

Product Liability Update 2022

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Agenda

- **The approach of the Courts to the interpretation of a “Defect”**
- **The Bacardi Question – Damaged or Defective?**
- **Insurance terms relevant to product liability**
- **Product liability and the future**

Definitions

What is a “product”?

- Section 1(2) CPA 1987 – “product means any goods or electricity... and includes a product which is comprised in another product, whether by virtue of being a component part of raw material or otherwise”



Definitions (2)

What is a “defect” – section 3 CPA 1987?

- “if the safety of the product is not such as persons generally are entitled to expect... in the context of risks of damage to property, as well as in the context of risks of death and personal injury”
- “all the circumstances...”

Defences

Set out in Section 4 (1) CPA 1987. They include

- the defect did not exist in the product at the relevant time
- the state of scientific and technical knowledge at the relevant time was not such that a producer of products might be expected to have discovered the defect if it had existed in his products while they were under his control (known as the “Development Risks” defence)

“Defect” case law

A v National Blood Authority [2001] EWHC QB 446

- Claimants were infected with Hepatitis C virus from blood transfusions performed in the late 1980s. The Claimants sought damages from the NBA under the CPA on the basis that the blood was not of a standard people were generally entitled to expect
- The NBA argued blood not defective, so not liable. Also argued the “development risks” defence on the basis that the virus had not been identified when the earliest transfusions took place and no tests were available which could have detected the virus
- Accepted that medical professionals were aware of the potential risk of contamination but that there was no way to eliminate that risk at the time
- Court focused on the protection of consumers and the harmful risk that caused the injury and ultimately found the NBA liable

“Defect” case law (2)

Wilkes v DePuy International Ltd [2016] EWHC 3096 (QB)

- Different approach taken by the Court – less of a focus on the harmful risk and more of a balancing exercise taking into account the potential benefits
- Metal-on-Metal Hip Implant case following the need for a replacement after metal fatigue in the C stem
- The Court rejected the approach taken in *A v NBA* and focused on a risk/benefit analysis approach and ultimately held in favour of the Defendant



“Defect” case law (3)

Colin Gee & ors v DePuy International Ltd [2018] EWHC 1208 (QB)

- Metal-on-Metal Hip Implant Case – Group Action – Claimants failed to prove a “Defect”
- the product's propensity to shed metal debris – an inherent characteristic of the product and not a “Defect” under the CPA 1987
- “Defect” must be an abnormal risk of damage



“Defect” case law (4)

Hastings v Finsbury Orthopaedics [2022] UKSC 19

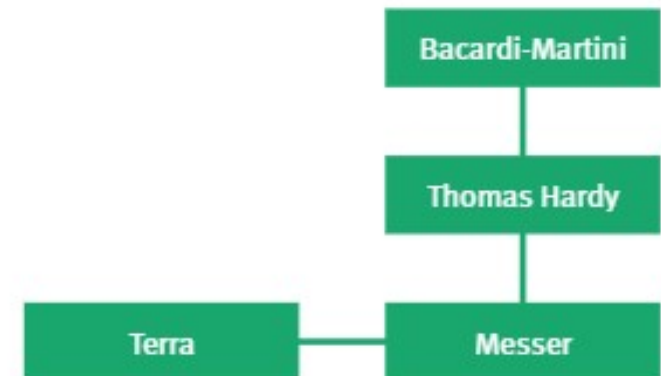
- Decision reinforces approach taken by the Court in *Wilkes v DePuy and Gee v DePuy*
- No presumption of a defect

The test of whether a product is defective is whether the safety of the product is not such as persons generally are entitled to expect. The test is not what is expected but one of entitled expectation. The test is an objective one. The standard of safety is measured by what the public at large is entitled to expect (para 15 (2))

The Bacardi Question – Damaged or Defective?

Bacardi-Martini Beverages v Thomas Hardy Packaging [2001] All ER (d) 168 and [2002] EWCA CIV 549

- Thomas Hardy (“TH”) had a contract with Bacardi (“B”) to mix CO2 with Bacardi concentrate and water to make Bacardi Breezers
- One batch of CO2 was contaminated with benzene and B h them
- TH was liable in contract to B
- TH sued Messer who had supplied the contaminated CO2
- M was supplied the CO2 by Terra (“T”)



The Bacardi Question (2)

Court had to consider whether

- The contamination of the Bacardi Breezers amounted to direct physical damage to property and
- The clauses purporting to limit and exclude Messer's liability were unenforceable by reason of the fact that the clauses were unreasonable for the purposes of the Unfair Contract Terms Act 1977

The Bacardi Question (3)

Initial decision

“...the thing alleged to be damaged did not exist prior to the alleged infliction of damage, it is not in my judgment correct to speak of direct physical damage to property. Rather there has been the production of a defective product” (Tomlinson J at para 25)

Court of Appeal

“THP's activity involved creating a new product by mixing all these elements. The new product was not damaged, but merely defective from the moment of its creation” (Mance LJ at para 18)

Damaged or Defective? - Conclusions

- Focus should be on ascertaining whether there was a defect in the product and, if so, what that defect might be
- Level of safety that persons generally are entitled to expect is an objective test
- There are no restrictions to the relevant circumstances which should be taken into account in assessing the level of safety which persons generally are entitled to expect
- Any assessment of product safety will involve a balancing of risks/benefits
- Claimants must always prove there is a causal link between the defect and damage
- Review the manufacturing process to consider when contamination occurred and whether the impact can be classed as damage or the production of a defective product

Insurance terms relevant to Product Liability

Types of policies which may be called upon to respond to a defective product

- Public Liability
- Product Liability
- Product Guarantee
- Product Recall
- Professional Indemnity

When is financial loss covered?

Common insuring clauses

Public Liability policy

The insurers will indemnify the Insured against all sums for which the Insured shall be liable at law for damages **in respect of**

- Death of or bodily injury...
- Loss or damage to material property...

Product Liability policy

•The Insurers will indemnify the Insured against all sums which the Insured shall become legally liable to pay **in respect of** death, bodily injury, illness, loss or damage... during the period of insurance and **caused by goods** manufactured, sold, supplied, repaired, altered in the course of the Business...

Insurance trigger – Damaged or defective?

Tioxide Europe v CGU International Insurance [2004] EWHC 2116

- Tioxide manufactured and supplied white titanium dioxide pigment for use in the manufacture of UPVC compounds for doors and window frames
- Pigment in the end product was supposed to be white but in many cases it caused discolouration under certain conditions
- Tioxide sought an indemnity under its global liability policy with its insurers and had to show that the claims had been made against it for “*damages on account of physical injury to tangible property*”

Insurance trigger (2)

Pilkington UK Ltd v CGU Insurance [2004] EWCA CIV 23

- Glass panels were defectively manufactured and fractured after they were installed. Owner of the station put in place safety features and sued the main contractor for the costs. The main contractor sued Pilkington, who supplied the glass
- Pilkington's product liability policy did not respond to claim because the station had not suffered any physical harm and the harmful effect of any later defect or deterioration was contained within the glass

Position in English law in relation to property damage is now fairly well-established

“generally speaking, damage requires some altered state, the relevant alteration being harmful in the commercial context. This plainly covers a situation where there is a poisoning or contaminating effect upon the property of a third party as a result of the introduction or intermixture of the product supplied”

(Potter LJ at para 51)

Insurance trigger (3)

- Bacardi was not an insurance case, but the concepts which are discussed in that case are relevant to this question
- *“In circumstances where the end product could have been drunk without any damage to health, I am not sure whether I would expect a typical product liability cover to respond”*
(Tomlinson J at para 27)
- Narrow approach to the question of whether property damage has occurred with the result that product liability insurance cover may not be available where contaminated products are mixed with others to create a new product

Insurance trigger - Conclusions

Each case will be highly fact dependent and expert evidence will be required to

- Understand the manufacturing process
- Discover exactly which ingredient was defective where a contaminated product is produced
- Advise when the finished product is said to come into existence, and
- Confirm what the alleged damage is and when it occurred
- Contractual exclusions and limitations in liability clauses will also need to be carefully considered to determine the extent of potential cover for any liabilities

AI and the future of product liability

OPSS study looked at the impact of artificial intelligence (“AI”) in consumer products and what that could mean for product safety

Products will continue to become more complex, including self driving cars, and a number of legal issues will likely arise as it is not clear to what extent AI products fit into the current legal framework and/or definitions



AI and the future of product liability (2)

The potential benefits

- The production of more efficient and effective products generally
- The ability to perform complex analytical tasks in real time (eg identifying patterns and processing data) and enhancement of the data collection processes during industrial assembly (expected to reduced the need for mass recalls)
- The use of predictive maintenance (not only improving product safety, but also reducing maintenance costs and downtime)
- Potential customisation and personalisation, and
- Reducing the scope of human error

AI and the future of product liability (3)

The following concerns were also recognised in the report

- Incorrect data inputting affecting algorithms and outputs
- Vulnerability to cyber attacks
- Potential direct and indirect harm taking place
- AI systems may not act as intended



Q&A



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