

Defects and the CPA 1987

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What is a defect? The Directive

- Directive 85/374/EEC:
- Article 6: *'a product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account'*.
- Sixth Recital of the Directive: *'to protect the physical well-being and property of the consumer, the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of safety which the public at large is entitled to expect'*

What is a defect? The Act

Section 3 (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, 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.'

What is a defect? The Act

'In determining for the purposes of subsection (1) above 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;*

What is a defect? The Act

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 shall require 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."

How to prove a defect

- *Foster v Biosil* - (Recorder Cherie Booth QC)
- Claimant undergoes two breast implants, both fail.
- The left implant ruptures prematurely.
- The claimant claims that all she need prove was that the implant was defective, nothing more.
- The Judge disagreed. The claimant had to prove that :
 - a) there was a defect; and
 - b) the *cause* of that defect.

How to prove a defect

Ide v ATB Sales Ltd [2008] EWCA Civ 424:

“Under ss.2 and 3 of the Act if a person is injured by a product, his claim succeeds if he establishes there is a defect in the product and that defect caused the loss unless the defendant can rely on one of the statutory defences. In determining whether the loss or injury has been caused by a defect or by some other cause, although the process of reasoning may involve an explanation of how the defect was caused, the task of the Court is simply to determine whether the loss was caused by the defect and not by another cause ... that distinction is important and can make the task of the Court a simpler one, as no doubt Parliament intended.”

Ide - causation

- There were only two possible causes for the accident:
- Either there was a defect in the handlebar, since it had insufficient strength to withstand the loads placed upon it; OR
- C lost control of the bike and the handlebar was fractured as a result.
- The second explanation was unlikely. The claimant was an experienced cyclist, was not going fast, and was on familiar terrain.
- By way of inference therefore, there must have been a defect, and it must have caused the accident.

How to prove a defect - *Idc* followed

- *Love v Halfords [2014] EWHC 1057 (QB)*
- C buys bike from H.
- Judge endorses the test set out in *Idc*.
- The court need not make a finding on the cause of any defect.
- However – the claim fails on the facts, since the scientific evidence clearly established the handlebars had been repaired by an amateur.

How to prove a defect – Ide followed

- *Baker v KTM SPORTMOTORCYCLE UK LTD [2017]*
EWCA Civ 378
- C riding motorbike when the brakes seize up, causing injury.
- Corrosion as a result of a design defect.
- No need to show how this was caused.
- Judge was entitled to infer that it was the defect that caused the accident.

Unavoidable defects

- *A v National Blood Authority [2001] 3 All ER 289.*
- Claims from a group contracting Hepatitis C from blood transfusions in March 1988.
- Screening was not available at that time.
- I.e. the risk of infection was unavoidable.
- Held that unavoidability had nothing to do with the legitimate expectations of the public.

'Setting' expectations

- What if it is made clear that the product does not always work?
- See *Richardson v LRC products Ltd [2000] PIQR P95*
- C and husband have sexual intercourse, but the condom fractures, causing C to fall pregnant.
- Judge: '*no-one has ever supposed that any method of contraception intended to defeat nature will be 100% effective*'.

'Inherent' dangers?

- Things that are inherently dangerous are not defective.
- The inherent danger is simply part of what the public are entitled to (and should) expect.
- See *Bogle v McDonald' Restaurants Ltd [2000] All ER (D) 436 (Mar):*
- *'Persons generally expect tea or coffee purchased to be consumed on the premises to be hot. Many prefer to consume a hot drink from an unlidged cup rather than through a spout in the lid. Persons generally know that if a hot drink is spilled onto someone, a serious scalding injury can result. They accordingly know that care must be taken to avoid such spills, especially if they are with young children...'*

Summary

- The claimant must still prove that a defect existed.
- The question is one of legitimate expectation.
- This can be proven by way of direct expert evidence or inference.
- If inference is the preferred route, the claimant must seek to rule out the alternative causes (or at least make them less likely than the existence of a defect).
- Can look for weaknesses by evidencing the alternative explanations by way of expert evidence (see Love) or making those explanations more plausible.
- The more plausible alternative explanations the better.