



**COUNTRY
COMPARATIVE
GUIDES 2022**

The Legal 500 Country Comparative Guides

United Kingdom

PRODUCT LIABILITY

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This country-specific Q&A provides an overview of product liability laws and regulations applicable in United Kingdom.

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UNITED KINGDOM PRODUCT LIABILITY



1. Please summarise the main legal bases for product liability

There are three main bases for a claim for damage caused by a product.

- Consumer Protection Act 1987 (CPA)

The EU Product Liability Directive [85/374/EEC] (PLD) was transposed into UK law by the CPA. This imposes strict liability for defective products (sometimes described as 'no fault liability') which have caused injury or damage to private property (excluding damage to the product itself).

- Negligence

Unlike the CPA, this is fault based. Liability will attach to a defendant who owes, and breaches, a duty of care that results in injury or property damage.

- Contract

A claimant would need to show that a seller or supplier under a contract for the sale of a product breached an express or implied term of the contract, and that the breach led to loss or damage.

2. How is "product" defined? In particular, does it cover software provided by way of a download only?

Product is defined in s.1(2) CPA as: '*any goods or electricity and... includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise*'. It does not cover the provision of services. 'Goods' is further defined in s.45(1) to include things attached to the land and aircraft, ships and vehicles.

There is a debate, most actively at EU level, as to whether the scope of the definition of "product" includes intangible products, such as software or digital content, or rather whether they instead constitute a "service".

This is particularly prevalent in the context of emerging technologies, for example smart medical devices which comprise physical hardware, and cloud-based software which may be provided by way of a download only and subject to automated updates.

In cases where software is an integral part of a physical product and causes that product to fail, resulting in injury or property damage, it is plausible that the physical and software parts combined could be found to be a product.

The distinction between 'product' and 'service' was addressed by the CJEU in *VI v KRONE-Verlag Gessellschaft mbH & Co KG* [2021]. The CJEU ruled that a newspaper containing inaccurate medical advice which, when followed, caused injury to the reader, did not constitute a defective product within the meaning of the PLD. The medical advice was considered a service and not a product, as defined by the PLD, notwithstanding that the medical advice was incorporated into the physical newspaper. Further, the CJEU ruled that the provision of medical advice was not an inherent characteristic of the printed newspaper that would be considered when determining whether the product was defective, as it does not relate to its presentation or use. The newspaper is merely the medium on which the advice is contained.

However, more recently, in *The Software Incubator Ltd v Computer Associates (UK) Ltd*, the Court of Justice of the European Union ("CJEU") was asked by the UK Supreme Court ("UKSC") to give a preliminary ruling as to whether software could constitute 'goods', for the purposes of the Commercial Agents Directive (86/653/EEC), implemented into UK law by virtue of the Commercial Agents (Council Directive) Regulations 1993. The CJEU ruled that software can constitute 'goods', irrespective of whether it is supplied on a tangible medium, or by electronic download. Although this decision is in the context of the protection of commercial agents regarding the sale and purchase of goods, as opposed to the protection of consumers, it indicates that the CJEU is prepared to widen the scope of existing legislation in order to respond to new technologies. The

UKSC's final decision is awaited.

It is anticipated that the European Commission ("EC") will address the definition of a 'product' when publishing its draft proposals to amend the PLD (see Q.23).

Any future amendments to the PLD will not apply to the CPA further to Brexit. As discussed in Q.23 below, UK legislators are also considering whether the CPA is fit for the digital age, although such discussions are not as advanced as those conducted at EU level.

3. What are the main elements which a claimant must prove to succeed in a strict liability type claim for damage caused by a defective product?

The CPA imposes strict liability for injury or damage to private property caused by a defective product. This is a system of no fault liability focused on the safety of the product. A claimant bears the burden of proof, and must prove the defect and that the defect caused the damage claimed.

Section 3 of the CPA sets out the relevant test:

There is a defect in a product *'if the safety of the product is not such as persons generally are entitled to expect'*. As the CPA applies to products from toys to medical devices, this is a flexible test.

In assessing the safety of the product, the court will take into account all of the circumstances, including:

- product marketing;
- date of supply;
- any safety mark;
- warnings;
- what might reasonably be expected to be done with the product;
- the time when the product was supplied by its producer to another.

The landmark case of *Gee & Others v DePuy International Limited* [2018] EWHC 1208 (QB) (Gee) provides guidance on how the test for defect should be applied:

- The test is objective and asks what **people generally are entitled to expect**, not what the claimant actually expected.
- Hindsight plays no part in the 'entitled expectation' of safety; entitled expectation must be assessed as at the date of supply of the product. However, when assessing whether the product met entitled expectation,

all relevant information to date can be considered.

- A court is entitled to take into account all the circumstances it considers factually and legally relevant to the evaluation of safety, on a case by case basis.

4. With whom does liability sit? If there is more than one entity liable, is liability joint and several?

The following entities can be jointly and severally liable for damage under the CPA:

- the producer (i.e. the manufacturer) of the product.
- a person who by, e.g. placing his name on the product or using his 'own brand' or trademark, holds himself out as a producer.
- the importer into the UK. NB This is a significant change to the pre-Brexit position when the relevant entity was an importer into the EU.

Further, a supplier of a product can be held liable if it fails to identify one of the above entities within a reasonable time period after receipt of a request for this information by a claimant.

5. Are any defences available? If so, please summarise them.

As the CPA imposes a form of strict liability, there are limited defences available once a product is found to be defective. Available defences are that:

- the defect is attributable to compliance with any requirement of UK or retained EU law post Brexit.
- the defendant did not at any time supply the product.
- the product was not supplied in the course of the defendant's business or with a view to profit.
- the defect did not exist in the product at the time of supply.
- the state of scientific and technical knowledge at the time the product was put into circulation was not such that a producer of products of the same description could be expected to have discovered the defect (often called the "state of the art defence").
- the defect was not in the component supplied but in the finished product in total for which the defendant should not be responsible.

6. What is the limitation period for bringing a claim?

A claim must be brought within the following periods:

- Three years from the later of:
 - The date the injury or loss is suffered; or
 - The date of knowledge of the damage, the defect and the identity of the producer.

The three year period can be extended at the court's discretion.

- In addition, a claim under the CPA must be brought within ten years from the date on which the product was put into circulation. This is called the ten year longstop period. A right of action under the CPA is extinguished after this period.

7. To what extent can liability be excluded (if at all)?

Section 7 of the CPA expressly prohibits liability being excluded by any contract term, notice or any other provision.

8. What are the main elements which a claimant must prove to succeed in a non-contractual (eg tort) claim for damage caused by a defective product?

A claimant must show, on the balance of probabilities, that:

- The defendant owed the claimant a duty of care;
- The defendant breached that duty;
- The breach caused the alleged loss or damage; and
- The loss was reasonably foreseeable.

Establishing a breach of duty requires an examination of the defendant's actions. It is therefore potentially more challenging for a claimant to establish negligence than to establish CPA liability. A claimant will often bring a claim both under the CPA and in negligence to maximise prospects of success.

9. What types of damage/loss can be compensated and what is the measure of

damages? Are punitive damages available?

The law aims to restore a claimant to the position they would have been in had the negligence not occurred.

Damages are available to compensate a claimant for losses that were a direct and reasonably foreseeable consequence of the injury or damage suffered. These may be:

- General damages for non-pecuniary losses, e.g. pain, suffering and loss of amenity.
- Special damages for financial losses, e.g. loss of earnings.

Pure economic loss is not recoverable.

Provisional damages may be awarded where a claimant has not fully recovered from injury, or is at risk of further injury in the future, as a result of the defendant's negligence.

Punitive damages are rarely awarded but are available, typically only in cases of deliberate torts where a defendant has calculated that the financial gain from the wrongdoing is likely to exceed any damages payable to a claimant.

10. How are multiple tortfeasors dealt with? Is liability joint and several? Can contribution proceedings be brought?

Liability for the same damage can be joint and several, meaning that liability can be split across multiple tortfeasors. A claimant can pursue any one or more of those tortfeasors for the full loss. An unsuccessful defendant can bring contribution proceedings against any other tortfeasor in respect of the same damage.

11. Are any defences available? If so, please summarise them.

Yes. This will often involve a defendant trying to show that an element of the claim has not been established, e.g. that there was no causal link between the breach of duty and the alleged injury or loss.

Common law defences are also available, including:

- Contributory negligence: where a claimant's actions contributed towards the loss suffered, there may be a reduction in the damages awarded.
- Voluntary assumption of risk: where a

claimant knew of, and accepted, the risks of a product.

samples shown at the point of purchase.

Available remedies are against the retailer, and include refund, repair or replacement of goods.

Similar requirements are set out in the Sales of Goods Act 1979 (SGA), which applies to B2B contracts.

12. What is the limitation period for bringing a claim?

The relevant limitation periods are set out in The Limitation Act 1980:

- For claims involving personal injury, three years from the date the damage occurred or from the date that the claimant knew, or reasonably ought to have known, that they had a cause of action, commonly referred to as “the date of knowledge”. Knowledge can be acquired from the date that the claimant knew the identity of the defendant or realised the significance of their injury.
- For claims not involving personal injury, six years from the date on which the damage occurred, or three years from the date of knowledge for claims concerning latent damage.

15. What types of damage/loss can be compensated and what is the measure of damages?

Contractual damages are intended to restore a claimant to the position they would have been in had the contract been properly performed.

The remedies available will vary depending on the contractual term(s) breached. For example, a claimant may be awarded financial compensation for loss sustained as a result of the delivery of defective goods, or a defendant may be ordered to perform a contractual obligation.

13. To what extent can liability be excluded (if at all)?

Liability for death or personal injury arising from negligence cannot be excluded.

It is possible to exclude other loss or damage resulting from negligence, for example, property damage. However, any term excluding or restricting liability must be compatible with the requirement of reasonableness set out in Schedule 2 of the Unfair Contract Terms Act 1977 (UCTA).

16. To what extent can liability be excluded for contract liability (if at all)?

The terms of a contract cannot exclude or limit liability for death, personal injury or damage to property under the CPA, nor can they limit or exclude liability for death or personal injury arising from negligence.

For B2B contracts, it is possible to otherwise exclude or limit liability for negligence that causes property damage, however this must be compatible with the requirement of reasonableness pursuant to UCTA.

14. Does the law imply any terms into B2B or B2C contracts which could impose liability in a situation where a product has caused damage? If so, please summarise.

Yes. The Consumer Rights Act 2015 (CRA) applies to B2C contracts and states that goods supplied to a consumer must be:

- Of satisfactory quality: goods should not be faulty or damaged upon receipt;
- Fit for that particular purpose: goods must be fit for the purpose for which they are supplied and any specific purpose made known to the seller at the point of purchase; and
- As described: goods supplied must correspond with any description given, or models/

17. Are there any recent key court judgements which have had a significant impact on the approach to product liability?

The Gee judgment remains the seminal decision in product liability. This adopted much of the reasoning in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB) which re-examined, and departed from, *A v National Blood Authority* [2001] 3 All E.R. 289.

The court in *Gee*:

Recognised the inherent flexibility of the CPA.

Advocated a holistic approach to the assessment of defect, enabling a court to take into account all legal and factual circumstances relevant to an evaluation of

safety.

Held that hindsight has no place in the formulation of the 'entitled expectation' of safety when considering the legal test to be applied in determining whether a product is defective under the CPA.

Held that a known and inherently harmful, or potentially harmful, consequence of the ordinary use of a product did not amount to a defect.

See also the CPA section above.

Gee was largely approved in the judgment for the defenders in the Scottish matter of *Hastings v Finsbury Orthopaedics Limited and Stryker UK Limited* [2019] CSOH 96, which was upheld on appeal ([2021] CSIH 6). The Pursuer has filed an appeal at the UK Supreme Court, due to be heard in April 2022.

18. What are the initial litigation related steps you should take if you are facing a product liability claim or threatened claim?

These are similar to the steps needed when facing any litigation: notify insurers, check limitation periods, consider other potential parties in the supply chain, preserve relevant documents and information which may include:

- product design files;
- documents evidencing regulatory compliance;
- sales figures;
- complaints information; and
- documents providing information regarding risks and warnings.

The following may be required from the party pursuing the claim:

- confirmation as to whether the product is available for inspection and will be retained, with no destructive testing without prior consent.
- full details as to what was being done with the product when the alleged incident occurred, particularly with a product which, if misused or mistreated, can be dangerous.

19. Are the courts adept at handling complex product liability claims? Are cases heard by a judge or jury?

Although many claims resolve before trial, UK courts are adept at handling complex product liability claims.

Cases are heard by a judge who will generally be alive to the potential complexity of such claims and will allow evidence from a range of expert disciplines and lay witnesses, where required. That evidence, including possibly complex technical analysis, will be considered in depth by the court in its assessment of liability, causation and quantum.

20. Is it possible to bring a product liability related group action? If so, please summarise the types of procedure(s) available

In England and Wales, group actions may be brought using either formal or informal mechanisms.

A 'Group Litigation Order' (GLO) has been the most commonly used formal mechanism for product liability related group actions to date, enabling the management of multiple claims which give rise to common or related issues of fact or law.

- Claimants must "opt in" to be part of the GLO.
- There will be a trial of issues that are common to all claims.
- Lead cases can be used to allow the parties to put common issues into context.
- Judgment will be binding on all parties to the GLO.

A 'representative action' may be brought by one or more claimants on behalf of an undefined group of persons who have the "same interest". Representative actions operate on an 'opt-out' basis, and judgment will be binding on all those represented. This procedure has been rarely used due to the strict interpretation and limited scope of the 'the same interest' requirement. That strict interpretation has recently been affirmed by the UK Supreme Court in *Lloyd v Google* [2021] UKSC 50 which considered the use of the representative action procedure in the context of a data privacy action. It is therefore likely that, for the time being, GLOs will remain the most commonly used procedure for product liability related group actions.

The courts may also manage groups of claims informally. For example, one or a number of test cases may be advanced to trial while remaining cases are stayed. Although the decision in a test case is not binding on parties to the other claims, the intention is to decide common issues that can assist parties to resolve remaining claims without further litigation.

In Scotland, the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018, effective since July

2020, enables two or more individuals with the 'same, similar or related claims' to commence a single group action.

In Northern Ireland, representative actions can be brought by one party representing individuals who have the 'same interest' in a claim.

21. How are cases typically funded? Can lawyers charge success fees? Is third party funding permissible?

Cases are typically funded by conditional fee agreements, damages based agreements and, increasingly, by third party funding which is permissible. Lawyers can charge success fees. However, in relation to funding arrangements entered into after 1 April 2013, a successful claimant can no longer recover success fees, ATE premiums or other arrangement costs from the defendant. Funding arrangements are therefore no longer notified to defendants.

22. How common are product liability claims and what factors influence their frequency?

These are both determined by various factors, including:

- Trends in product liability group actions in other jurisdictions, particularly the USA, Australia and Europe, which often filter down to the UK, e.g. metal-on-metal hip replacement claims and Volkswagen emissions litigation. Uptake of these actions in the UK is influenced by collaboration and information sharing between claimant law firms across jurisdictions and experienced US class action law firms opening up offices in the UK.
- Major events such as civil unrest; natural disasters; environmental concerns and global crises, such as the COVID-19 pandemic, which can fuel consumers' appetites for litigation;
- Emergency rapid response products where the long term safety/adverse events data is unavailable/unknown;
- Consumer product recalls;
- Inherent and associated risks (which may be unknown when the product is put onto the market) of emerging technologies e.g. arising from software/data vulnerabilities which have the potential to affect thousands of consumers.
- Emergence of collective redress e.g.

endorsement of the Directive of the European Parliament and of the Council on representative actions for the protection of the collective interests of consumers 2020/1828 (the Directive) in December 2020, which, once implemented into national laws, will provide consumers in EU Member States with a mechanism to bring collective actions in respect of infringements of EU law.

Although the Directive does not apply in the UK following its departure from the EU, there has been a surge of group actions in the UK in recent years, indicating that it is following the same direction of travel as the EU, noting in particular the Competition Appeal Tribunal's certification of the first application for a collective proceedings order ("CPO") in *Merricks v Mastercard* [2021] CAT 28 and the other CPOs granted since then.

- Costs shifting and availability of funding, including third party funding.

23. What are the likely future developments in product liability law and practice? To what extent is the suitability of the law being challenged by advances in technology?

The way that the CPA applies, or indeed whether it does apply, to new technologies is far from clear. This is best demonstrated by a series of questions in relation to, e.g. software supplied over-the-air, without a physical medium, which could be something like a connected pacemaker:

- Is the software a product to which the CPA would apply, or a service, to which it would not (see Q2 above)?
- If the software is considered a product, who has the ongoing onus (and associated potential liability) to update the software?
- How will the state of the art defence apply to the updated software?
- How will limitation be determined in relation to the updated software?

These issues have been subject to extensive discussion at EU level, including the extent to which the existing liability framework applies to emerging technologies, including digital content and artificial intelligence ("AI"), and whether reform of the PLD is necessary (see Q.23). In October 2021, the EC launched a public consultation seeking views from key stakeholders including consumers, businesses, insurers and industry bodies on the relevance of these issues and how to improve the

PLD. The consultation also sought views on how to address damage caused by AI systems.

The EC consultation closed in January 2022 and whilst the outcome of the consultation is not yet known, some of the key policy options being considered are as follows:

- Amendments that would make it easier for consumers to bring claims, for example, amending time limits for bringing claims.
- Extending the scope of the PLD to cover intangible products that cause physical or material damage, e.g. software and digital content.
- Addressing defects resulting from changes to products after they have been put into circulation, e.g. software updates or circular economy activities like product refurbishments.
- Alleviating the burden of proof by obliging the producer to disclose technical information to the injured party, allowing courts to infer that a product is defective or caused the damage under certain circumstances, or even reversing the burden of proof.

The EC's draft legislative proposals may be published by the third quarter of 2022.

Further to Brexit, any changes to the PLD will not be implemented into UK law. Nonetheless, as part of a wider package of law reform, the UK is also considering whether the CPA is fit for the digital age. In March 2021, the UK Law Commission launched a public consultation seeking views on potential areas and themes to feature in its 14th Programme of Law Reform, including "*product liability and emerging technology*" and, for example, whether the CPA should be extended to cover software products and other technological developments.

Some responses to the consultation have been published and, although they do not represent the full spectrum of views, they align with some of the EC's policy proposals. The Law Commission's final 14th Programme of Law Reform is expected to be published in the first half of 2022.

24. Please provide an update of any interesting developments which have taken place in your jurisdiction over the last 12 months.

- **Challenges posed by online marketplaces**

UK product liability legislation comes up against serious challenge when faced with online marketplace platforms,

which are on the rise. Current legislation, as explained in Q4 above, provides for a traditional form of supply chain, namely a producer, importer and supplier, and the concept of an online marketplace does not necessarily fall into these categories.

The EU has already sought to address the challenges posed by online marketplaces through the introduction of the Market Surveillance Regulation ("MSR") in July 2021. All economic operators in the supply chain are subject to the provisions in the MSR, obliging them to cooperate with market surveillance authorities to ensure consumers are protected from receiving non-compliant products sold to them from both inside and outside of the EU, including those sold online. The MSR provides that certain categories of CE marked products, such as toys and electrical equipment, should not be placed on the EU market unless an economic operator is established there. Those economic operators are subject to more extensive market surveillance obligations.

In the UK, the difficulties consumers may face when seeking redress in respect of non-compliant products was addressed in the response to the Office for Product Safety and Standards' (OPSS) Call for Evidence, a public consultation launched in March 2021 as part of the UK Government's 'Product Safety Review'. The response highlighted the problems of establishing where responsibility or liability lies in non-traditional models of supply. Further, the practical implications of enforcement action are difficult to overcome where sellers are abroad or completely untraceable.

This growing concern prompted the OPSS to issue a warning to UK consumers of non-compliant products being sold via online marketplaces and the safety risks involved.

Although the issue has not yet been the subject of litigation in the UK, given the emerging regulatory developments in the US and EU, and the UK authorities withdrawing more than 10,000 unsafe products from online platforms in 2021 alone, there is scope for the onset of disputes to soon reach the courts.

- **'Forever chemicals'**

In the UK, there is increased concern in relation to the use of Perfluoroalkyl and Polyfluoroalkyl substances (PFAS), often known as 'forever chemicals', which are a group of highly persistent, manmade chemicals found in various industrial and consumer products that do not naturally break down.

Developments in the US and the EU, as well as environmental monitoring by the UK's Environment Agency, prompted the UK Government to begin

preparation of a regulatory management options analysis (RMOA) in December 2021 for protecting against the risks of PFAS. The RMOA involves a wide-ranging UK-based investigation into all articles, mixtures or substances that contain PFAs, including their manufacture, import and exposure, as well as the legislation and standards that are applicable. The call for evidence closed on 30 January 2022 and it is intended that a draft report will be shared with interested

stakeholders for comment. It is expected the finalised report will prompt further regulatory reform in this area.

PFAS litigation has already reared its head in the United States and Europe. Manufacturers and importers of PFAS and products containing PFAS could face similar actions in the UK, particularly if more stringent regulation is introduced in due course. The UK's growing appetite for group litigation provides fertile ground for product litigation in this area.

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