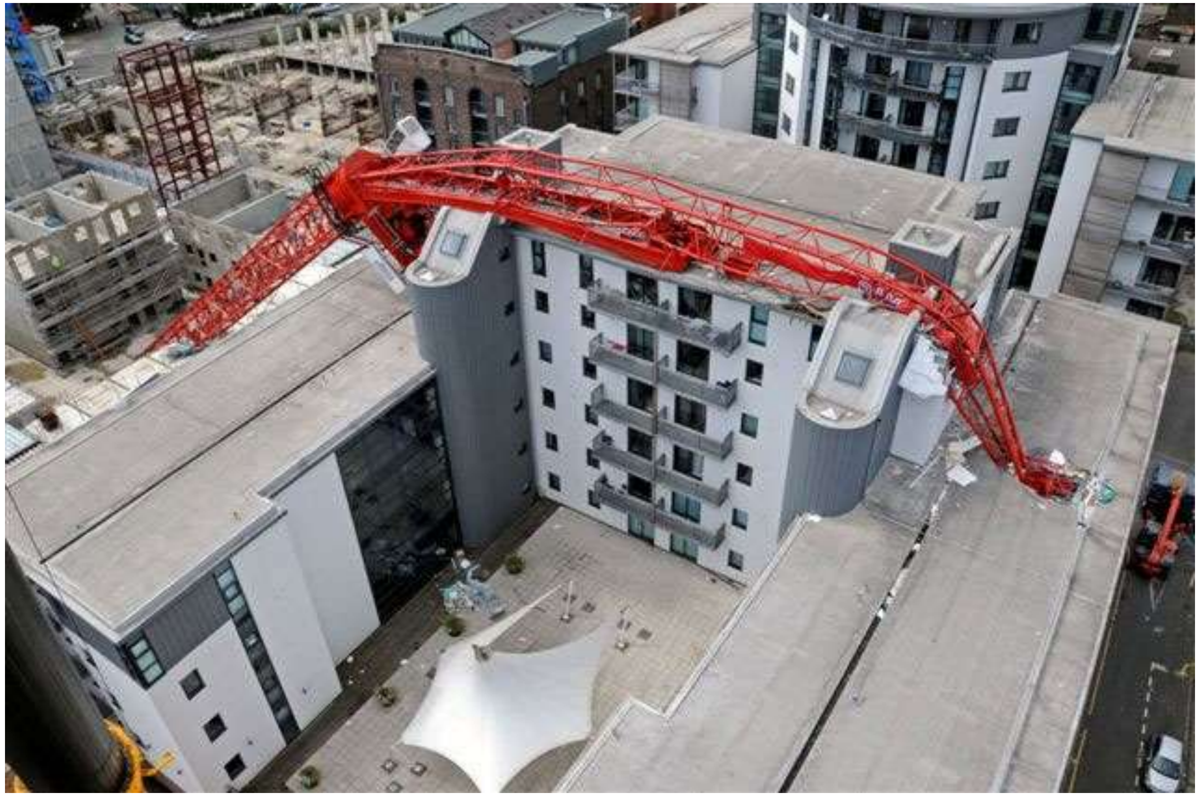
- **Product Liability insurance**

Product Liability insurance

Aspen Insurance UK Ltd v Adana Construction Ltd [2015] EWCA Civ 176

- Adana constructed a crane base out of concrete.
- The crane collapsed when the base separated from the concrete piles it was built on.
- The metal dowels securing the base to the piles had pulled clean out.



Product Liability insurance

- Aspen insured Adana under a Combined Contractors' Liability Policy
- Section B: Public Liability
  - *"Underwriters will provide indemnity in respect of liability … resulting from faulty or inefficient workmanship, materials or design …"*
  - *"Underwriters will not indemnify the Insured against liability … caused by any Product"*

- Section C: Product Liability
  - *"Underwriters will indemnify the Insured against all sums which the Insured becomes legally liable to pay for damages and claimants' costs and expenses arising out of …* [personal injury or property damage] … *caused by any Product."*

- Was the base a 'Product'?

Product Liability insurance

Policy definition:

- "Product" means any product or goods manufactured, constructed, installed, altered, repaired, serviced, processed, treated, sold, leased, supplied or distributed by or on behalf of the Insured from or within Great Britain … (including any advice, design, consultancy, plan, specification, formulae, labelling, packing or instructions for use given in connection therewith) but only after such item has left the Insured's care, custody or control.'

Product Liability insurance

Policy definition:

- "Product" means any product or goods manufactured, constructed, installed, altered, repaired, serviced, processed, treated, sold, leased, supplied or distributed by or on behalf of the Insured from or within Great Britain … (including any advice, design, consultancy, plan, specification, formulae, labelling, packing or instructions for use given in connection therewith) but only after such item has left the Insured's care, custody or control.'

Product Liability insurance

- Aspen said: the base was a Product, and it had failed to fulfil its intended function, so Aspen was not liable to indemnify Adana.

- High Court: the base was not a Product. It was not part of Adana’s range, or something you could buy; it was created as part of the work on site, not in a factory.

Product Liability insurance

- Court of Appeal: the base was not a Product:
  - *“37. A product (with a small ‘p’) can be given a very wide meaning. It could mean anything which is the result of any process of manufacture or construction.”*
  - BUT: *“38. … there needs to be something causative of the insured’s liability which would reasonably be regarded by someone with the background knowledge of these parties as a product in the conventional or natural sense of the word, since in defining ‘Product’ as ‘any product or goods’ they adopted that sense.”*

Product Liability insurance

- Look at the policy as a whole, including the Public Liability cover:
  - The Public Liability cover extends to faulty workmanship, materials or design. And: *"40. … The combination of workmanship, materials and design in the construction trade usually results in the production of something. If, whenever it does, there is a Product, whose failure or inadequacy, if it gives rise to liability to third parties, is excluded from Public Liability cover, the insurance expressly provided … is very much reduced."*

- So: not everything which is produced is a Product.
  - *"44. … Looking at the matter in the round Adana is not reasonably to be regarded as having constructed a product but as having carried out concreting works for the purpose of securing a foundation for the crane on and in the site. The fact that the works create something does not mean that everything that is created is to be regarded as a Product for the purpose of the clause."*

Product Liability insurance

Metricon Homes PTY Ltd v Great Lakes Insurance SE [2017] VSC 749

- Insured Products:
  - *"any ... products ... manufactured, assembled ... constructed, erected ... sold...supplied ... [and/or] distributed ... by [Metricon] ...(after such goods and/or products cease to be in the possession and/or control of the Insured)."*
  - *"120. … The words of the definition of Insured Product make it clear that the completed house, and each of its components, was intended to be included as a product."*
  - *"126. With respect, I agree with the Insurer's contention that Clarke LJ* [in *Aspen*] *fell into … error"*
- Still affirms the general principle:
  - *"127. … references to whether or not a house may be a product within a definition in a particular case will depend upon the precise form of the definition in that case, the context of the policy as a whole and, where admissible, evidence of surrounding circumstances."*

Product Liability insurance

- So:
  - There are divergent views, but …
  - Not everything which is produced is necessarily a Product.
  - The policy has to be interpreted as a whole. The presence of one cover (here Public Liability) can inform how another cover (here Product Liability) is understood.
  - The policy has to be interpreted in light of the activities covered. If one reading of a term (here ‘Product’) would give it a very broad application, that may count against it.

Product Liability insurance

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Applying that to software:

- Back to the definition in *Aspen*: “Product” means any product or goods manufactured, constructed, installed, altered, repaired, serviced, processed, treated, sold, leased, supplied or distributed by or on behalf of the Insured

- Is software such a product?
  - Software probably isn’t goods
  - Is it nonetheless a product ‘in the conventional or natural sense of the word’?
  - Maybe, but …
  - Not for the purposes of the Consumer Protection Act 1987

- Need to look at the contract as a whole, and the policy as a whole

Recap

- Forms of liability:
  - Contract
  - Tort
  - Product liability legislation

- Product Liability insurance

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Product Liability: law reform

- In 2025 the Law Commission announced a review of the CPA 1987.

- It will consider issues including whether the definition of ‘product’ needs to be reformed to accommodate software even if provided in an intangible format.

- More broadly the topics identified reflect the changes made in the New Product Liability Directive.

- Although … the Product Regulation and Metrology Act 2025 defines product as *“a tangible item that results from a method of production”*, which embeds the tangible/intangible distinction.