



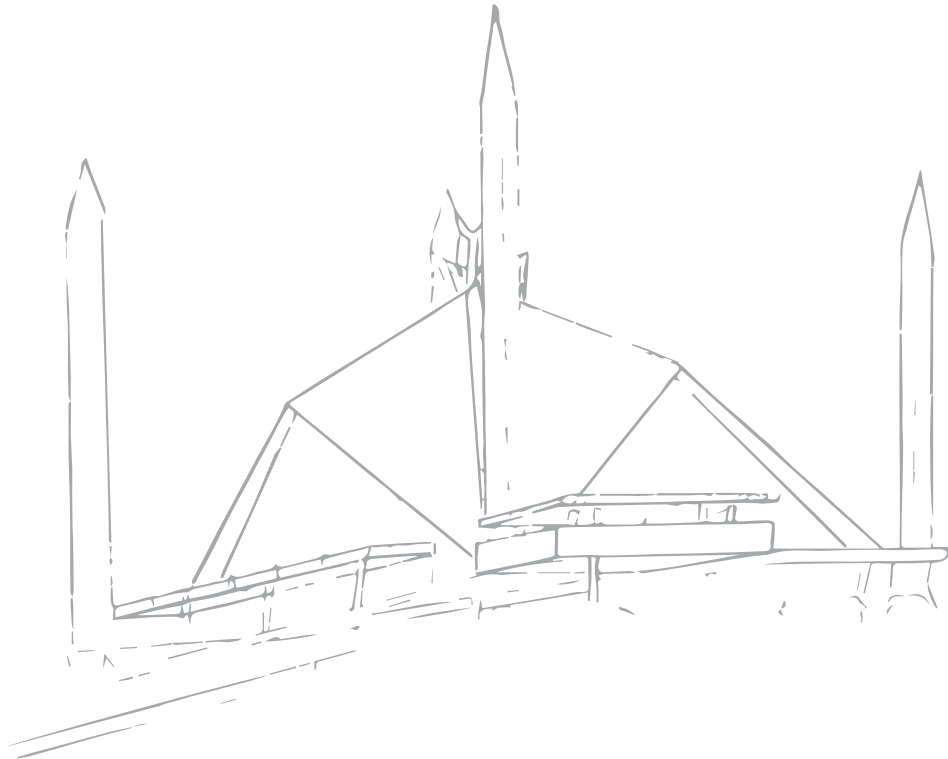
ISSN 1992-5018

# ISLAMABAD LAW REVIEW

*Quarterly Research Journal of Faculty of Shariah &  
Law, International Islamic University, Islamabad*

*Volume 3, Number 3&4, Autumn/Winter, 2019*

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## Product Liability Law in United Kingdom: An Analysis

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### Abstract

*This article argues that the traditional principles of contract law and negligence have limitations which prevent some persons injured by defective products from relying on them as a means of redress. This research paper analyses the application of strict product liability in England through enactment of the Consumer Protection Act, 1987. The background and need for the application of strict product liability in England is highlighted in this regard. Moreover, in order to analyze the effectiveness of English product liability regime the key notions of the regime embodied in Consumer Protection Act, 1987, have been analyzed. The paper poses important questions such as: what is meant by the notion of strict product liability under English law? Which particular act was enacted through which the EU Directive on product liability, 1985 (85/374/EEC) was adopted in England? What is meant by 'product' in CPA? What does defect mean and what are its various kinds under CPA? Who are the potential defendants under the CPA, 1987? What defenses are provided to the defendants under CPA? How to establish the link between the harm caused and defective product? What is the time limitation under CPA, 1987 for product liability cases? These and many other important questions have been tackled in the article.*

**Key Words:** Contract, Privity, Torts, Negligence, Strict Liability, Product Liability, Consumer Protection etc.

### 1. Introduction

In United Kingdom before the introduction of Consumer Protection Act, 1987 product liability can be seen to be deficient, mainly due to the *privity* requirement in contract law and fault requirement in the law of tort.<sup>1</sup> The victims

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<sup>1</sup> Royce-Lewis, Christine A., *Product liability and consumer safety: A practical guide to the Consumer Protection Act* (ICSA Publishing Limited, London 1988), p. 3. Cf. Simon Deakin, Angus Johnston, and Basil Markesinis, *Markesinis and Deakin's Tort Law* (5th edn, Clarendon Press, Oxford 2003), p. 603. Geraint

of defective products can never rely on contractual rights unless they bought them, because there is lack of 'horizontal privity' as they were not a party to the contract under which the goods were supplied. This would exclude the recipients of gifts, possibly members of a group who did not pay for goods consumed and by-standers. The 'vertical privity' restricts the possible defendants to the final seller.<sup>2</sup> On the other side, in the tort of negligence in cases related to product liability, the major problem is that the liability is fault-based. The burden of proving the negligence is on the claimant and he has to prove that the defendant owed him a duty of care. The defendant breached that duty by failing to meet the required standard of care and causing damage. In such cases the standard of 'care' is that of a reasonably competent person and must be exercised at all stages of production process.<sup>3</sup> If the standard of care is breached it will render the product "defective". J.A. Jolowicz remarks in this context:

"I think that in this matter of the civil remedies of the consumer public opinion, or perhaps better, public belief as to the law and the law itself, have got rather far apart. I think also that the main reason for this is the law's insistence on privity of contract and on non-contractual liability only for fault. There are signs in other areas of the law that privity of contract is beginning to yield to the pressures of modern society, for example in the case

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G. Howells writes in this context: "The United Kingdom's product liability law can be seen to be deficient, mainly due to the privity requirement in contract law and the fault requirement in tort law. The thalidomide disaster provoked widespread discussion of product liability and the matter was referred to the English and Scottish Law Commission in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal Injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products" (Geraint Howells, "Product Liability: A Global Problem" *Managerial Law*, 29: 5/6, p. 1-36.

<sup>2</sup> Geraint G. Howells, *The Law of Product Liability*, (2<sup>nd</sup> Edition, LexisNexis Butterworths, 2007), p. 265.

<sup>3</sup> Overview of UK: Product Liability Law available at: [http://www.biicl.org/files/1123\\_overview\\_uk.pdf](http://www.biicl.org/files/1123_overview_uk.pdf), last accessed on 15.08.2013.

of *Hedley Byrne & Co.Ltd v. Heller & Partners Ltd.*, and it is time that in the consumer field also we should prepare ourselves to sacrifice that and other some of the other sacred cows of the law. Popular belief about the law is often wrong and I am far from agreeing that the law should always be so simple that everyone can understand it. But in a field which touches every one as loosely as does consumer law, there is something to be said for a re-examination of the law in the light of what it is popularly, if erroneously, supposed to be".<sup>4</sup>

In this scenario, in England public concern at the problem experienced by *thalidomide* claimants in trying to recover damages under the existing laws of contract and tort led to renewed pressure for their reform.<sup>5</sup> The *Thalidomide* disaster provoked widespread discussion of product liability and the matter was referred to the English and Scottish Law Commissions in 1971 and the Pearson Royal Commission on Civil Liability and Compensation for Personal injury. All three recommended that producers should be strictly liable for personal injury or death caused by their defective products.

Simultaneously the common market was seeking to harmonize the product liability laws of member states. It was deemed an important area for harmony, since differing legal liability in member states affects the price to be charged for a product and distorts competition. The commission to the Council of Ministers of the European Communities embarked upon the task in 1972. It

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<sup>4</sup> J.A. Jolowicz, "The Protection of the Consumer and Purchaser of Goods under English Law", *The Modern Law Review*, 32: 1, January 1969, p. 1-18.

<sup>5</sup> In early 1960s, the drug *thalidomide* affected about 10,000 birth defects and caused thousands of fatal deaths worldwide. The affected babies typically suffered from failure of the limbs to develop. These unfortunate children were cruelly referred to as 'flipper babies.' Thalidomide had been prescribed to pregnant women to help reduce morning sickness, but tragically, it turned out to be toxic to developing fetuses (The Tragedy of Thalidomide and the Failure of Animal Testing available at: <http://www.prijatelj-zivotinja.hr/index.en.php?id=582>, last accessed on 14.08.2013).

submitted a draft Directive in 1976 and a revised draft in 1979.<sup>6</sup>

Hence, in Europe, one of the most significant milestones achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products' (hereafter the Directive).<sup>7</sup> The Green Paper on liability for defective products makes clear that the goal of the Directive was to provide a balanced approach giving, on the one hand, a protection to victims but avoiding, on the other hand, a crushing liability, e.g. by requiring the victim to prove the defective nature of the product and by providing limitations in time.<sup>8</sup> The Directive intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer.<sup>9</sup>

The purpose of the Directive was to: introduce the notion of strict product liability i.e. liability without fault on the part of the manufacturer in favour of the consumer; establish joint and several liability of all operators in the production chain in favour of the injured party, so as to provide a financial guarantee for compensation of the

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<sup>6</sup> Rodney Nelson, Jones & Peter Stewart, *Product Liability: The New Law under The Consumer Protection Act, 1987*, (Fourmat Publishing, 1987), p. 33-34.

<sup>7</sup> Helen Delaney and Rene van de Zande, A Guide to the EU Directive Concerning Liability for Defective Products (Product Liability Directive), U.S. Department of Commerce, National Institute of Standards and Technology, available at: [http://gsi.nist.gov/global/docs/EUGuide\\_ProductLiability.pdf](http://gsi.nist.gov/global/docs/EUGuide_ProductLiability.pdf), last accessed on 13.08.2013.

<sup>8</sup> Michael G. Faure. "Product Liability and Product Safety in Europe: Harmonization or Differentiation?", *Kyklos*, (Online, International Review for Social Sciences). 53:4, (2000), p. 467-508.

<sup>9</sup> See for a detailed discourse on EU Directive on Product Liability, 1985: Muhammad Akbar Khan, *Consumer Protection in Shariah and Law: A Comparative study of Product Liability in Islamic and English Laws*, Chapter 4, PhD thesis submitted to the Department of Shariah, Faculty of Shariah & Law, Interantional Islamic law, Islamabad, 2015. chapter 4 of the thesis

damage; place the burden of proof on the injured party insofar as the damage, the defect and the causal relationship between the two are concerned; provide for exoneration of the producer when the producer proves the existence of certain facts explicitly set out in the Directive; set liability limitations in terms of time, by virtue of uniform deadlines; set the illegality of clauses limiting or excluding liability towards the injured party; set a limit for financial liability; and provide for a regular review of its content in the light of the effects on injured parties and producers.<sup>10</sup>

The Consumer Protection Act, 1987 was promulgated in UK to incorporate the EU Directive on Product Liability, 1985 (85/374/EEC). It was applied to damages caused by products which were put into circulation by the producer after 1 March 1988. Section 1(1) states: "Part I of the Act shall have effect for the purpose of making such provision as is necessary in order to comply with the product liability Directive and shall be construed accordingly".<sup>11</sup>

## **2. Consumer Protection Act, 1987: An Overview**

The principal statutory provisions are contained within Part I of the Consumer Protection Act 1987(CPA). Part I of the Consumer Protection Act, 1987 implements the Directive. The Act has five parts in all: Part I sets out the circumstances in which, under its operation, a consumer can make a claim for damages caused by a defective product; Part II contains the consumer safety legislation; Part III deals with misleading price indications; Part IV details the methods of enforcing the legislation in Part II and III; and Part V consists of miscellaneous provisions concerning, for example, the definition of certain terms. In

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<sup>10</sup> Helen Delaney and Rene van de Zande; also Muhammad Fayyad, "The Transposition of the European Union Directive 85/374 /EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic Law?" *Global Journal of Comparative Law*, 1: 2 (2012), p. 194-224.

<sup>11</sup> Sec.1 (1), Consumer Protection Act, 1987.

addition there are five schedules of which the first, the most important, sets out the time limits for starting court action under the Act. Part I of the Act, 1987 implements the Directive and it is a domestic adaptation of the EU Directive on product liability, 1985. Liability in the Act is strict but not absolute as there are a number of defences available under the legislation. The Act covers the establishment of liability in respect of damages caused by a defect in a product.<sup>12</sup> There are two heads of loss mentioned in the law that are personal injury, death and damage to private property over 275 pounds.<sup>13</sup>

Section 5 (2) has expressly ruled out the recovery for damage to product itself (so Murphy-type economic loss not covered) and 'complex structure' type economic loss, so long as part X, causing damage to the product Y (into which X is incorporated) so long as Y was already incorporated when Y was supplied. According to the Act, there are four classes of persons who can be held liable under the Act: Producers<sup>14</sup> that comprises manufacturers, abstractors, and persons who are in neither class (i) nor (ii) but who give an agricultural product an essential characterization by means of an industrial process; brand-namers<sup>15</sup> who hold themselves out as the producer; EC Importers<sup>16</sup> in case where they import from non-EC producer, the former would be liable for damage caused to UK Citizen; 'Silent' Suppliers<sup>17</sup> which covers the situation where the supplier (S) supplies to a buyer (B) and then (B) asks for the identity of the person against whom the action would normally be brought. Section 3 of the Act governs the definition of defect. Defect is defined in terms of the safety of the product being below the standard of safety which one is generally entitled to expect.<sup>18</sup> There are various defences for the defendant to show that he falls

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<sup>12</sup> Sec. 2 (1), Consumer Protection Act, 1987.

<sup>13</sup> Sec. 5(1) & S.5(4), Consumer Protection Act, 1987.

<sup>14</sup> Sec.1(2) & 2(2)(a), Consumer Protection Act, 1987.

<sup>15</sup> Sec. 2(2)(b), Consumer Protection Act, 1987.

<sup>16</sup> Sec. 2(2)(c), Consumer Protection Act, 1987.

<sup>17</sup> Sec. 2(3), Consumer Protection Act, 1987.

<sup>18</sup> Sec. 3(1), Consumer Protection Act, 1987.

within one of the statutory defences. These are compliance with rule of law<sup>19</sup>, product never supplied to another<sup>20</sup>, non-business supply,<sup>21</sup> defect occurring after the time of supply<sup>22</sup>, development risks<sup>23</sup>, installation defect in a subsequent product<sup>24</sup> and contributory negligence<sup>25</sup>.

### **3. Appraisal of the Key Notions of Strict Product Liability Regime in United Kingdom**

#### **3.1. Strict Product Liability**

The CPA 1987 places strict liability for defective products on a range of possible defendants. The discussion so far indicates that the modern law of product liability in United Kingdom is based on the rule of strict liability. As it is discussed earlier that the existing English product liability regime is based on EU Directive on Product Liability (85/374 EEC) that is based on the notion of strict product liability. The Directive envisages imposing liability on importers and suppliers even when they have used all reasonable care, the liability to which those parties are exposed is clearly strict. Similarly, the Directive also imposes on producers when the defect was due to the activities of a party further up stream in the process such as an out of house designer or a component part producer. Similarly, it is expected that U.K. judges will continue to impose covert strict liability for manufacturing errors.<sup>26</sup>

#### **3.2. The Notion of Product**

The term 'Product' indicates an item which has been manufactured and then sold, perhaps through an

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<sup>19</sup> Sec. 4(1)(a), Consumer Protection Act, 1987.

<sup>20</sup> Sec. 4(1)(b), Consumer Protection Act, 1987.

<sup>21</sup> Sec. 4(1)(c), Consumer Protection Act, 1987.

<sup>22</sup> Sec. 4(1)(d), Consumer Protection Act, 1987.

<sup>23</sup> Sec. 4(1)(e), Consumer Protection Act, 1987.

<sup>24</sup> Sect. 4(1)(f), Consumer Protection Act, 1987.

<sup>25</sup> Sec. 6(4), Consumer Protection Act, 1987.

<sup>26</sup> Jane Stapleton, "Product Liability in United Kingdom: Myths of Reforms", *Texas International Law Journal*, Vol. 34: 4, p. 45-71.



intermediary, to the consumer. In market transactions, a product is anything that might satisfy a want and offered to the market. It is also called merchandise. According to manufacturing, products are bought as raw materials and sold as finished products. In project management, products are the formal definition of the project deliverables that make up or contribute to delivering the objectives of the project.<sup>27</sup> Under the general English law of negligence no definition of product exists. Under the new rules, however, 'product' is a central concept-if no 'product' is involved then the new regime of strict liability will not be attracted. What should be the boundary between products and other things? The *Winterbottom v. Wright*, though it was not a case of product liability, may be considered as the starting point to examine the evolution of product liability in United Kingdom. In this case the plaintiff, a coachman, was injured due to the failure of the defendant to maintain the coach. The defendant was a contractor in charge of maintaining coaches for the stagecoach company. The court held that the liability would not attach to the defendant as there was no *privity* of contract between the parties.<sup>28</sup> Mr. Winterbottom's case was an impediment from which English law did not recover until *Donoghue v. Stevenson* in 1932, having spent more than a century with an apparent dichotomy between 'dangerous chattels' and other goods. General negligence principles have been applied to what could be called product liability cases.<sup>29</sup>

As the English regime of product liability is based on EU Directive on Product Liability, it is, therefore, important to know the meaning of the word "product" in the Directive. According to the EU Directive; a "product" means physical property and goods, as opposed to land or rights in or to

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<sup>27</sup> Michael G. Faure, p. 470; also quoted by M. Fayyad in his *Transposition of the European Directive 85/374/EEC on Product Liability into Palestine and Jordan: Is it Adaptable to Islamic law?*

<sup>28</sup> *Winterbottom v. Wright* (1842) 10 M. & W. 109.

<sup>29</sup> Alister Clark, *Product Liability*, (Sweet & Maxwell Publishers, 1989), p. 47.

real property.<sup>30</sup> According to this definition, the following are to be products: any goods which can include substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle; electricity-defects do not include a power cut; products comprised in other products as component raw material or likewise. This means that buildings themselves will not be included whereas the materials used to make up those buildings will be. In the original Directive, primary agricultural products and game were excluded (article 2). This modification was only made when consumers had been alarmed by outbreak of mad cow disease.<sup>31</sup>

The Consumer Protection Act, 1987 has defined "Product" in as: "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".<sup>32</sup> "Goods" is further defined as including: "substances, growing crops and things comprised in land by virtue of being attached to it and any ship, aircraft or vehicle".<sup>33</sup>

The criteria must be met for an article to constitute a product. It must be movable. Cars and ovens are product.<sup>34</sup> "Product" obviously includes standard consumer goods such as lawnmowers and televisions. It also includes components, such as brakes in a car. It includes raw materials incorporated into goods. It includes ships, hovercrafts, aero-planes, gliders, trains and other vehicles. It includes gas, water and electricity. It includes waste when supplied as a product in its own right, but not where it is merely an unwanted incident of the production process, e.g. effluent from a factory. Land and buildings are not products, because they are immovable. However,

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<sup>30</sup> Art. 2, EU Directive on Product Liability 85/374 (EEC).

<sup>31</sup> Hans-W. Micklitz, N. Reich and P. Rott, *Understanding EU Consumer Law* (Oxford: Intersentia Publications, 2009) 246.

<sup>32</sup> s. 1 (2), CPA, 1987.

<sup>33</sup> s. 45, CPA, 1987.

<sup>34</sup> Rodney Nelson, Jones & Peter Stewart, p.36.

s.45 of the Consumer Protection Act, 1987 clearly covers such items as bricks, wood and cement, even though they become part of a house. Hence, building materials are products but not the building itself; the effect is that the Act applies to building material producers but not normally to the work of building and civil engineering contracts. If your house falls down due to defective bricks, you may sue under Part I of the Act. If it falls down due to defective design or assembly, you must rely on the existing laws of contract and tort (including the Defective Premises Act 1972).<sup>35</sup>

Now the question may arise that liability should also be imposed for nuclear accidents? Nuclear accidents are excluded from the Act. In this regard A.14 of Directive states: This Directive shall not apply to injury or damage arising from nuclear accidents and covered by international conventions ratified by the Member states.<sup>36</sup> In the UK the relevant conventions are mainly implemented by the Nuclear Installations Act 1965. In this context, s.6 (8) provides states: 'Nothing in this Part shall prejudice the operation of section 12 of the Nuclear Installations Act 1965 (rights to compensation for certain breaches of duties confined to rights under that Act)'.<sup>37</sup> The most contentious exception concerns agricultural produce which has amended as mentioned earlier. Agricultural produce is outside Part I, but industrially processed agricultural produce is within it. A fisherman is not liable for selling sickly fish, but a food manufacturer would be liable for producing defective fish fingers. If contaminated wheat eventually forms part of defective biscuits, it is the biscuit manufacturer rather than the wheat grower who will be liable under Part I. The industrial manufacturers then have to exercise their rights of contribution and indemnity against the producers of the primary foodstuff. If a consumer is directly injured by primary agricultural produce, such as rotten tomatoes, Part I does not apply at

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<sup>35</sup> Sec. 45, Consumer Protection Act, 1987.

<sup>36</sup> Art. 14, EU Directive on Product Liability, 1985.

<sup>37</sup> Sec. 6 (8), Consumer Protection Act, 1987.

all and he must rely on the existing law. The major consequences of the breadth of meaning ascribed to the term “product” is that, despite the statute’s short title of the Consumer Protection Act, 1987, Part I’s scheme of strict liability will have a wider application than to consumer goods. As noticed earlier, major disasters stemming from for examples chemicals or aircraft could well be litigated under the Act. The extension of the term “goods” to include movables which have been incorporated into immoveable is of some interest. This clearly covers moveable items such as windows, frames, pipes, and central heating systems which have been so incorporated. In this way the Act implements A.2 of the Directive.

Many difficult propositions are likely to arise in relation to the scope of product. In this regard, the first one is to determine the boundaries the term product covered by the Act.

Another important point which has caused some anxiety is the position of those who produce printed textbooks, manuscripts and the like. In their Explanatory and Consultative Note the “Special problems arise with those industries dealing with products concerned with information, such as books, records, tapes and computer software. It has been suggested, for example, that it would be absurd for printers and bookbinders to be held strictly liable for faithfully reproducing errors in the material provided to them, which-by giving bad instructions or defective warnings-indirectly causes injury. It does not appear that the Directive is intended to extend liability in such situations. On the other hand, it is important that liability is extended to the manufacturer of a machine which contains defective software and is thereby becoming unsafe, and to the producer of an article accompanied by inadequate instructions or warnings, the article thereby become a hazard to the consumer. The line between those cases may however not be easy to draw, particularly in the field of new technology where distinction between

software and hardware is becoming increasingly blurred.”<sup>38</sup>

In modern context the most debated question that arises is whether or not computer technology can be categorized as a product. There is no doubt that hardware is covered by the Directive and no doubt providing a modicum of comfort to those working in close proximity to ‘killer robots’. The difficulty arises in relation to the question of software. The arguments against software being classified as a product are essentially threefold. Firstly, software is not moveable, therefore is not a product. Secondly, software is information as opposed to a product, although some other obiter comments on the question of the status of software suggests that information forms an integral part of a product. Thirdly, software development is a service, and consequently the legislation does not apply.<sup>39</sup> On the contrary, it can be argued that software should be treated like electricity, which itself is specifically covered by the Directive in article 2 and the Act in section 1 (2), and that software is essentially compiled from energy that is material in the scientific sense. Ultimately it could be argued that placing an over legalistic definition on the word “product” ignores the reality that we now live in an information society where for social and economic purposes information is treated as a product and that the law should also recognize this.

Furthermore, following the St Albans<sup>40</sup> case it could be argued that the trend is now firmly towards categorizing software as a product and indeed the European Commission has expressed the view that

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<sup>38</sup> Alister M. Clark, p.53.

<sup>39</sup> *Maurice Jamieson, Liability for Defective Software*, available at: <http://www.journalonline.co.uk/magazine/46-5/1000702.aspx>, last accessed on 13.08.2013.

<sup>40</sup> *St Albans City and DC v. International Computers Ltd.* [1995] FSR 686; [1996] 4 All ER 481.

software should in fact be categorized as a product.<sup>41</sup> The new bill on consumer rights protection introduced in the British Parliament in 2013 has covered, inter alia, the digital-content.

### 3.3 The Notion of Defect

In order to establish liability under Consumer Protection Act proof of defect is essential. The plaintiff has to prove that the product is defective.<sup>42</sup> According to S.3 (1) of CPA, 1987, a defect exists where the safety of the product is not such as persons generally are entitled to expect. The test is based on consumer expectations i.e. what they expect generally. It is subject to a reasonable test.<sup>43</sup> In S. 3(2) of CPA, 1987 states certain factors to be taken into account in assessing consumer expectations of a product's safety. These are: 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; reasonably expected use; and the time that the product was supplied by its producer to another.

However, there is no defect if:

- (a) The product is perfectly safe;
- (b) The product is as safe as persons generally are entitled to expect, in view of its nature and presentation;
- (c) The damage only arose through the disregard of instructions or warnings;
- (d) The damage only arose because the product was put to an unexpected use;

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<sup>41</sup> <http://www.journalonline.co.uk/Magazine/46-5/1000702.aspx#.UgEfsPL97Co> last visited on 06-08-2013.

<sup>42</sup> *Foster v. Biosil* (2000) 59 BMLR 178.

<sup>43</sup> *Richardson v. LRC Products Ltd.* [2000] Lloyd's Rep Med 280.

- (e) The damage was solely caused by fair wear and tear;
- (f) Knowledge that the product could be made safer only became available after its producer supplied it.<sup>44</sup>

In addition to factors to guide the analysis of whether there is a defect, there is also the question of what standard of defect is required for the product to be unsafe and for liability to attach.

This differs from case to case. There is not much case law developed so far that's why the notion of defect and standards to determine the defectiveness of something need to be refined. The three kinds of defect pointed out from the case law on negligence i.e. manufacturing, design and marketing are appropriate and expected to be adopted in future litigation.<sup>45</sup>

The 'manufacturing defect' is covered by the CPA, 1987. This is the defect in a product because it fails to conform to design specification as was in the case of 'A v National Blood authority'. The case has made a clear distinction between standards and non-standard products. Burton J held that the infected products were non-standard, unsafe and, in the absence of warnings to the public about the risk of infection, were not what the public was legitimately entitled to expect and were therefore defective. The fact that infection was unavoidable (due to the lack of screening tests available at the relevant time) was irrelevant to the analysis of defect. In 'Bogle and Others v McDonald's Restaurants Ltd'<sup>46</sup> the court held that 'consumers expectations of coffee were that it should be served hot and therefore the product (coffee in a

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<sup>44</sup> Rodney Nelson, Jones and Peter Stewart, p.61.

<sup>45</sup> Overview of UK: Product Liability Law, available at: [http://www.biicl.org/files/1123\\_overview\\_uk.pdf](http://www.biicl.org/files/1123_overview_uk.pdf), last accessed on 15.08.2013.

<sup>46</sup> *Bogle and Others v. McDonald's Restaurants Ltd.* [2002] All ER (D) 436 (Mar).

Styrofoam cup with lid) was not defective merely because it could scald when spilled’.

When the design itself is defective that is called design defects. These kinds of defects are more complex as there is no ‘standard’ product against which to compare the allegedly ‘non-standard’ product. All products involve inherent risk and the benefits of the product must be weighed against its potential benefits. A product will be considered to have design defect when its risks are much more as compare to its benefits and if such risks could have been avoided by an alternative design. To meet the regulatory standards may indicate that there is no design defect, although this cannot be guaranteed. Where the design permits the risk to arise and there is no warning to the user, the product’s safety will fail the consumer expectations test as was the case in ‘Iman Abouzaid v Mothercare (UK) Ltd’.<sup>47</sup>

S.3 (2) (a) of the Consumer Protection Act contains the failure to warn/manufacturing defect. Failure to issue adequate and proper warnings of associated risks or instructions to avoid their materialization, the product will be considered a defective one. In *Worsley v Tambrands Ltd*, the plaintiff filed a suit against the defendant, a tampon manufacturer, claiming compensation for personal injuries suffered as result of toxic shock syndrome after inserting a regular tampon, a type she had used since she age 15. The plaintiff contended that the warnings on the packet were defective. The court held that the box gave unambiguous instructions to read the detailed leaflet inside, and the leaflet was true and accurate. The claim failed.<sup>48</sup>

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<sup>47</sup> *Iman Abouzaid v. Mothercare (UK) Ltd.* [2000] All ER (D) 2436.

<sup>48</sup> *Worsley v. Tambrands Ltd.* [2000] PIQR P95.



### 3.4. The Notion of Producer

The nucleus of Part I of the Consumer Protection Act is s.2 (1), it states:

“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.”<sup>49</sup>

Those primarily liable under the Consumer Protection Act, 1987 are: (1) the producer of the product; (2) any person putting his name on the product or using a distinguishing mark, or who has held himself out to be the producer of the product (‘own brander’); (3) or any person who has imported the product into the EU/European Economic Area in the course of any business to supply it to another (‘first importer’) (section 2(1) and (2) CPA). ‘Producer’ is in turn defined as: (1) the person who manufactured it; (2) if not manufactured, the person who won or abstracted it; and (3) if essential characteristics of the product are attributable to an industrial or other process having been carried out, the person carrying out that process (section 1(2)). Suppliers of the product (to the person who suffered damage or to the producer in which the product is comprised) may also be liable (in the form of subsidiary liability) if: (1) the person who suffered the damage requests the supplier to identify the producer; (2) within a reasonable period after the damage occurs; and (3) the supplier fails within a reasonable time to comply or identify the person who supplied the product to him (section 2(3) CPA). The rationale behind this provision is to protect the claimant from producers who conceal themselves behind a chain of suppliers. The supplier can avoid liability by informing the consumer of the identity of the producer/importer. Where two or more persons are liable for the same damage then they are jointly and severally liable (section 2(5) CPA).

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<sup>49</sup> S. 2 (1), Consumer Protection Act, 1987.

### 3.5. Proof of Defect and Causation

The liability for compensation is imposed in all those particular situations is nothing more than the resulting harm or injury. The test is whether or not there is injury being in fact caused to or actually suffered by the victim. The matter is being looked at objectively from the side of the victim not from the side of the injury-causing party if a person's conduct actually results in injury to another. This corresponds to Article 6.1(b) of the EU Directive and S. 3 (1) of CPA, 1987 of United Kingdom.

The claimant has to prove the causation link between the defect in the product and the damage he suffered. In *Foster v Biosil*,<sup>50</sup> a claimant sought compensation for injury caused by a ruptured breast implant. Her lawyers argued that the fact that the device had ruptured proved that the product was defective. The courts disagreed, holding that a claimant had to indicate a specific defect and identify how it had occurred, e.g. what is a design or a manufacturing fault.

### 3.6. The Notion of 'Damage'

Meaning of the "damage" is wide and covers death, personal injury that includes any disease and any other impairment of a person's physical or mental condition, nervous shock<sup>51</sup> and the loss of or any damage to property including land.<sup>52</sup> The following types of property damage are excluded:

- a) Pure economic loss: it means the damage to the product itself or another product of which the defective component was a part;<sup>53</sup>
- b) Non-consumer products: it is the damage to property not ordinarily intended for private use;<sup>54</sup>

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<sup>50</sup> *Foster v. Biosil* (2000) 59 BMLR178.

<sup>51</sup> Sec. 45(1), Consumer Protection Act, 1987.

<sup>52</sup> Sec.5(1), Consumer Protection Act, 1987.

<sup>53</sup> Sec.5(2), Consumer Protection Act, 1987.

c) Damage to property of £275 or less.<sup>55</sup>

Any loss or damage to property is to be regarded as having occurred at the earliest time at which a person with an interest in the property had knowledge about the loss or damage to the same.<sup>56</sup> According to S.5 (7)(b) “knowledge” includes which a person might reasonably have been expected to acquire from facts observable or ascertainable by him; or from facts ascertainable by him with the help of appropriate expert advice which it is reasonable for him to seek. However, section 5(7) is clear in that a person is not taken to have knowledge of a fact ascertainable by him only with the help of expert advice unless he has failed to take all reasonable steps to obtain, and where appropriate to act on, that advice.<sup>57</sup>

### 3.7. Financial Limit to Liability

The producer’s potential liability is unrestricted; the UK Government chose not to provide for the financial limit to a producer’s total liability. However, a limit of sorts is provided by the requirement in section 5(3) that the damaged property used by the victim was intended for private use, occupation or ‘consumption’. Section 5(4) provides a lower financial limit of £275, below which the courts will not award damages. This figure does not include the liability for any interest which may have accrued.<sup>58</sup> Section 5(5) provides that the loss and damage shall be assessed ‘at the earliest time at which a person with an interest in the property had knowledge of the material facts about the loss and damage’ if necessary with

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<sup>54</sup> Sec.5(3), Consumer Protection Act, 1987.

<sup>55</sup> Sec.5 (4), Consumer Protection Act, 1987.

<sup>56</sup> Sec.5 (5), Consumer Protection Act, 1987.

<sup>57</sup> S. 5(7), Consumer Protection Act, 1987.

<sup>58</sup> Duncan G. Smith, *The European Community Directive on Product Liability: A Comparative Study of its Implementation in the UK, France and West Germany*, Kluwer Law International, 2007.

the help of expert advice, if it was reasonable to expect the acquisition of such knowledge.<sup>59</sup>

### 3.8. The Notion of 'Defences'

Under the CPA, 1987 several defences have been given to the defendants in cases of product liability. These are as follows:

a) Where the product is defective because of a standard imposed by statute/EC law;

b) Where the defendant did not at any time supply the product e.g. where the defective product was stolen;

c) Where the supplier was not acting as a business supplier is the gist of this defence;

d) The defect occurred after the time of supply;

e) Development Risks: this defence centres on defects that scientific knowledge at the time of production would not have enabled one to detect.<sup>60</sup> The state of scientific and technical knowledge at the time of supply was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.<sup>61</sup>

f) Installation defects in a 'Subsequent' Product: this kind of defence can be invoked when the product in question amounts to a fault in a complex/subsequent product, and it does so either because of the design of the subsequent product or because the producer of the second product had dictated certain features in the first product.<sup>62</sup>

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<sup>59</sup> S. 5(7), CPA, 1987. D. Owles, 'Damage to Property', (1988) NLJ 771.

<sup>60</sup> *Richardson v. LRC Products Ltd.* [2000] Lloyd's rep Med 280.

<sup>61</sup> Sec. 4 (1), Consumer Protection Act, 1987.

<sup>62</sup> *Ibid.*

The defect constituted a defect in a product ('subsequent product') in which the product in question had been comprised and was wholly attributable to the design of the subsequent product or to compliance by the producer of the product in question with instructions given by the producer of the subsequent product (the 'component supplier's defence').

g) Contributory negligence is only a partial defence that reduces the defendant's liability in accordance with the principles in the Law Reform (Contributory Negligence) Act 1945.<sup>63</sup>

Development risks defence is one that was not discoverable when the product was supplied. There was a tension between the development risks defence as articulated in section 4(1)(e) CPA and that in Article 7(e) Directive and the Commission has alleged (unsuccessfully) that the UK had failed properly to implement the development risks defence and brought infringement proceedings under Article 169. The CPA was meant to implement the terms of the EC Directive. The European Commission was concerned that the terminology of section 4(1)(e) of the CPA (the development risks defence) deviated from the wording of the defence under Article 7 of the Directive, creating what could be called a subjective test, as it focused on the conduct and abilities of the reasonable manufacturer. Article 7 (1)(e) was worded differently and required an objective assessment of the state of scientific and technical knowledge at the time the product was put into circulation. It said that the defence would apply when:

*[t]he state of scientific and technical at the time when the producer put the product into circulation was not such as to enable the existence of the defect to be discovered.*<sup>64</sup>

In *EC v UK*, the European Court of Justice said that the relevant test was to ask whether the information (that

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<sup>63</sup> *Ibid.*

<sup>64</sup> Art.7 (1) (e), EU Directive on Product Liability, 1985.

would make the product defective) was accessible to the producer of the product concerned at the relevant time.

The Commission argued that section 4(1)(e) CPA called for a subjective assessment in that the phrase "...might be expected to have discovered the defect" placed an emphasis on the conduct of a reasonable producer, having regard to the standard precautions in use in the industry in question.<sup>65</sup>

According to S.1(1) of the Consumer Protection Act, 1987 the provisions are to be construed in conformity with the EU Directive on product liability. About the development risk defence in *A v National Blood Authority*, the court held that such defence can only be invoked when the producer can show that there was no objectively accessible scientific or technical knowledge existing anywhere in the world which would have helped in discovering the existence defect.

### **3.9. Limitation Period**

The right to bring an action under the CPA 1987 is lost 10 years from the date that the defendant supplied the product.<sup>66</sup> The claimant must begin proceedings within three years of becoming aware of the defect, the damage or the identity of the defendant, or if the damage is latent, the date of knowledge of the plaintiff, provided that it is within the 10-year limit (s11A(4) Limitation Act 1980). In the case of personal injuries there is a discretion vested in the court to override the three-year limitation period (s33 Limitation Act 1980). The liability will expire after a certain period. An injured person has three years to seek compensation from the date on which they first become aware of the damage, the defect and the identity of the producer.<sup>67</sup> In addition, the producer's liability expires after "long-stop" period of ten years from the date on

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<sup>65</sup> Kirsty Horsey and Erika Rackley, *Tort Law*, (Oxford University Press: 20112<sup>nd</sup> Edition), p.366.

<sup>66</sup> Schedule 1 CPA 1987 and s11 A(3) Limitation Act 1980.

<sup>67</sup> Sec. 11A(4) and S. 14(3), Limitation Act, 1980.

which the product was put into circulation.<sup>68</sup> The basic limitation period may be extended by the courts.<sup>69</sup> In *Horne-Roberts v SmithKline Beecham*<sup>70</sup>, a claimant, seeking compensation for injury alleged to have been caused by the MMR (measles, mumps, rubella) vaccination, brought an action against Merck, based on an error in identifying the batch number for the relevant product. After proceedings had commenced, the claimant realized the error and attempted to sue the correct manufacturer, SmithKline Beecham. However, this was after the ten year long-stop period. The English courts were obliged to consider whether or not to allow substitution of the defendant. The court held that the claimant should be given a 'reasonable length of time' to commence proceedings and exercised its discretion to allow the defendant to be substituted after the ten year period had expired.<sup>71</sup>

#### 4. Leading Cases on Product Liability in United Kingdom

The Consumer Protection Act, 1987 was first mentioned in *AB v South West water services Ltd*<sup>72</sup> albeit in a secondary manner. There then followed a series of unsuccessful attempts to invoke strict liability in *Worsley v Tambrands Ltd*<sup>73</sup> (tampons), *Richardson v LRC Products Ltd*<sup>74</sup> and *Foster v Biosii*<sup>75</sup> (breast implants) where the judgments showed little appetite for making out strict liability as

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<sup>68</sup> Sec. 11A(3), Limitation Act, 1980.

<sup>69</sup> Sec. 33, Limitation Act, 1980.

<sup>70</sup> *Horne-Roberts v. SmithKline Beecham* [2002]1 WLR 1662.

<sup>71</sup> Anne Ware and Grant Castle, *Product Liability for Medical Devices*, available on <http://www.cov.com/files/Publication/7a4b6264-9174-4c14-9a25-b0e75e099c03/Presentation/PublicationAttachment/94aacf8f-dec8-46a2-a879-bc89ae81fb82/oid61432.pdf>, last visited on 28-08-2013.

<sup>72</sup> *AB v. South West water services Ltd.* [1993] 1 All ER 609.

<sup>73</sup> *Worsley v. Tambrands Ltd.* [2000] PIQR P95.

<sup>74</sup> *Richardson v. LRC Products Ltd.* [2000] Lloyd's Rep Med 280.

<sup>75</sup> *Foster v. Biosii* (2001) 59 BMLR 178.

being distinct from negligence. There followed a pro-claimant Court of Appeal decision in *Abouzaid v Mothercare (UK) Ltd*<sup>76</sup> (pushchair liner) and of the High Court in *A v National Blood Authority*<sup>77</sup> (infected blood). Post that landmark case the claimants were in *Bogle v McDonalds Restaurants Ltd*<sup>78</sup> (hot coffee) and in the Court of appeal in *Pollard v Tesco Stores Ltd*<sup>79</sup> (child resistant closure on dishwasher powder) and *Piper v JRI (Manufacturing) Ltd*<sup>80</sup> (replacement hip), but successful in *Palmer v Palmer*<sup>81</sup> ('Klunk Klip' seat belt device).<sup>82</sup>

## 5. Conclusion

The term "*Product liability*" is used to identify the body of law that seeks to hold manufacturers and sellers financially responsible for their products not meeting safety standards. Developments in science and technology constantly exert new pressures on existing legal concepts. The speed and accuracy with which those concepts are able to adapt to such challenges have important social and economic consequences.<sup>83</sup> It has become indispensable for all the nations to promulgate concrete and solid legislations on product liability in the era of the rise of industrial capitalism, with the consequent proliferation of dangerous machinery, railways, road traffic, production of mass products, and polluting activities and multiplicity of

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<sup>76</sup> *Abouzaid v. Mothercare (UK) Ltd* [2000] All ER (D) 2436; Williamson, S.. "Strict Liability for Medical Products: Prospects for Success", *Medical Law International*, 5: 4 (September 2002), p. 281-304.

<sup>77</sup> *A v. National Blood Authority* [2001] 3 All ER 289.

<sup>78</sup> *Bogle v. McDonalds Restaurants Ltd.* [2002] EWHC 490.

<sup>79</sup> *Pollard v. Tesco Stores Ltd.* [2006] EWCA 393, [2006] All ER (D) 186 (Apr).

<sup>80</sup> *Piper v. JRI (Manufacturing) Ltd.* [2006] EWCA Civ 1344, (2006) 92 BMLR 141.

<sup>81</sup> *Palmer v. Palmer* [2006] EWHC 1284 (QB), [2006] All ER (D) 86 (Jun).

<sup>82</sup> Geraint G. Howells, *The Law of Product Liability*, p. 277.

<sup>83</sup> Jane Stapleton, "Software, Information and the Concept of Product", *Tel Aviv University Studies in Law*, Vol.9, 1989, p. 147-165.



deaths and sever harms due to use of defective products and services. In this context, one of the most significant milestones achieved in the history of consumer protection law on 25 July 1985 with the promulgation of the Council Directive on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States concerning Liability for Defective Products.<sup>84</sup> The EU Directive, 1985 (85/374/EEC) is intended to address dangerous products after they are sold and used, in addition to providing redress to an injured consumer. No doubt that the *Thalidomide* disaster in Europe was clearly the catalyst for the reforms processes that culminated in the 1985 Council Directive “on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. It provides a telling benchmark by which to evaluate the impact of the latter.”<sup>85</sup> The Directive has attempted to reduce distortions in competitive trade between Member States whilst providing a common level of protection to consumers throughout the Community against defective products.<sup>86</sup> Before the European Directive on products liability was implemented in the United Kingdom the principal pillars of products liability were the common law principles of the statutory warranties in the Sale of Goods Act 1979 and the common law action in the tort of negligence. Today, there are three regimes that deal with the issues of consumer protection in the context of product liability i.e. contract regime, tort regime and strict product liability regime (CPA, 1987). In UK the EU Directive on Product Liability, 1985 (85/374/EEC) was adopted through enactment of the Consumer Protection Act, 1987. This has become a very significant law in UK and number of cases has been filed under the strict product liability regime which has proved to be more effective as compare to the traditional regimes of contract and torts.

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<sup>84</sup> Helen Delaney and Rene van de Zande.

<sup>85</sup> Jane Stapleton, *Product Liability in United Kingdom: Myths of Reforms*.

<sup>86</sup> Duncan G. Smith, *The European Community Directive on Product Liability*.