A recap on defects and the Consumer Protection Act 1987

James Bentley, Guildhall Chambers

These notes cover the meaning of 'defect' under the Consumer Protection Act 1987 (hereon 'the Act') what the claimant must prove, and how they may do so. It does not cover: who qualifies as a defendant under the act, what is meant by a 'product', or any of the defences available to a defendant under Section 4.

Liability

Section 2 (1) of 'the Act' is straightforward:

'Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) below applies shall be liable for the damage.'

Liability is therefore strict. The claimant does not have to prove negligence on the part of the defendant, nor do they need to have entered into any type of contract. Indeed, the claimant need not even be using the product in question. There is no reason why, for example, a bystander could not claim under the Act also.

Furthermore, the defendant will be liable in full, regardless of damage caused (say) by a third party. For example, if a (defective) second hand bike was poorly maintained after purchase by the supplier, then the producer of the bike would still be liable in full to the claimant. Justice between the defendants can then be achieved through the Civil Liability (Contribution) Act 1978. In that regard, responsibility/fault *does* play a role, as do contractual indemnities, which may have been provided between (for example) producers and distributors.

For those reasons, knowing what is required to prove a defect is particularly important.

What is a defect?

The Act arises out of Directive 85/374/EEC (the product liability directive), which states at 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'.

The sixth recital of the Directive explains that:

'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'

As per above, the Directive gave rise to the Act, which pretty much mirrors the wording above. Section 3(1) states that:

''...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.''

In the same manner that (for example) Section 58 of the Highways Act does, the Act goes onto list the factors the court ***must*** consider in deciding what the public are entitled to expect. Under Section 3 (2), in determining what persons are entitled to expect, all the circumstances are to be taken into account, including:

a) *the manner in which, and purposes for which, the product has been marketed...(i.e. what is it designed to do, and who does it appeal to).*

   ...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 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.''*

Section 3 (2) is therefore pretty self-explanatory. However, there are two important points to note. Firstly, the list above is not exhaustive. The factors are preceded by the direction that the court must take into account *all the circumstances* and not simply the ones listed above. Secondly, and as is clear from the underlining, the mere fact that a safety of a product has improved over time does not mean that the original product will be deemed defective.

What is required to prove a defect?

Tough on defects, tough on the causes of defects?

In *Foster v Biosil (2000, 59 BMLR 178)* Recorder Cherie Booth QC considered what was required to prove that there was a defect in a case involving breast implants. Although only a county court decision, it is referred to in many of the textbooks on product liability.

The facts of the case were that the claimant underwent two breast implants and alleged that both (manufactured by the defendant) were defective. The left implant ruptured prematurely and the right implant (it was said) leaked silicone. It was argued by the claimant that all she needed to prove was that the products had failed in a way that was unsafe and which was contrary to what persons generally were entitled to expect. The defendant submitted that that was not enough, saying that not only did the claimant need to prove that the implants were defective, but that *the cause* of the defect was attributable to the implants being defective.

Judgment

The Judge agreed with the defendant. It was not for the manufacturer to prove that they were not defective. It was held that the claimant had to prove both the fact of the defect *and* the cause of the defect. It was not enough to prove just that the product had failed in circumstances that were unsafe and contrary to what the persons might generally be entitled to expect.

On the facts of this case the claimant had failed to establish that there was a defect in respect of either implant. In the case of the right implant, it was in fact intact upon removal. In the case of the left implant it had not been available for examination by the experts (of either party).

There were two probable causes – either faulty insertion or a defective product. Faulty insertion had been ruled out. No other implants in the relevant batch had ruptured and one had even been successfully inserted to replace the ruptured one. Statistically speaking, ruptures were a rare occurrence and therefore the claimant had failed to prove that the implants were defective.

The Ides of March

The leading case on what the claimant needs to prove is perhaps *Ide v ATB Sales Ltd [2008] EWCA Civ 424.* Whilst the case does not refer to *Foster* directly the Court of Appeal confirmed that the proper approach was in fact far simpler than was suggested previously:

"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."

The facts of the case were that the claimant fell from his bicycle as he rode along a bridleway in the South Downs. There were two competing causes of the accident:

i) *Mr. Ide (the claimant) claimed that there was a defect in the handlebar because it had insufficient strength to withstand the loads imposed upon it in ordinary use as a mountain bike; it had suddenly fractured and this had caused him to lose control of the bike and fall.*

ii) *The importers contended, based on a report of one of the experts they called, Dr. Chinn, that Mr. Ide lost control of the bike and fell off the bike; the handlebar had then fractured either through being struck by his body or when it hit the ground or by a combination of the two.*

It was held that neither explanation was entirely improbable. However, on the evidence, Dr. Chinn's explanation that the claimant had lost control and broken the handlebar was rejected. Although the claimant could not remember anything, he had two friends with him. Whilst they did not see the accident, the route was familiar, conditions were ordinary and they were experienced cyclists. The 'loss of control' explanation was therefore more unlikely, and therefore since both explanations were not improbable, he was, the Court held, entitled to infer that the cause of the accident was a defect in the product in question.

Ide confirmed

The approach in *Ide* has been followed since.

In *Love v Halfords [2014] EWHC 1057 (QB)* the claimant bought a bike from the defendant. Nine months later he lost control on a tarmac path, suffering serious injury as a result. The claimant submitted that from the moment of supply there had been a defect in the bike, that in turn lead to the fracture in the handlebar, that in turn led to him losing control.

The Judge endorsed the approach in *Ide*, saying that the claimant only need prove that the defect existed (as well as causation), and the court need not explore or make any finding on *why* the defect existed.

However, the claimant still lost on the facts of the case. The scientific evidence was that the tube in the handlebar had been bent and further damaged by being subjected to an amateur attempt at re-straightening.

The Court of Appeal recently re-visited the topic of what the claimant must prove in *Baker v KTM SPORTMOTORCYCLE UK LTD [2017] EWCA Civ 378*.

In that case, the claimant had been riding the motorbike when the front brake seized, throwing him from the bike and causing serious personal injuries. It was found at first instance that the corrosion which was found on the bike was galvanic corrosion that had occurred as a result (it was said) of a design defect.

The defendants contended that the claimant still had to show that there was a *feature* of the design or manufacture of the braking system which led to galvanic corrosion and that he had not done so. It will be noted that in this sense, the submission followed the approach in *Foster.*

That submission was rejected. The Court of Appeal states that (as was made clear in *Ide*) there was no need to show *how* the defect was caused. It was sufficient to find that there was a defect (in this case a 'susceptibility to galvanic corrosion'), i.e. something there which the injured party had a legitimate expectation to not be there, and that that had caused the accident in question.

The occurrence of galvanic corrosion constituted a defect since the bike was less than two years old, well serviced and maintained, and had a relatively low mileage. It was 'self-evident' that one did not expect to find galvanic corrosion on such a bike.

Of course, as saw in *Ide*, the claimant also must prove that the defect caused the defect in question. This can be done by direct evidence, but also by inference. The Court of Appeal confirmed that it was legitimate when looking at causation for the Judge to narrow down the

likely causes (in this case, either loss of control or the defect) and to find that it was not (a) so must be (b).

Some other issues

What if the defect is unavoidable?

As was established in *A v National Blood Authority [2001] 3 All ER 289*, unavoidability is not to be taken into account in looking at whether there is a defect for the purposes of the Act.

In that case, a group of claims arose out of a Hepatitis C infection in March 1988. The medical profession knew in the 1970s that there was a problem of infection of Hepatitis C in transfused blood. However, no screening was developed until April/May 1989 (i.e. after the patients had become infected).

Nevertheless, it was held that the public expected blood transfusions to be uninfected. Their legitimate expectation was as to the safety of the product, not merely that tests be carried out. That applied even though that expectation (i.e. transfusions free of Hepatitis C) may be unattainable. Unavoidability therefore has nothing to do with the public's expectations. (N.B. – it should be noted that 'unavoidability' is different from products are 'inherently dangerous' – an issue that is addressed below).

'Setting' expectations

Does it make a difference if the producer/supplier makes it clear that the product may not always work or if it is common knowledge that it may not work in some instances?

Richardson v LRC products Ltd [2000] PIQR P95 suggests that that may be the case.

The claimant and her husband had used a condom manufactured by the defendant whilst having sexual intercourse. The condom fractured and the claimant became pregnant. Although the claimant was entitled to expect the condom to work, the defendant had never claimed that the none would ever fail. Indeed (said the Judge) *'no-one has ever supposed that any method of contraception intended to defeat nature will be 100% effective'*.

Warnings

Adequate warnings and instructions are vitally important when defending a product liability claim.

In *Worsley v Tambrands Ltd (2000) Lloyd's Rep Med 280* the court considered the adequacy of warnings given in relation to tampons. The claimant purchased a box of tampons containing a warning on the outside of the box that stated tampons are associated with Toxic Shock Syndrome (TSS). Attention was drawn to the leaflet inside the box. That leaflet listed symptoms such as sudden high fever, vomiting, diarrhoea and dizziness and stated:

'If you have any of these symptoms and are using a tampon, remove it and contact your doctor for immediate treatment, telling him you have been using a tampon. Do not use a tampon again without your doctor's advice.'

Although the husband had thrown away the leaflet inside of *this* box, the claimant had read such warnings in the past.

When her period began she inserted a tampon from the box. Early next morning she suffered diarrhoea and vomiting, she was confused and uncoordinated and had flu-like symptoms. She continued to use the tampons but did not mention this to her doctor whom she saw on the 14th July. Her condition rapidly deteriorated until she was taken into hospital on 16th July and diagnosed to be suffering from TSS.

Giving judgment for the defendant, Mrs. Justice Ebsworth found that the:

''…defendant had done what a menstruating woman was, in all the circumstances, entitled to expect: (1) they had a clearly legible warning on the outside of the boxes directing the user to the leaflet; (2) the leaflet was legible, literate, and unambiguous and contained all the material necessary to convey both the warning signs and the action required if any of them were present; and (3) they cannot cater for lost leaflets or for those who choose not to replace them, as the claimant could have done after the Tuesday when she discovered the loss.''

Furthermore, when it comes to warnings, the test is not whether they could have been more adequate, but whether they reached a minimum level of adequacy.

'Inherent' dangerousness

As is mentioned above, this is different from unavoidability. The fact that a product may cause injury is not enough to show that it is defective. The fact that a product is inherently dangerous and is known to be so will be factored into the public/legitimate expectation test. This may be something worth looking at if defending a claim.

As such, the claimant's case in *Bogle v McDonald' Restaurants Ltd [2000] All ER (D) 436 (Mar)* (the coffee cup litigation) was dismissed. It will be recalled that the claimant had burnt themselves the defendant's coffee. The claim was given short shrift by Mr. Justice Field, who held:

'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 unlidded 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. They expect precautions to be taken to guard against this risk but not to the point that they are denied the basic utility of being able to buy hot drinks to be consumed on the premises from a cup with the lid off. Given that the staff were trained to cap the drinks securely and given the capabilities of the cups and lids used, I am satisfied that the safety of the hot drinks served by McDonald's was such as persons generally are entitled to expect. Accordingly, I hold that in serving hot drinks in the manner in which they did McDonalds was not in breach of the CPA.'

What a shame that it needed a High Court judge to point out to the claimant that coffee is hot!

Summary

At the outset of the case the claimant will need to show that there was a) a defect in the product and b) that that defect caused the accident. He/she does not have to show what caused the defect, and indeed the defect cited or pleaded need not be particularly specific. (See for example in *Baker* when the defect cited was merely 'a susceptibility to galvanic corrosion.)

The claimant can approach that task one of two ways: either he/she can establish through inspection of the product that a defect was in fact present (scientific/expert evidence will need to be adduced to show that that was the case), or this can be done by way of inference.

If the latter route is to be chosen (i.e. inference), then the claimant must identify the defect first, and then work to eliminate the other alternative explanations for the accident (e.g. loss of control of your bike).

As a defendant therefore, the best approach is to focus on coming up with plausible alternative explanations for the accident. The more explanations there are, the less likelihood there is of the claimant establishing a defect by way of inference. This will still need to be evidenced, either by way of expert evidence or witnesses (or both).

JAMES BENTLEY

GUILDHALL CHAMBERS