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

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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] 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 the product breached an express or implied term of the contract, and that the breach led to loss or damage.

2. 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 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.
3. 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.

4. 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 EU law.
- 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.
- the defect was not in the component supplied but in the finished product in total for which the defendant should not be responsible.

5. 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.

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

S7 of the CPA expressly prohibits liability being excluded by any contract term, notice or any other provision.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 he/she 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 his/her 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.

12. 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).

13. 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/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.
14. 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 he/she 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.

15. 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.

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


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 recently upheld on appeal ([2021] CSIH 6).

In the Volkswagen Emissions Litigation, [2020] EWHC 783 (QB), the court held it was bound under EU law (the case was heard during the ‘transition period’) by the German-type approval authority’s finding that certain vehicles contained a “defeat device”, and the defendants’ attempt to re-litigate that decision was an abuse of process.

17. 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: check limitation periods, consider other potential parties in the supply chain, notify insurers, 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.

18. 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.

19. 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. Such actions are rare although there are signs they may become more widely used, and we await the Supreme Court’s assessment of the term “same interest” in the appeal of Lloyd v Google LLC [2019] EWCA Civ 1599.

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.

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

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

21. 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. the PIP claims and Volkswagen emissions litigation. This is increased by collaboration and information sharing between claimant law firms across jurisdictions including the UK.
- Major events such as civil unrest; natural disasters; environmental concerns and a global crisis 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.
- Emergence of collective redress e.g. recent 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), which, once implemented, will provide consumers in EU Member States with a mechanism to bring collective actions in respect of infringements of EU law. Although the Directive will not
apply to the UK following its departure from the EU, it would appear that the UK is following the same direction of travel, noting the Supreme Court's recent judgment in *Merricks v Mastercard* [2020] UKSC 51 and the introduction of group actions in Scotland with The Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

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

22. 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?
- 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?

The European Commission’s (EC) Expert Group on Liability and New Technologies considers that a review of product liability laws in respect of emerging technologies should include, for example, a person operating a technology being required to comply with specific duties to properly operate, monitor and maintain the technology.

The EC is expected to publish a horizontal regulatory proposal in 2021, the aim being to safeguard fundamental EU values, rights and user safety by obliging high-risk AI systems to meet mandatory requirements related to their trustworthiness. We anticipate that the UK Government will seek to implement similar measures in the UK.

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

The COVID-19 pandemic has led to global demand for the rapid production of emergency products such as personal protective wear, diagnostics and treatments. The race to develop a COVID-19 vaccine in unprecedented circumstances has forced an immediate shift in the UK and globally towards:

- Increased use of new technologies, including telemedicine, genomics, nanotechnology and AI in the drug discovery process;
- Greater reliance upon data-driven technologies and related products, which may lead to a potentially more complex product liability matrix where liability may fall on multiple defendants.

On 11 March 2021, the UK Government set out its plans to review and strengthen the UK’s current product safety laws, which are over 30 years old, to ensure that they are fit to deal with emerging innovations and technologies. This UK product safety review covers consumer products such as electrical equipment, cosmetics and toys but excludes food products, medical or healthcare products, chemical, vehicles and construction products.

The delayed implementation of the EU’s new regulations on medical devices and in vitro diagnostic medical devices means that they will not automatically apply to the UK post Brexit. However, the Medicines and Medical Devices Bill seeks to ensure that the UK continues to be a global leader in the life sciences sector and to provide UK patients with faster access to pioneering medicines.

The MHRA has published updated guidance on the regulation of medical devices and medicinal products, effective from 1 January 2021, which includes a timeline for a new UK medical device regulation framework from July 2023.
Contributors

Samantha Silver  
Partner  
samantha.silver@kennedyslaw.com

Karishma Paroha  
Senior Associate  
karishma.paroha@kennedyslaw.com

Ed Gibson  
Associate  
ed.gibson@kennedyslaw.com

Emily Burrett  
Associate  
emily.burrett@kennedyslaw.com