PRODUCT LIABILITY:
CONSUMER PROTECTION ACT 1987

WORKSHOP ANSWERS

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Consider as a preliminary point whether Slacks can be regarded as a) the producer, b) the supplier, or c) both, in respect of the 'products' involved.

1. The Instruction Manual

Can the *Lounger* be said to be defective?

It is worth revisiting the statute - Section 2(1) "…where any damage is caused wholly or partly by a defect in a product…"

No doubt if the screw were e.g. brittle then the Lounger would be regarded as defective – s3(1) – "…safety in relation to a product, shall include safety with respect to products comprised in that product…", but is there an argument here that the screw is of sound quality, the LegBobkin is of sound quality, the problem is when bringing the two together. The two have been brought together because of the confusing instruction manual?

My view (MPB) is that because the injury (i.e. a laceration) has been caused by the physical propensity of the screw which was used as directed, liability may well attach. The meaning of defect is provided by section 3 of the Act. In determining what persons are entitled to expect, subsection 2(a) includes:

> "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 <u>any instructions for</u>, or warnings with respect to, doing or refraining from doing anything with or in relation to the product."

However, the Claimant's solicitor seems to be arguing that the *instruction manual* was defective. Can a purely informational defect be caught by the Act? The answer is probably not. Certainly that is the approach favoured by practitioner texts and the thrust of the Act and Directive the Act implemented seems to be directed toward physical defects. C/F *St Albans v ICL* [1996] 4 All ER 481 – Glidewell LJ suggested, obiter, that a book containing dangerous misinformation might be regarded as defective for the purposes of s14 SoGA 1979.

What of the fact that the error is not the fault of Slacks? Assuming that there can, theoretically, be liability for defects within the *instruction manual,* whether it attaches to Slacks will stand or fall by whether Slacks are caught by section 2 in respect of the Lounger itself; otherwise one could have the odd result of being caught by section 2 in respect of the Lounger and not the attached instruction manual or vice versa.

Is there a potential action in negligence (or negligent misstatement)?

2. The Spring Incident

Consider *Iman Abouzaid v Mothercare* where an elasticated strap used to connect a Coseytoes pushchair liner snapped back striking the Claimant in the face. Pill LJ said this at paragraph 27:

> "I have come to the conclusion that, though the case is close to the borderline, the product was defective within the meaning of the Act. The risk is in losing control of an elastic strap at a time when it is stretched and eyes are in the line of recoil. The product was defective because it was supplied with a design which permitted the risk to arise and without giving a warning that the user should not so position himself that the risk arose. Members of the public were entitled to expect better from the appellants. A factor in the expectation is the vulnerability of the eye and the serious consequences which may follow from a blunt injury to

> the eye. Expectations would be different if the worst which could occur was an impact of elastic on the hand. It is not necessary for the Court to determine precisely what more should have been done. It is clear that more could have been done, for example, a non-elasticated method of attachment of instructions to fasten the straps from behind the seat unit, together with a warning."

Here we probably need more information as to how the spring was to be attached, whether it could be anticipated that a second person would be close to the spring (was it necessarily a two person job?), and whether any warnings had been given.

The fact that there was no alternative method of assembly (if that turns out to be the case) is probably not relevant to the issue of liability with there being no distinction between design defects and manufacturing defects.

In the Mothercare case, the Defendant (perhaps a little strangely) tried to argue a 4(1)(e) defence. They argued that in the absence of any previously recorded incident as at the date of supply amounted to "scientific and technical knowledge". At paragraph 29, the argument was dispatched:

> "In my judgment that argument fails first on the ground that the defect, as defined, was present whether or not previous accidents had occurred. Dr Hayward [the expert instructed] has identified the risk which was present. The defect which gave rise to the risk was just as likely (or unlikely) to lead to an accident in 1990 as it was in 1999. Knowledge of previous accidents is not an ingredient necessary to a finding that a defect, within the meaning of the section, is present. Different considerations apply to negligence at common law where foreseeability of injury, as defined in the authorities, is a necessary ingredient. Secondly, I am very doubtful whether, in the present context, a record of accidents, comes within the category of "scientific and technical knowledge". The defence contemplates scientific and technical advances which throw additional light, for example, on propensities of materials and allows defects to be discovered. There are no such advances here..."

3. The Tipping Bench

What would people expect? This is a canvas bench and is likely, by its very nature, to be very light. But if persons are encouraged to sit upon it, does that create a legitimate expectation that it will be stable when unweighted? Probably not. Benches tipping as this one did must be in the minds of every person using it. Nonetheless, it is worth reiterating the stringent nature of the test of defect. In *A v National Blood Authority* [2001] 3 All ER 289, it was held that the concept refers to the public's legitimate expectation not its actual expectation.

What of the fact that it was possible to avoid the bench tipping? Again, it is probably not sufficient for liability to attach in this case. Take, for example, ABS – the fact that some vehicles have it does not mean that the public should have a legitimate expectation that skidding will not occur with cheaper models not having that feature.

4. The Collapsing Lounger

This is perhaps a little more difficult. No doubt relevant to the issue is the fact that this is designed, in bench mode at least, to be a multi-person piece of apparatus. We probably need to know why it collapsed: was it simply because the Lounger is intended for use by one person only? Should the public expect a warning or instruction that the Lounger is intended to be used by only one person? With regard to warnings, where the danger is a known one, it is likely that the standard required will be similar to that in negligence. Was it reasonable to require the manufacturer to provide a warning?

One would look to argue that the Lounger had been misused. However, a manufacturer is not entitled to disregard foreseeable misuse. Section 3(2)(b) specifically requires the court to take account of what may reasonably be expected to be done with the product.

5. Curly Conn

Consider *Tesco v Pollard* [2006] EWCA Civ 393 where a child managed to get hold of a bottle of dishwasher powder, open the child resistant cap and ingest some of the contents. The cap did not comply with British Standards. Had it done the child would not have been able to open it. Crucially, however, there was no requirement under the Regulations applicable to the product for anything other than a normal screwtop to be used.

The court rejected the claim in negligence finding that while the law does not "systematically require, for a common law duty of care to be established, the precise chain of events culminating in the damage suffered by the claimant has to be foreseeable step by step. But in a case like this any calculation of foreseeability must surely assume that the child's parents will in the home take steps to prevent his having access to the bottle…in this case…foreseeability [cannot] be got out of the fact that it proved possible for [the claimant] to open the bottle coupled with the fact than the British Standard certificate was not met."

In respect of the CPA claim, this too was rejected on the basis that members of the public were entitled to expect that the bottle would be more difficult to open that if it had been an ordinary screwtop.

But here, injury has been caused by the flame spiking which should not ordinarily happen. The fact that the cause cannot be identified is not necessarily fatal to the claim; if the product has behaved in a manner that it should not that may be enough. Moreover, liability being strict there is no need to establish causation. There is a real risk of the client being found liable for Curly's injuries therefore.

6. The Relevance of Shonky

Persons liable are defined by section 2(2) as:

(a) The producer;

(b) Any person who, by putting his name on the product or using a trademark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product;

(c) Any person who has imported the product into a member State from a place outside the member States in order, in the course of any business of his, to supply it to another.

Manufacturers who "outsource" are clearly caught by 2(2)(b). However, do the words used here make it clear that Slacks are not the producer? There has to be a strong argument here. There is, though, no particularly helpful guidance from the courts on the point (although note the Tesco case referred to above where Tesco were prepared to act as Defendant even though they did not produce the cap and *B v McDonalds* [2002] EWHC 490 where the Defendant was prepared to accept responsibility for the food and drink produced by a franchisee).

Be aware of the requirement on suppliers to identify the producer.