PRODUCT LIABILITY & CONSUMER SAFETY

A practical guide to the Consumer Protection Act 1987

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INTRODUCTION

The Consumer Protection Act 1987 (CPA) was passed by Parliament on 15 May 1987. It describes itself, among other things, as

> An Act to make provision with respect to the liability of persons for damage caused by defective products; to consolidate with amendments the Consumer Safety Act 1978 and the Consumer Safety (Amendment) Act 1986; to make provision with respect to the giving of price indications; . . . to repeal the Trade Descriptions Act 1972; . . . and for connected purposes.

It is designed to fill in pre-existing gaps in common law and in various statutes as a result of which innocent persons (consumers) who have suffered at the hands of others (producers) have not been and cannot be compensated.

It is divided into five parts. Part I is concerned with product liability. It incorporates the EEC Product Liability Directive (no. 85/374/EEC, dated 25 July 1985) 'on the approximation of the laws, regulations and administrative provisions of the member States concerning liability for defective products' (CPA, s.1(1)). This Directive had to be implemented by 1988.

While having to pass the Directive, the government has taken the opportunity to address criticisms of the law relating to consumer safety and misleading price indications. These are the subject of Parts II and III of the CPA, their enforcement being dealt with in Part IV. These parts of the CPA, while largely re-enacting previous legislation, have given enforcement authorities wider powers, and the Secretary of State has the power to act swiftly in cases where he feels it is justified to do so. The intention is to prevent consumers from being harmed or misled prior to sale, rather than being able to act only after the event.

Lastly, Part V deals with miscellaneous and supplemental matters.

This book is mainly concerned with Parts I–III of the CPA. It is divided into three parts along lines similar to the Act itself. Each begins with a review of legislation in force prior to the passing of the CPA,

before detailing whom the Act will affect and going into further details of its provisions.

The Thalidomide case is often cited as a prime example of the difficulties people have encountered in attempting to obtain compensation for harm suffered. More recently, another case in which the pharmaceutical industry has been involved, concerning the drug Opren, has provided much useful material for a discussion of the pros and cons of product liability legislation. In the United States, where product liability law has long existed and where massive damages are often awarded, the plaintiffs did not have to prove negligence in order to succeed. (Most cases in the United States have indeed been settled out of court.) In the United Kingdom, however, plaintiffs have had to rely on the laws of contract and tort to bring their claims. They have much more of a battle on their hands, having to show not only that their injuries resulted from use of the drug, but also that the manufacturers have been negligent. (They have also had setbacks over the matter of legal costs.)

As a result of the CPA, some people have predicted that damages awarded in the United Kingdom will soon be on the same level as those awarded in the United States. I do not think that this will necessarily be the case. In the United States, damages awarded by the courts take into account that a percentage of the award must often be paid to the lawyers, who work on a contingency fee basis (no win—no pay!). The courts are therefore concerned that the plaintiff should still be adequately compensated for his loss or damage notwithstanding the lawyers' 'cut'.

One area to watch out for, though, will be that of insurance premiums. It is possible that the in-house management of product liability and consumer safety procedures will enable the efficient 'producer' to keep premiums to a minimum; 'risk management' is referred to in Chapter 5.

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PART ONE

PRODUCT LIABILITY

CHAPTER 1

INJURED PARTIES – THE LAW OF NEGLIGENCE AND CONTRACT

Prior to the passing of the Consumer Protection Act 1987 (CPA), the most common means used to obtain compensation for injury and damage were contract law and the law governing the tort of negligence. These means have not proved entirely satisfactory, and this was one of the reasons which gave rise to the need for supplementary legislation in the form of the CPA. A look at the redress previously available, and which is now specifically preserved by the Act (see s.2(6)) will help to provide an overview of the subject.

NEGLIGENCE

The tort of negligence occurs where there has been a breach of the legal duty to take care which results in loss or damage by the plaintiff, unintended and undesired by the defendant. The most famous case in the law of negligence is the case of *Donoghue* v. *Stevenson* [1932] AC 562. The facts of this case are memorable. The plaintiff was with her friend in a shop. Her friend bought and paid for a bottle of ginger beer (in an opaque bottle) and handed it to the plaintiff 'as a treat'. The plaintiff had drunk most of the contents of the bottle before discovering the remains of a decomposed snail. Hardly surprisingly, the plaintiff became unwell after drinking the ginger beer, and suffered nervous shock. As a result of this she instituted proceedings *against the manufacturer*.

The question was whether the *manufacturer* had a case to answer. Should a manufacturer who sells to a distributor or customer under circumstances which prevent the distributor or customer from making an independent examination of the goods for defects (the opaque bottle in this case), be under a legal duty to the purchaser or consumer to take reasonable care to ensure that the goods are free from defect likely to cause harm? In this case, the House of Lords found that the manufacturer did owe such a duty of care.

The most commonly propounded principle of negligence, as stated by the House of Lords in their judgment in this case, is as follows:

> You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

This has developed over the years to provide reasonably comprehensive relief to injured parties. There are, of course, complications. In order to succeed in his action for negligence the plaintiff, or injured party, must prove that:

(a) he is owed a legal duty of care by the defendant;
(b) the defendant has been negligent (that is, done something he ought not to have done, or omitted to do something which he ought to have done);
(c) as a result of (b), the plaintiff has suffered loss or damage of a type which one could have reasonably foreseen.

Breach of a legal duty of care

While the expression 'duty of care' seems to be self-explanatory, in the legal sense it is slightly more complicated.

In the first place, there must be a sufficient degree of proximity – not necessarily physical proximity but, as Lord Atkin put it, 'persons who are so closely and directly affected by my act that I ought reasonably to have them in my contemplation'. Accordingly, one may have physical proximity but no duty of care or duty of care but no physical proximity (for example between point of 'negligent' manufacture and injury caused by defect).

This is important when taken in conjunction with the Civil Jurisdiction and Judgments Act 1982 and could lead to a situation where goods having been manufactured in the UK are used in France but cause injury in West Germany giving rise to a cause of action in three different countries. One would clearly have encountered problems with 'physical proximity' in this, highly possible, example.

The test for proximity is that of the foresight of the reasonable man. Could the loss or damage suffered by the plaintiff be reasonably foreseeable as a result of the defendant's acts or omissions?

In *Bourhill* v. *Young* [1943] AC 92, a case of nervous shock, Lord Russell of Killowen said 'a duty of care only arises towards those

individuals of whom it may reasonably be anticipated that they will be affected by the acts which constituted the alleged breach'.

A 'reasonable anticipation' does not have to mean that a person is specifically identifiable. In other words, it is sufficient for the purposes of 'duty of care' for the plaintiff to be within a class of people who may foreseeably be injured.

For the sake of convenience it is often possible to categorise the duty of care by reference to the relationship between the parties. For example, it may be possible to say that drivers owe a duty of care to other road users and to pedestrians and that manufacturers owe a duty of care to the ultimate consumers and people who may come into contact with their goods. This, as I have said, can be convenient but is not necessarily exhaustive. The test must be the 'foresight of the reasonable man'.

The 'reasonable man' plays an important role in the law of negligence. In *Blyth* v. *Birmingham Waterworks Company* (1856) 11 Ex.781 the Judge, Alderson B said: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.'

Thus the standard of reference provided by the reasonable man is objective and impersonal. It becomes subjective when the judge decides in the particular circumstances of the case what a reasonable man would have done or would not have done in those circumstances. At all times 'reasonable' will vary with circumstance.

Hand in glove with the considerations of proximity and the reasonable man must go a consideration of a causal connection between the defendant's carelessness and the damage, that is, whether there is a proximate and direct consequence of the wrongful act. A word often applied to this area and yet which is of wider definition than we need for present purposes is the term 'remoteness'. As previously stated, this can be the proximate and direct consequence of wrongful acts. However it can also be applied to a lack of duty of care or to a situation where foresight of damage is not present. Remoteness can also mean or include the extent of the damage attributable to the defendant.

Where a defendant has acted negligently the effect seems to be that as long as there is some damage, however slight, of a particular kind that was foreseeable to the person or property then that can be the basis of a cause of action. This will be the case even where neither the extent nor the precise manner of the incident was foreseeable. It may be that a person who has been cut because of a jagged piece of metal on a machine is a haemophiliac. Accordingly, the degree of injury suffered will be greater than may reasonably have been expected. However, this

will not prevent the defendant being answerable for the full extent of the injury.

Having discovered that a duty of care exists betwen the parties and that there has been a breach of this duty where, for example, the defendant has failed to measure up to the standard set by the reasonable man, then one may go on to consider other elements of negligence, such as whether the injury or damage was of a type which was foreseeable, the extent of the damage attributable to the defendant and the compensation which should be paid.

As already stated above, the burden of proof is on the plaintiff to show that the behaviour of the defendant is such as to qualify for a cause of action in negligence. However, in some cases the courts will be prepared to allow a finding of negligence against the defendant without hearing detailed evidence on the part of the plaintiff of what the defendant did or did not do. This is the maxim of *res ipsa loquitur*. In these cases an absence of explanation on the part of the defendant will mean that the plaintiff has discharged his burden of proof. The maxim is generally taken to be a short way of saying: 'I submit that the fact and circumstances which have been proved establish a *prima facie* case of negligence against the defendant'.

In order to succeed with this case there must be:

1. A control of the situation by the defendant or his servants or agents and,
2. That the accident must be such as would not in the ordinary course have happened without negligence by the defendant, his servants or agents.

It is sometimes said that a third requirement for the application of the maxim is that there is no actual evidence of the cause of the accident. The burden is then on the defendant to discharge the inference of negligence raised by the plaintiff. He must prove that there is no lack of care on his part or on the part of the person for whom he is responsible. Indeed, it may be enough for the defendant to show a possible way for the accident to have occurred and if this is the case then the burden of proof shifts back to the plaintiff.

Foreseeability

Having established that there is a breach of a duty of care, the plaintiff must then prove to the satisfaction of the court that the harm or damage was of a type foreseeble by the defendant. It has been shown that it is necessary for foresight of some degree of harm to the plaintiff in order to determine liability on the part of the defendant. Once again the test used is

the foresight of a reasonable man. For example, where as a result of the defendant's action it can be foreseen that A will be harmed but that B may not be harmed then A will be able to recover for his injuries but B will not.

In the case of *Wagon Mound (No. 1)* [1961] AC 388, the plaintiff was unable to recover for property damaged by fire because the only damage foreseeable from the accident was pollution and not fire. This was the case even though the defendant had undeniably been negligent. However, in *Wagon Mound (No. 2)* [1967] 1 AC 617, plaintiffs were able to recover for fire damage because it was held that damage by fire was foreseeable, even though only as a remote possibility. Yet because it was foreseeable they were able to recover.

Where no harm at all was foreseeable then the defendant's conduct cannot be described as careless or negligent, and his defence to any action would be that it was an inevitable accident. Where in the case described above damage was foreseeable to A but not to B then the defence to an action brought by B would be that there was no duty of care or that there was no breach of duty, or that there was no causation, or that the damage was too remote. The question of foreseeability is a question of fact to be determined by the court. The difficulty for the court is of course that of using the test of hindsight to predict the foresight of a reasonable man in those circumstances. As such it is necessary for the court to exercise its discretion and policy matters may also be relevant. In this way the law of negligence can develop as circumstances and/or technology demand.

There are limits to the rule of foreseeability. First, there is the probability of an intermediate examination. Where a manufacturer has made it clear that the goods are not to be used prior to examination or testing then it may be that the manufacturer will be able to escape liability. Second, the goods may not have been dangerous at the time the defendant parted with them, and he may have had no reason to anticipate that they could become dangerous. It is always for the plaintiff to prove that the article was defective when it left the manufacturer. Of course, it may be possible for him to do this if he can show, on a balance of probability, that nothing had happened to the goods since they had left the manufacturer to make them defective. Third, if the defendant can show that he has taken all reasonable care, then he will not be liable for he has not then been negligent. This will also involve consideration of the degree of knowledge available to him at the time.

Damages and defences

Where a plaintiff has succeeded in proving a case of negligence against the defendant, the matter of compensation should then be considered.

There are several considerations to be taken into account when discussing the extent of damage and the compensation therefor.

When the extent of the damage was foreseeable there is no doubt that such damages must be recoverable. Where the extent of the damage is unforeseeable, other matters have to be taken into consideration, for example had a third party's intervening acts made the extent of the damage worse? Thus to refer back to our case of the haemophiliac, the incidence of damage to an ordinary person may have been considerably less but this does not prevent our injured person from recovering for the full value of his loss, or from being compensated fully for his injuries.

The question of economic damage or loss must be considered separately. It is a well-established principle in English law that liability for pecuniary loss goes only as far as was foreseeable. This was established by the case of *Liesbosch Dredger* v. *S.S. Edison* [1933] AC 449. In this case and due to admitted negligence on the part of the defendant, the plaintiff's ship was sunk. At the time the plaintiffs were under a contract with the harbour commissioners to complete a piece of work. Not having the funds to buy another vessel, they therefore hired a substitute vessel at extremely high rates. The plaintiffs were awarded damages by the House of Lords for a new vessel in substitution of their original one, the cost of adapting it to their needs and transporting it to the harbour in question, and in compensation for the loss on the contract for the period between the sinking of their vessel and the time when the substitute could reasonably have been expected to be available. The extra loss incurred through their original lack of funds was rejected as being too remote.

CONTRIBUTORY NEGLIGENCE

Where a plaintiff has contributed to his damage either wholly or in part through his own behaviour, then it can be expected that the defendant will raise a 'defence' of *contributory negligence*. This will affect the measure of damages which the defendant will have to pay to the plaintiff. For example, in a case where the defendant was wholly to blame for an accident where the plaintiff, who was riding a moped, was injured, the plaintiff's damages were reduced by a percentage to reflect the fact that, by not wearing a crash helmet, he contributed to the degree of injuries he suffered.

The standard of care in cases of contributory negligence is what might be reasonably expected in the circumstances. A person is guilty of contributory negligence whenever he ought reasonably to have foreseen that by not acting as a reasonable prudent man he might be hurt himself, and in his reckonings he must take into account the possibility of others