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THE CONSUMER PROTECTION ACT 1987: PROOF AT LAST THAT IT IS PROTECTING CONSUMERS?

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INTRODUCTION

Part I of the Consumer Protection Act 1987 ("the Act") transposes the Product Liability Directive[1] and imposes strict liability in respect of unsafe products on all those in the production and supply chain. The preamble to Directive 85/374 asserts that such liability is the sole means of fairly apportioning risk in modern consumer transactions. Despite the fact that this avoids the limitations of actions for breach of contract or negligence,[2] jurisprudence on the Directive is scarce across the Member States,[3] although it has been reported that approximately 90% of all cases may be settled out of court.[4]

During the last two years, however, a number of judgments under the Act have been reported. These decisions, one of which was handed down by the Court of Appeal, give some indication of the areas that are likely to be at the centre of future actions under Directive 85/374 and the Act. The purpose of this article is to consider the light that is shed by these decisions on key concepts of the product liability regime, and to assess the value of Part I of the Act to consumers in the light of the principles that have emerged from a number of recent cases.

OVERVIEW OF THE ACT

The scheme of Part I of the Act is, by statutory standards, straightforward. It is separate to the general safety requirement in Part II and the provisions on misleading

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[1] Directive 85/374/EEC O.J. 1985 L 210, p.29, amended by Directive 99/3/EC O.J. 1999 L 49, p. 1, transposed by the Consumer Protection Act (Product Liability) (Modification) Order 2000 S.I. 2000/2771.

[2] That is, the need to show that the claimant is in privity of contract with the defendant, or that the defendant owed a duty of care to the claimant.

[3] Commission "First Report on the Application of Council Directive on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products" COM (95) 617 final at p. 2 and "Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products" COM (2000) 893 final 31·1.2002 at 2·1.1.

[4] Commission "Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products", *op. cit.* note 3.

prices in Part III, and it sets out all the requirements that have to be met for a product liability action to succeed. First, the item in question must be a "product" within the meaning of section 1. "Product" for the purposes of Part I of the Act is given a very broad definition and means "any goods or electricity".[5] There is, therefore, no requirement that the product in question is a product specifically for use by consumers.

Second, only the persons listed in section 2(2) are liable under this part of the Act; the manufacturer of the product, the importer of the product into the E.C. or a person who puts his or her trademark on a particular product.

Third, an action under this part of the Act requires that there is a defect within the meaning of section 3. A product is defective "if the safety of the product is not such as persons are generally entitled to expect . . .".[6] Account is to be taken of the way and the purpose for which the product was marketed and to any instructions or warnings given with the product,[7] as well as what might reasonably be expected to be done with the product[8] and the time it was supplied by the producer.[9] This definition seeks to exclude those dangers that are inherent in the particular product (sharp blades on knives, for example) as well as those for which adequate warning has been given (such as labelling on cleaning products warning of their hazardous nature).

Fourth, the damage caused by the defect must be within section 5. This includes death, personal injury or damage to property,[10] provided that the property damage exceeds a value of £275 and is property intended for private use and so used.[11] Fifth, there must be a causal link between the defect and the damage. The action may then be defeated if the defendant can establish one of the defences in section 4. Briefly, these are: (a) the product complies with mandatory Community or national requirements; (b) the defendant never supplied the product; (c) the product was not supplied in the course of a business *and* the defendant did not operate with a view to profit; (d) the product was not defective when it left the producer's control; (e) the defect was a development risk or (f) the product is a component of another product and the defect lies in the way the component is used in that other product.

Inevitably, some of these requirements make it quite difficult to bring an action. For example, section 3 provides that a product is defective if its "safety . . . is not such as persons generally are entitled to expect", having regard to a number of factors including the way in which it was marketed and any warnings or instructions provided, what might reasonably be expected to be done with the product, and the time at which it was supplied by its producer. While this is comparable to the general safety requirement in Part II of the Act and the General Product Safety Regulations 1994,[12] it imposes on consumers the difficult task of obtaining expert evidence on the level of safety which consumers are entitled to expect of a particular product. The European Consumers' Organisation (BEUC) argues that claimants have insufficient expertise and access to information to discharge this burden and cites two Austrian cases where this problem has arisen, in at least one of which the consumer's claim failed as a result.[13]

[5] Section 1(2).

[6] Section 3(1).

[7] Section 3(2)(a).

[8] Section 3(2)(b).

[9] Section 3(2)(c).

[10] Section 5(1).

[11] Section 5(4). This is the lower threshold of 500 ECU set by Article 9(b) of the Directive. It is interesting to note that, taking account of the present exchange rate of Euro to Sterling, this ceiling could theoretically be raised to £350.

[12] S.I. 1994/2328.

[13] BEUC "BEUC response to the Commission's Green Paper on Liability for defective products" BEUC/016/2000, at section 12, citing OGH 16·4.97 OB 2414/86t and OGH 16·7.98 OB 157/98a, KRES 4134.

The definition in section 3 also excludes defects in quality or fitness for purpose that do not adversely affect the safety of the product. Thus many consumer claims are automatically excluded from the ambit of the Act.

A second restriction is the defences under section 4. Not only is a wide range of defences provided, it is arguable that the controversial defence under section 4(1)(e) (the so-called development risks defence) is unduly restrictive. Section 4(1)(e) provides that it is a defence for the defendant to show that the state of scientific knowledge at the time the product was supplied was not such as to enable a producer of such products to be aware of the defect. Even though Directive 85/374 made the development risks defence optional, only Finland and Luxembourg exclude it entirely, although certain member states exclude the defence to some extent. For example, Spain excludes use of the defence in respect of medicinal products and foodstuffs for human consumption. Consumer organisations such as the National Consumer Council,[14] BEUC[15] and the European Consumer Law Group (ECLG)[16] oppose its inclusion, on the basis that it passes the risk associated with innovation from the manufacturer to the consumer. However, the Report commissioned by the European Commission on the application of Directive 85/374[17] found no evidence that the defences in general discouraged claims, and the development risks defence is supported by business organisations such as the Confederation of British Industry (CBI)[18] and the EC Committee of the American Chamber of Commerce in Belgium[19] on the grounds that its removal would inhibit innovation and place an unreasonable financial burden on industry".[20]

The Act does not expressly provide for group actions to be brought. Such actions, enabling consumers to pool their resources and add the evidential weight of repeated defects, can potentially assist claimants, and the fact that Directive 85/374 did not provide for them was strongly criticised by the ECLG.[21] However, in the UK group actions are possible generally,[22] and in *A and others* v. *The National Blood Authority and others*[23] discussed below, a group action was brought under the Act. This was the first time that a group action under the Act proceeded to judgment. Previous group actions under the Act did not get that far; in some cases an acceptable settlement was reached, in others the action collapsed when the claimants lost their legal aid certificates.[24]

The Act contains a longstop time limit of ten years from the date the product was first placed on the market, after which no claim may be brought.[25] This has been

[14] NCC "Product Liability: a response by the NCC to the product liability directive" at section 3.

[15] BEUC, *op. cit.* note 13, at section 3.

[16] ECLG "Liability for Defective Products: Consumer's position on the Green Paper of the European Commission" ECLG/3821/2000 December 2000 at p. 10.

[17] McKenna & Co "Report for the Commission of the European Communities on the Application of Directive 85/374/EEC on Liability for Defective Products" Study Contract No. ETD/93/B5–3000/MI/06 at p. 42.

[18] CBI comments on the European Commission's Green Paper on Liability for Defective Products CCL 137 99.

[19] EC Committee of the American Chamber of Commerce in Belgium "Response to the Green Paper on Liability for Defective Products".

[20] See further C. Hodges, "Reform of the Product Liability Directive 1998–1999" (1999) 7 *Consumer Law Journal* 35 at p. 43.

[21] ECLG, *op. cit.* note 16 at p 10.

[22] See the Practice Direction on Group Litigation supplementing Part 19 of the Civil Procedure Rules 1988.

[23] [2001] 3 All ER 289

[24] The worst example of the latter is the Bezodiazepine (tranquilliser) litigation which collapsed in 1994 after some £35 m in legal and expert costs had been incurred. There were some 17,000 claimants in this action who received no payments after the case collapsed. A similar fate befell the claimants in 17 cases in the Gravigard litigation against Searle, which also collapsed after the Legal Aid Board withdrew funding.

[25] Part I of Schedule 1 to the Act.

criticised by both BEUC and the ECLG[26] but is supported by the CBI on the grounds of legal certainty.[27] It is too early to tell whether this time limit will have a significant impact on claims.

Another restriction on the usefulness of the Act lies in the restriction on the damage for which compensation is available. Section 5 excludes property damage valued at £275 or less, or affecting business property. The exclusion of business property is discriminatory, although in fact most other consumer protection Directives (for example, the Directives on unfair terms in consumer contracts,[28] distance selling[29] and the sale of consumer goods and associated guarantees[30]) exclude consumers who are acting in the course of a business, trade or profession, and the discrimination is thus a consistent feature of EU law.[31] The exclusion of the first £275 has been criticised by BEUC[32] on the ground that damage valued at less that £275 may nonetheless be significant to the consumer.

In addition, damage to the product itself is excluded. For claims where damage to business property or the product itself constitute the whole or a significant amount of the compensation required, the Act is therefore insufficient as a cause of action on its own and may be entirely redundant. This issue has been identified by the European Commission as the key factor militating against the use of legislation based on Directive 85/374.[33] Even where this restriction does not preclude a claim, it may impose procedural and practical difficulties. In the UK, a consumer who wishes to recover a remedy for the defective product itself, as well as for any damage caused by the defect, might have to bring two separate claims; one against the retailer under section 14(2) of the Sale of Goods Act 1979 (on the basis that the product was not of satisfactory quality), and another against the manufacturer under the Act. It is inherently undesirable to oblige the consumer to bring two separate claims, one in respect of damage to the product and another in respect of the consequences of the defect. However, it is worth noting that a single claim may be brought where the contractual claim lies against the manufacturer, own brander or importer, or where the claim under the Act is brought against the supplier. For example, the case of *Abouzaid* v. *Mothercare (UK) Ltd*[34] discussed below, involved a claim under the Act against a manufacturer who was also the supplier. Had there also been a claim under the Sale of Goods Act, no separate action would have been required.

It should also be noted that the Directive originally provided the option of excluding primary agricultural products from its ambit unless they had "undergone an industrial process". The United Kingdom, and indeed all member states except Sweden, Finland, Luxembourg and Greece, exercised this option, and thus many foodstuffs were outside the ambit of the Act. However, Directive 34/1999 removed the option and the Act has

[26] BEUC, *op. cit.* note 13 at section 5; ECLG *op. cit.* note 16 at p. 11.

[27] CBI, *op. cit.* note 18 at p. 11.

[28] Directive 93/13 OJ 1993 L95/29.

[29] Directive 97/28 OJ 1997 L144/19.

[30] Directive 1999/44 OJ 1999 L171/12. See C. Twigg-Flesner, "The E.C. Directive on Certain Aspects Of The Sale Of Consumer Goods and Associated Guarantees" (1999) 7 *Consumer Law Journal* 177.

[31] English law also provides greater protection to private consumers as compared with business consumers; for example the restrictions in the Unfair Contract Terms Act 1977 on the use of exclusion clauses are greater where the contract is with a non-business consumer.

[32] BEUC, *op. cit.* note 13 at section 4. The £275 threshold is also criticised by the ECLG *op. cit.* note 16 at p. 11.

[33] Commission "Report from the Commission on the Application of Directive 85/374/EEC on Liability for Defective Products", *op. cit.* note 3 at 2·1.1.

[34] 21 December 2000, *The Times*.20 February 2001.

now been amended to reflect this.[35] Thus one potential source of difficulty with the Act, namely the determination of what constituted an "industrial process" in connection with agricultural products, has been removed.[36]

Other factors, however, make the Act a useful addition to existing possibilities. First, the Act imposes strict liability, which only requires that a causal link be shown between the product and the damage suffered by the consumer. The state of mind of the producer is irrelevant and a producer may therefore be liable under the Act for damage caused by one of its products although it was neither negligent nor reckless. Second, section 2(2) specifies a wide range of defendants, including the producer, any own brander and the first importer into the Community. A producer is defined by section 1(2) as the manufacturer or, if the product has not been manufactured, the person who won or abstracted it or, if the product has not been won or abstracted, any person who carried out an industrial process to which the essential characteristics of the product are attributable. Where the claimant is not reasonably able to identify any of these characters, the supplier must do so or identify his or her own supplier. If the supplier fails to do this, he or she becomes liable himself or herself to the claimant. This means that a consumer may have a claim in the absence of a contract, for example where the product is a gift, and that the insolvency or untraceability of one potential defendant is unlikely to be fatal to the bringing of a claim. This gives claims under the Act an advantage over claims based on the implied terms in the Sale of Goods Act 1979 and, to a lesser extent, negligence. To claim under the Sale of Goods Act, the claimant has to be in a contractual relationship with the defendant. For a claim in negligence to succeed, the claimant has to show that the defendant owed him or her a duty of care and that the breach of that duty caused the injury. The absence of a requirement to establish some form of relationship between claimant and defendant is therefore of considerable advantage. All five of the claims discussed below were brought against the manufacturer.

A third redeeming factor is that specific provision is made for recovery, albeit limited, of property damage.[37] However, this was not an issue for the claimants in the cases so far brought under the Act in which the claims were for personal injury only.

The preceding discussion has sought to summarise both the legislative framework of the Act itself and the difficulties with that framework. Given these difficulties, it is perhaps not surprising that there were no reported decisions of cases under the Act until late 1999. The sudden influx of cases (four reported judgments and a fifth unreported case) may be due to the introduction of conditional fees for personal injury cases in 1995[38] (extended to most other civil claims by the Conditional Fees Agreements Order 1998[39]). These cases will be examined in some detail, but it is interesting to note at the outset that all the cases centred around the same narrow issues, in particular whether the product in question was "defective" within the meaning of the Act. In the earlier cases, this requirement appeared to represent a significant hurdle for claimants to overcome. In the later cases the courts appear to have taken a more relaxed approach and found that defects existed. In these latter cases, however, the defendants then sought to invoke the "development risks" defence. The following analysis will therefore focus on how the courts have interpreted the term

[35] See C. Twigg-Flesner, "The Inclusion Of Agricultural Produce Within The Scope Of The Product Liability Directive (85/374/EEC)" (1998) 9 *Australian Product Liability Reporter* 71–76 and "Amendments to the EC Product Liability Directive – partial victory for European consumers?" (1999) 10 *Australian Product Liability Reporter* 57.

[36] See further G. D. McLeish, "Hello Dolly" (1997) NLJ,9 May, p. 682.

[37] Section 5(1).

[38] Introduced by the Lord Chancellor pursuant to powers conferred by Courts and Legal Services Act 1990, s. 36.

[39] S.I. 1998/1860.

"defect" in the Act, and how the development risks defence is handled. The facts and outcome in these cases will now be briefly summarised, then a more detailed analysis made of the points of law that arose in those decisions.

THE CASES

As mentioned above, a number of years passed during which no cases proceeded to judgment. In 1995 it was reported that the recipient of an allegedly defective replacement hip joint was seeking to bring a claim under the Act against the manufacturers.[40] The recipient, Hegarty, claimed that the lining of the artificial hip moved, causing two hip dislocations and severe pain. As a result, he had to undergo two more operations and a new hip had to be fitted. It appears that this claim was subsequently settled out of court. Similarly, in 1997 it was reported that a "number of cases" were being brought by or on behalf of women who had suffered death or personal injury allegedly caused by taking the contraceptive pill.[41] In one of the cases detailed in the report, the claim was brought in negligence; in the other, under the Act. Both cases were brought against the manufacturer and claimed that the defect lay in the manufacture of the products and the advice and warning supplied with them. Again, it appears that the cases were subsequently settled out of court.

It was not until 1999 that a judgment under the Act was reported. In *Worsley* v. *Tambrands Ltd*,[42] the claimant, Worsley, alleged that she had suffered toxic shock syndrome (TSS) as a result of the use of a Tampax Regular tampon manufactured by the defendant, Tambrands Ltd. Her claim was not that the tampon was defective in itself, but rather than insufficient warnings had been given and that the product was defective as a result. There was a warning on the box that tampons might cause TSS and reference to an information leaflet inside the box. Worsley argued that the warning on the box was insufficient and that the more detailed leaflet might easily be ignored or thrown away inadvertently. The High Court was not persuaded by this reasoning and held that there had been sufficient warnings and the product was therefore not defective.

In *Richardson* v. *LRC Products Ltd*,[43] the claimant, Richardson, claimed damages in respect of losses incurred as a result of an unwanted pregnancy which resulted from the fracture, during sexual intercourse, of a condom manufactured by the defendant, LRC Products Ltd. It was apparent that the fractured condom had cracks, but the parties disagreed as to whether the cracks existed when the condom was used or appeared only subsequently, and as to the existence of any causal link between the fracture which led to the pregnancy and the cracks. The High Court ruled that the product was not defective within the meaning of the Act. It also noted that Richardson had failed to mitigate her loss by seeking the morning after pill. Furthermore, public policy prohibited the award of damages for the cost of raising a child that resulted from an unwanted pregnancy.

In *Foster* v. *Biosil*[44] the claimant, Foster, alleged that the breast implants manufactured by the defendant, Biosil, were defective. The implants had to be removed

[40] F. Gibb, "Patient sues over spare-part injury" (1995) *The Times*, 12 September.

[41] R. Pearson, "Consumer Protection Act probes the pill" (1997) *The Lawyer*, 7 October, p. 14.

[42] High Court (QBD), Ebsworth J. Judgment of 3 December 1999, [2000] Personal Injuries and Quantum Reports, p. 95.

[43] High Court (QBD), Kennedy J., Judgment of 2 February 2000, [2000] Personal Injuries and Quantum Reports, p. 164, [2000] Lloyd's Rep Med 280.

[44] 2000, unreported but noted in R. Freeman, "Strict Product Liability laws – Consumer Protection Act provisions fail to assist claimants in three recent cases" (2001) *Journal of Personal Injury Law*, p. 26 and P. Popat, "Defects and the Consumer Protection Act 1987" (2000) NLJ, 1 December, p. 1780.

within seven months of insertion because, it was alleged, one had ruptured and the other had started leaking, causing pain and suffering to the claimant and requiring her to undergo a further operation. Recorder Cherie Booth Q.C. ruled in favour of Biosil on the ground that Foster had failed to prove the existence of a defect.

The most authoritative ruling to date is that of the Court of Appeal in *Abouzaid* v. *Mothercare (UK) Ltd.*[45] The judgment is the first (and so far the only) case on the Act on which full judgment has been given by the Court of Appeal. (*Worsley* v. *Tambrands Ltd* involved only an appeal on the direction for trial of a preliminary issue). The product at issue was a "Cosytoes" child's sleeping bag manufactured and sold by Mothercare and was intended to be attached to a pushchair by elasticated straps joined by a metal buckle attached to one of the straps. The claimant, Abouzaid, then aged 12, was assisting his mother in preparing the sleeping bag for use by his younger brother. When he attempted to fasten the buckle of the Cosytoes sleeping bag, one of the straps slipped from his grasp and the buckle hit him in the left eye. As a result of the accident the retina in the left eye was damaged and the claimant was left with no useful central vision in that eye.[46] The judge at first instance held that there had been a breach of the Act. Mothercare appealed. The Court of Appeal ruled that the product was "defective" within the meaning of the Act and that Mothercare could not rely on the development risks defence.

The most recent case, and the first group action involving a claim under the Act, is *A and others* v. *The National Blood Authority and others.*[47] This case concerned some 114 claimants who had been infected with the Hepatitis C virus as a result of receiving contaminated blood transfusions. The High Court ruled that the product was defective and that the development risks defence did not apply.[48]

It is clear from this brief summary that two issues have dominated the caselaw. First, there has been some confusion as to the meaning of the term "defect", and the factors to be taken into account in establishing that a product is defective. Secondly, there has been some dispute as to the availability of the development risks defence. The following section will examine these points of law in more detail.

MEANING OF THE TERM "DEFECT"

The issue whether the product at issue was defective has been at the heart of all of the judgments so far given. According to section 3(1) of the Act, a product is defective if the safety of the product is not of the standard which persons generally are entitled to expect. In determining the standard of safety consumers can expect, regard should be had to any warnings or instructions provided, what might reasonably be expected to be done with the product, the manner in which it was marketed and the time it was supplied by the producer.

In all the first instance decisions prior to *Abouzaid*, the products were found not to be defective. Only in *Abouzaid* and *A and others* were the products found to be defective, and the approach of the courts to the meaning of this term has not been entirely consistent.[49]

[45] Judgment of 21 December 2000, *The Times*, 20 February 2001.

[46] The medical evidence was not disputed at the hearing.

[47] [2001] All E.R. (D) 298 (Mar).

[48] The judgment focuses on the Directive rather than the Act, on the basis that the Act should be applied in the light of the Directive. However, although the attempt to give effect to the legislative intention at European level is commendable, the court should have applied the Act, and picked up on any inconsistencies between it and the Directive separately.

[49] See also R. Freeman, *op. cit.* note 44.

In *Worsley* v. *Tambrands Ltd*, Worsley argued that the tampon was defective for two reasons: first, Tambrands should have printed details on the packaging rather than on the enclosed leaflet because the leaflet might be lost; and second, the warning in the leaflet was not designed in such a way as to have a sufficient impact upon her. Both contentions were rejected swiftly by the High Court. It ruled that the product was not defective. Tambrands had included on the box a legible warning, directing the user to the leaflet inside the box and suggesting that this leaflet should be kept, and that the leaflet had legibly, literately and unambiguously warned that TSS could result from tampon use, described the symptoms and advised the action to be taken should they occur. The balance between the rarity of TSS and its gravity had been correctly struck by the dual system of a brief warning on the box and a full explanation on the leaflet inside. It was not necessary, as Worsley had argued, for a detailed warning to be provided on the box to guard against loss of the leaflet by the user.

Ebsworth J. concluded that:

> The reality of the case is that the claimant had lost the relevant leaflet and, for some inexplicable reason, misremembered its contents as to the onset of the illness. That does not render the box or the leaflet defective, and the claim must fail. The defendant had done what a menstruating woman was, in all the circumstances, entitled to expect.

There was therefore no case to answer and the claim was struck out. This judgment is in line with *Abouzaid*.

It is important to note that, had the court not decided to accept the application to strike out the case, the question of causation in that case would have been a very difficult one with which to deal. Ebsworth J. stated that the issue of causation in this case (and generally) was "highly contentious" and that the expert evidence as to whether the claimant's TSS was caused or contributed to by the defendant's product was in conflict. However, in the absence of a defect the issue of causation did not have to be addressed.

The judgment in *Worsley* is sound and to be welcomed for its no-nonsense attitude. Worsley herself admitted that in the past she had read the warnings about TSS in the leaflets, and was aware of the risk and the need to seek prompt medical attention, although she had failed to do so. It is perhaps noteworthy that the fears of the pharmaceutical industry in relation to its obligation under Directive 85/374 to provide adequate information[50] have not so far been borne out. While an absence of warnings could make a finding that there is a defect more likely, their presence could, as here, negate the existence of a defect. A consumer can be expected to take the minimal degree of care to read the instructions which accompany the product.

However, in the following two cases, the courts displayed some discomfort in dealing with the meaning of "defect". In *Richardson* v. *LRC Products Ltd*, it was apparent on examination that the fractured condom had ozone cracks, but the parties disagreed whether the cracks existed when the condom was used or appeared only subsequently, and as to any causal link between the fracture that led to the pregnancy and the cracks. The High Court considered two alternative allegations concerning the existence of a defect: that the fracture in the condom resulted from a crack which was present when the condom left the factory, and that the crack constituted a defect; or, if this was not the case, that the fracture must have resulted from the existence of some other defect.

[50] See, for example, McKenna & Co, *op. cit.* note 17, referring to the comment of the Association of the British Pharmaceutical Industry that the Directive "encourages the provision of too much information which can cause confusion and non-compliance with [instructions]".

The court dismissed the first claim on the ground that that it could not be proved that the cracks were present when the condom was used. It reviewed the complex scientific evidence and concluded that the likelihood was that the cracks actually occurred after the condom had fractured during sexual intercourse. Even if the cracks had been present when the condom was used, it could not be proved that they caused the fracture. The fracture had therefore not been caused by a defect consisting of the cracks. The court also dismissed the alternative claim that the fracture was caused by some other defect, on the ground that the existence of a fracture did not prove the existence of a defect. The product met the standard of safety that consumers were entitled to expect (for the purposes of section 3), and no one would expect a condom to be fully effective in all cases.

The existence of a fracture in the condom was therefore insufficient on its own to render the product defective, and since the product exceeded British Safety Standards and there was an American study that revealed that there were instances of condom failure for which there was no explanation, the condom could not be held to be defective.

It is difficult to sympathise with Richardson. It is well known that condoms are not 100% effective as a method of contraception and indeed Richardson discovered that the condom she had used was defective at a time when she could have, but did not, take remedial action. However, as a matter of law there are two rather worrying aspects to this case.

First, a considerable part of the judgment is devoted to the reasonableness of the precautions taken by LRC at its factory to prevent any damage from occurring during the manufacturing process. It is possible that these comments were *obiter*, but this seems unlikely since the related point that the product exceeded British Safety Standards is contained in the sentence immediately prior to the statement that "For those reasons, I have reached the conclusion that the claimant has not established a breach of [section 3 of the Act]". If the comments are not *obiter*, the result is that a product which has failed for a reason which is not clearly attributable to events that occurred whilst the product was under the control of the defendant is only then defective if the manufacturer could have taken further steps to prevent this failure from occurring during the manufacturing process. With respect, this cannot be accepted, as it would effectively erode the application of strict liability. Strict liability requires only proof of defect, damage and a causal link between the two. The reasonableness of the defendant's behaviour in trying to minimise any defects is irrelevant.[51] Compliance with British Safety Standards could only be relevant in so far as this may be a factor to be taken into account in determining the consumer's expectations as to safety. However, permitting this to be taken into account only seems acceptable if it were proved that consumers generally were aware of the existence of a British Safety Standard (or the European equivalent) for a particular product. It would be reading the section too widely if a presumption existed that the reasonable expectation of persons generally were taken to correspond automatically to the British Safety Standard (or indeed any other similar standard). In any event, this question was not addressed by the court.[52]

Second, it was evident that the condom had failed. Although it was for the claimant to prove that this constituted a defect, and the fact that persons generally were not

[51] See further C. Hodges, "Product liability for old products" (2001) NLJ, 23 March, p. 424.

[52] The scheme under the General Product Safety Directive 92/59/EEC, OJ (1992) L 228/24 utilises such standards in determining whether a particular product is safe. See generally G. Howells, *Consumer Product Safety* (Ashgate, 1998), Ch.2. It seems attractive to suggest that a product which is not "safe" within the meaning of the Directive should automatically be deemed "defective" if a claimant suffers damage as a result of using the product. This question deserves further consideration elsewhere.

entitled to assume that a condom would never fail made this difficult, it should not have been for the claimant to prove *how* the defect occurred. The manufacturer was well placed to produce expert evidence on this issue; the claimant – as is the case for consumers generally – was not. Surely if the product has failed for no ascertainable reason, the product is defective, just as it is defective where the reason can clearly be established. The question whether the manufacturer should be liable for the defect can be dealt with under the "causation" and "defences" headings, but not in determining whether or not there was a "defect" in the product.[53]

A better approach in *Richardson* would have been to accept that the condom was defective but apply a defence. Given the detailed evidence and the emphasis on the defendant's "reasonable precautions" to avoid the defect, as well as the fact that it could not be established exactly when the damage occurred, relying on the defence in section 4(1)(d) that the product was not defective when it left the defendant's factory would have had a good chance of success. The condom was defective according to the definition in section 3 of the Act, but the defendant could prove that it was not defective when it supplied it. The onus of proving the latter would therefore be on the defendant, rather than the claimant having to prove not only that the condom was defective but that it was defective when it was supplied by the defendant. This would have been a much more coherent and logical application of the Act, and would undoubtedly have resulted in a different outcome in the next case.

In *Foster* v. *Biosil Limited*[54] the County Court applied the reasoning in *Richardson* on the issue of whether product failure is evidence of a defect. It accepted that the failed implant, which had ruptured, had become unsafe. However, it did not accept that this meant that the implant was "defective" for the purposes of the Act. Foster had failed to identify the manufacturing defect alleged or indeed the causal link between any defect and the injury. Failure to identify the particular manufacturing or design defect deprived Biosil of the possibility of relying on the development risks defence or the defence that the defect did not exist when the implant left its control. Foster thus had to adduce evidence that established why the product had failed in order to show that the product was defective within the meaning of the Act. Not surprisingly, she – like Richardson – was unable to do so.

This interpretation of "defect" places too heavy a burden on the claimant. The producer is in a much better position to produce expert evidence as to the safety of the product, and it seems contrary to the objective of the Directive to require the claimant to produce specific evidence about a complex product which is, judged by the standard of the reasonable person, defective.

In *Abouzaid* v. *Mothercare (UK) Ltd* the Court of Appeal found that the Cosytoes sleeping bag was defective. Its design permitted the risk to arise of loss of control of the elastic strap when stretched and when eyes were in the line of recoil. A non-elasticated method of attachment could have been used, or instructions given to the user to position him- or herself so that the risk did not arise, together with a warning. Persons generally were entitled to expect such a warning, given the vulnerability of the eye and the potentially serious consequences of an eye injury. This expectation had not changed over the time since the product had been supplied.

It is unfortunate that the court did not refer to the earlier cases in reaching this conclusion, particularly on the method for establishing that a product is defective advanced in those decisions, in concluding that the product in the present case was

[53] A further distinction may be made on the basis that consumers were aware that there was a likelihood of such freak failures. See *A* v. *National Blood Authority*, discussed below.

[54] Central London County Court, Booth Q.C., Recorder. For a summary, see P. Popat, *op. cit.* note 44.

defective. As discussed above, *Richardson* and *Foster* both seemed to tamper with the definition of "defect" by commenting on the reasonableness of the defendant's action. Whilst the Court of Appeal emphasises that any such consideration could, if at all, only be relevant in considering the availability of any of the defences in section 4(1), the Court did not explicitly reject the reasoning in those cases. It is, however, implicit in the Court of Appeal's reasoning that the approach adopted in *Richardson* is no longer an accurate statement of the law.

The assessment in this case of what persons generally were entitled to expect in terms of safety may be contrasted with the decision of the Pennsylvania District Court in the case of *Epler and Epler* v. *Jansport Inc.*[55] In that case, the claimant sustained an injury when the elasticated draw cord on the hood of his jacket, manufactured by the defendant, slipped out of his hand and recoiled towards his face. The plastic cord lock at the end of the cord struck his eye, causing injury. The court relied on section 402(A) of the Restatement (Second) of Torts, based on the Pennsylvania Supreme Court in *Erie R. Co.* v. *Tompkins*,[56] which provided that a seller of products was strictly liable for the physical harm caused by a product sold in a defective condition unreasonably dangerous to the user. The court ruled that the coat was not in such a condition, on the basis of the utility of the product to the user and the public, its safety, the user's ability to avoid danger by exercising care in using the product, the unfeasibility of the manufacturer spreading the loss through price adjustment or insurance, and the awareness which the user should have had of the inherent dangers of the product. These factors were not outweighed by the availability of a similar but safer product, nor by the manufacturer's ability to eliminate the lack of safety without impairing the usefulness of the product or raising its price to an unrealistic level.

In assessing the user's likely awareness of the inherent dangers of the product and their avoidability, the court ruled that "the average ordinary consumer is well acquainted with the propensity of elastic items to recoil after they have been extended and released".[57] As a result of this general public knowledge, a warning about the recoil effect was not necessary. This contrasts with the ruling in *Abouzaid* that persons generally were entitled to expect either that this effect would not arise or to be warned that it could. In this instance, the analysis of the Pennsylvania court with regard to the particular product (an elastic strap) seems more acceptable than that of the Court of Appeal in *Abouzaid.* The reasonable expectation of an ordinary consumer must be that an elasticated strap will recoil, and that it, and anything attached to it such as a buckle, could strike a nearby person or object. No warning should therefore be required of such an obvious problem. The reasonable standard of safety in section 3 of the Act includes "what might reasonably be expected to be done with or in relation to the product". Once a consumer is, or could reasonably be expected to be, aware of the properties of the elasticated strap, he should take reasonable care when extending the strap. The stretching of an elasticated strap with a metal buckle close to the face is therefore not reasonable. Although it might be considered so for a child of 12 (Abouzaid's age at the time of the accident), section 3 refers to "persons generally" and therefore a more objective standard applies. The court at first instance stated that the manufacturer ought to have been aware that older children or teenagers might use the product, although the consequence of this expectation was not explained. The Court of Appeal noted that it was unclear whether this reasoning related to

[55] 2001 WL 179862 (E.D.Pa).

[56] 304 U.S. 64 (1938).

[57] At para. 5 of the judgment.

the Act or the claim in negligence, but suggested that it was more appropriate to the latter.

In the final case under consideration, *A and others* v. *The National Blood Authority and others*, the claimants succeeded in proving the existence of a defect. The High Court drew a distinction between "standard" and "non-standard" products. "Standard" products were those that met the design and standard of safety intended by the manufacturer. A "non-standard" product was a particular unit of the product that did not meet the standard. In *A and others,* the court stated that the infected blood products were non-standard, that is to say, differed from the standard product intended by the manufacturer. The standard blood products were not inherently defective. In the case of blood transfusions, it was only 1% of the product that "failed" in that it had been contaminated with the Hepatitis C virus. The court suggested that it might be easier to prove a defect where the product in question was non-standard, since it would fall to be compared with the standard product. The problem with this argument is that a product is only non-standard if it is in some way defective, but whether it is defective could be affected by whether it is non-standard. Admittedly the court envisaged that a non-standard product was one that was defective in a non-technical, non-Act sense, but there could be cases where even this was disputed, and then a circular argument would result. In respect of non-standard products, the court stated that the consumers' expectations as to safety depended on whether they accepted the non-standard nature of the product.

The High Court confirmed that the factors for assessing the defectiveness listed in section 3 of the Act were not exclusive, and that all relevant circumstances were to be considered. However, it ruled that the avoidability of the risk of infection was not a relevant factor. The possibility of avoiding the harmful characteristics by taking precautionary measures, the impracticality, cost and difficulty of taking such measures and the benefit to society of the product were therefore not relevant. On the facts, the risk was known by doctors but was not known and accepted by society generally. The risk of infected blood could therefore not have been accepted by consumers unless they were warned, which they had not been. The infected blood products were therefore defective.

The High Court also considered the alternative possibility; that avoidability was in fact relevant to the existence of a defect. If this was so, it should be assessed by reference to the risk (3%) at the relevant time, the foreseeability of the risk (known), whether avoiding it was a priority (as it was here), the seriousness to the claimant and others if precautions were not taken, and the availability, reliability and cost of the precautions. However, if avoidability was relevant, a number of other factors should also be taken into account.[58]

The High Court concluded that if precautions could prevent or materially reduce the incidence of infection of patients, they should be taken unless their advantages were outweighed by their disadvantages, which was not the case on these facts. Surrogate testing should have been introduced from March 1988 (the earliest date on which a claim could be brought under the Act) and anti-Hepatitis C screening from March 1990. In conclusion, taking into account all relevant factors, including the avoidability of the risk of infection, the infected blood was defective.

[58] The Court referred to the position of recipients of the blood who had been disabled by Hepatitis C, the position of donors who might be stigmatised or fail to give blood again leading to a shortage of supplies, the potentially shortened lifespan of the recipients, the interests of patients generally, the prioritising of Hepatitis C by the defendant, the lack of any warnings as to the risk, and the substantial number of donors who were drug addicts and therefore likely to carry Hepatitis C.

The judgment is complex and remarkable for its detailed analysis of the law, particularly of section 3 and section 4(1)(e) of the Act. None of the judges in the previous cases adopted the same rigour in analysing the scope of those sections. Had this been done sooner, perhaps the confusion that arose in the wake of *Richardson* could have been averted. Burton J. in *A and others* methodically analysed the provisions themselves and, with no judgment of the Court of Justice of the European Communities available to assist him in the interpretation of the relevant provisions of the Act/Directive, put great emphasis on the academic commentary in this area. Whether or not one agrees with his conclusions on the law, this approach to interpreting a provision of domestic law which implements an EC Directive is a good example of how the courts should deal with matters that involve aspects of Community law, with the caveat that the judge should not have focused on the Directive, but on the Act instead. Although the Act should, of course, be read in the light of the Directive, it is the Act that should have been applied, with any inconsistencies between it and the Directive dealt with separately.

What, then, can be deduced from this analysis? First, the question whether a product is defective is to be decided without reference to factors that are to be considered in respect of the development risks defence (such as the avoidability of the defect). This was also emphasised by the Court of Appeal in *Abouzaid.* Second, in contrast to the reasoning in *Richardson* and *Foster*, the question of avoidability is not one to be considered in establishing that a product is defective. It is submitted that the view taken by the court in *A and others* is the correct one. If avoidability were to be regarded as relevant, then the distinction between strict liability and negligence liability would become so blurred as to be meaningless.

THE "DEVELOPMENT RISKS" DEFENCE

A second issue that arose in a number of the cases under discussion is whether the defendant could rely on any of the defences in section 4(1). Although a range of defences is available, the only defence relied on so far has been the development risks defence. Section 4(1)(e) of the Act provides that it is a defence for the defendant to show that the state of scientific knowledge at the time that the product was supplied by the defendant was not such as that a producer of similar products might be expected to have discovered the defect to be discovered. The defence was put forward unsuccessfully in *Abouzaid* v. *Mothercare (UK) Ltd* and *A and others* v. *The National Blood Authority and others.*

In *Richardson* v. *LRC Products Ltd* the High Court did not consider the development risks defence in detail, since Richardson had failed to prove that the product was defective. However, it indicated that it was not apt to cover a defect of a known character merely because there was no test that would reveal its existence in every case. This is in accordance with the more detailed consideration of the defence in *Abouzaid* and *A and others v. The National Blood Authority and others*, to which this analysis now turns.

In *Abouzaid* v. *Mothercare (UK) Ltd*, the defendants argued that the development risks defence should absolve them from any liability, because there was no research evidence available at the time of manufacture showing that the elastic strap could cause injury, nor had any accidents of this type been reported in the Department of Trade and Industry's (DTI) Accident Database. The Court of Appeal rejected this argument and held that the defence did not apply. First, the fact that there was no record on the

DTI database of similar accidents involving the product did not mean that the defect was not discoverable. No advance in scientific and technical knowledge since 1990 was required to enable the effect to be discovered.

Pill L. J. also appeared to suggest that the defence failed because the defect was present regardless whether previous accidents had occurred. This seems to misunderstand the defence.[59] The defence is not that the defect did not exist at the time of supply (although this is a separate defence under section 4(1)(d)), but that its existence at that time was not discoverable. This was recognised by Chadwick L. J. who noted that the test for defectiveness did not include any element of fault, so that a product could be defective even though the manufacturer could not reasonably have been expected to have discovered the defect. He stated "but that is to confuse the test for liability under section 3(1), which is not dependant on fault, with the defence under section 4(1)(e), which enables a producer to escape strict liability".[60] On the facts it was clear that it would not have been difficult, and was certainly not impossible, to discover the potential danger.

The court observed[61] that the wording of section 4(1)(e) was challenged unsuccessfully before the Court of Justice of the European Communities. Both the Directive 85/374 and the Act left open the question of how readily discoverable relevant scientific and technical information must be to negate the defence, and in *Commission* v. *United Kingdom*[62] the European Court had ruled that section 4(1)(e) did not incorrectly transpose Directive 85/374 because it was capable of being interpreted consistently with the Directive, and English courts were under an obligation to so interpret it. The Advocate-General argued by way of example that scientific knowledge which was published only in Chinese in a regional scientific journal was not discoverable, whereas research published in English in an international journal was. This specific example was not taken up by the European Court, but it held, inter alia, that the accessibility of the relevant scientific information was a factor to be taken into account in determining whether or not the defence could succeed.[63] Thus, the more accessible the information, the less likely it will be that the defence will succeed.[64]

The parties and the court in *A and others* agreed that the scientific and technical knowledge must be "accessible" in order for the defence to apply. In *Commission* v. *UK*, the Advocate-General had explained that research published in Chinese, in a local scientific journal which did not go outside the boundaries of Manchuria, was not accessible (although it presumably would be to a Manchurian and possibly a Chinese producer). In *A and others*, the court argued that in such an example, the importance of Manchuria in relation to the product was also relevant. If Manchuria were renowned for the particular product, then research published there should be regarded as more accessible than if it was not. The High Court argued for a narrower definition of accessibility, and suggested that only unpublished research or research retained within a particular company was not accessible. However, it did not decide the point since the research at issue was clearly accessible on any definition of that term.

[59] This analysis of the development risks defence is also criticised by R. Freeman, "Strict product liability laws – Consumer Protection Act fails to assist claimants in three recent cases" (2001) *Journal of Personal Injury Law* p. 26.

[60] Para 43.

[61] Para 12.

[62] C-300/95 [1997] E.C.R. I-2649.

[63] At paras. 28 and 29.

[64] For a discussion of this, see C. Hodges, "Development Risks: Unanswered Questions" (1998) 61 MLR 560 and G. Howells and M. Mildred, "Is European Products Liability More Protective Than The Restatement (Third) Of Torts: Product Liability?" (1998) 65 *Tennessee Law Review* 985.

It must surely be correct that accessibility is not purely determined by geographical factors. For example, the publication of the research on the Internet might negate the argument that there had been no reference to the risk outside Manchuria. Of course, if the website is in Chinese, then it might still be possible to argue that the information was not "accessible", and the defence might still apply.

It is submitted that *A and others* ultimately does little to clarify the issue since the High Court's reference to a particular laboratory or research department of a company is at variance with the Advocate-General's reference to a region of a country, and it was not required, on the facts, to reach a firm decision on this issue. Information known only to one company or one group of companies might reasonably be considered undiscoverable by anyone else, but the reference to Manchuria made by the Advocate-General in *UK* v. *Commission* was surely not intended to mean the company or conglomerate which developed the research.

In *A and others* the court ruled that even if the development risks defence was available in respect of known risks, it did not apply on the facts because the existence of the defect in the particular products at issue was discoverable at the relevant time, either by surrogate testing or by screening.

Surrogate testing was introduced in the United States and France and considered in the United Kingdom prior to 1 March 1988, the first date on which claims under the Act could be brought, and was therefore available at all material times. Screening was developed in the United States and was introduced in a number of countries from 1989 onwards. It was difficult to say whether it was discoverable as from the date of first international publication of details (April 1989), symposia in Paris (June 1989) or Rome (September 1989), or from the first introduction of screening (in Japan in November 1989). However, it was appropriate to use the same date as was relevant to the existence of a defect through failure to take precautions, namely March 1990, even though this was generous to the defendant. Since the defendants could not prove that they would not have discovered the defect had they introduced testing in March 1988, and could certainly not prove this in respect of the period from March 1990 when the possibility of screening was to be regarded as discoverable, the development risks defence did not apply.

However, if the reasoning in *A and others* is taken together with Chadwick L. J.'s observations in *Abouzaid*, it appears that the defence in section 4(1)(e) will only operate if either there is no test available to discover the defect at all, or the defect has been discovered but this information was not accessible to the defendant. The fact that no testing has been carried out is therefore insufficient for the defence to succeed. This suggests that the finding of defect should be made more readily. Liability should only be avoided by relying on one of the defences in section 4.

PRODUCT LIABILITY LITIGATION IN THE ENGLISH COURTS: THE LESSONS TO BE DRAWN

Neither *Worsley* nor *Richardson* should ever have come before a court, and it is evident in the tone of both judgments that that was the view taken by the courts themselves. Unfortunately, in both cases, the courts' eagerness to dismiss the claims resulted in a lack of rigour in the reasoning, a rigour urgently needed in this area. This lack of rigour is also true of *Foster* v. *Biosil*. *Abouzaid*, with its more systematic reasoning, marked the first case of real assistance as a precedent, and the subsequent detailed analysis of section 3 and section 4(1)(e) of the Act in *A* v. *National Blood Authority* further helps to clarify the scope and application of the Act.

The cases reveal that a number of potential disadvantages of the Act have so far failed to materialise. The restriction of defectiveness to safety-related features has naturally excluded many consumer claims, but the restriction is perhaps not as great as might have been expected. First, the *Richardson* case indicates that "safety" may be interpreted widely to include products which expose the user to some unwanted consequence, rather than one which threatens their physical safety. Second, *Abouzaid* indicates that a product whose limitations are known to the ordinary person (such as the tendency of elastic to recoil) may nonetheless be regarded as defective in the absence of a warning. Third, *A and others* indicates that any difficulty encountered by the manufacturer in avoiding the defect is irrelevant. Although this latter point should not have been surprising, the apparent importance attached by the court in *Richardson* to the quality control procedures undertaken by the manufacturer had temporarily put the point in some doubt. In this respect, the Act, which does not include an assessment whether the risk has come or ought to have come to the attention of the manufacturer, may be contrasted with a claim in negligence, where such an assessment it essential.

The second potential problem with the Act, the range of defences, has also not proved to be as significant as some had feared. In several of the cases no defence was pleaded, and only one of the six defences, the development risks defence, has been pleaded in the remainder. It was this defence which gave rise to most concern; yet in no case did the defence succeed. It appears that it will be narrowly interpreted. It does not apply to known risks, and the absence of evidence of accidents as a result of the defect is irrelevant to the state of scientific or technical knowledge.

The concern raised at the start of this article, that group actions under the Act may not succeed should finally be allayed by the *A and others* v. *The National Blood Authority*. This is particularly significant because the number of cases coming to court remains small, and settlements are not always given the publicity that is needed to allow for an evaluation of the application of the Act.

There is no evidence either way whether the time limits under the Act are causing problems, since both the three year time limit (from the date the cause of action accrued or came to the claimant's knowledge) and the ten year long stop time limit would operate to prevent claims from being brought. In addition, it is early days for the ten year time limit to apply, since the Act only came into force in 1988. Similar comments apply to the final problem noted above, the restrictions on the damage for which compensation may be awarded. All of the claims that have so far been brought have been for personal injury, and it is impossible to know whether more claims would have been brought had there been no restrictions on compensation for damage to the product itself of property damage. Certainly the nature of the products so far at issue is such that the damage likely to have been caused by any defect is personal injury, but this may be coincidental.

Turning to the potential advantages of the Act, the imposition of strict liability is clearly a significant advantage. Although the judgment in *Richardson*, with its stress on the care exercised by the manufacturer, threatened to make inroads on this, the more authoritative judgment in *Abouzaid* and the subsequent judgment in *A and others* make clear the absolute nature of the liability. The second potential advantage, the range of defendants, has proved important not for variety of possible defendants, but for the inclusion of the manufacturer, who has been the defendant in all of the cases discussed above. The third potential advantage, the availability of compensation for property damage, has not so far proved useful. However, as mentioned above, that may simply be because of the nature of the products at issue so far, all of which were intended to be used in or on the human body.

THE FUTURE?

The cases discussed in this article suggest that the central features of the Act (and the Directive) that are most likely to give rise to difficult questions are the meaning of "defect" and the scope of the "development risks" defence. However, the recent judgment by the European Court in *Henning Veedfald* v. *Århus Amtskommune*[65] shows that other issues are also likely to cause difficulties of interpretation and application. In *Veedfald*, the claimant was to receive a kidney transplant. The kidney had been removed from the (living) donor (the claimant's brother), and was flushed through with a special liquid that had been prepared for this purpose in the hospital's pharmacy. The liquid formed crystals which blocked the arteries through the kidney, and ultimately, the kidney became unusable for the transplant. There was no doubt that the product in question, the liquid, was defective, but the hospital raised two defences. First, it argued that the product had not been put into circulation (Article 7(a) of the Directive, section 4(1)(b) of the Act). Second, it argued that the product had neither been made for an economic purpose nor made in the course of a business (Article 7(c), section 4(1)(c)).

Having decided that the liquid constituted a product for the purposes of the Directive,[66] the European Court observed that the defence in Article 7(b) had been intended to cover situations where the product had left the process of manufacture without the consent of the producer, or where the product had been used before the manufacturing process had been completed.[67] "Putting the product into circulation" should therefore given a broad interpretation, and so it did not matter whether the product had been made by the service provider itself or by an entity linked to it. The crucial aspect was that the product had been made and was being used.

As for the defence in Article 7(c), the European Court held that it was irrelevant that there was no direct payment by the claimant to the hospital but only an indirect payment through taxpayers' contributions. The activity in question was not charitable, but had economic and business characteristics, and indeed a private hospital would clearly be unable to rely on this defence. The defence therefore did not apply to the supply of a defective product which had been made and used in the course of a medical service financed entirely from public funds.

The European Court refused to rule on a question referred which related to the nature of the damage that had been caused and held that this question was a matter for the national court. However, the European Court did rule that national courts were not entitled to decline the award of damages merely because it was difficult to classify whether the damage cause was personal injury or damage to property.[68]

[65] Case C-203/99 *Henning Veedfald* v. *Århus Amtskommune*, judgment of 10 May 2001, not yet reported. Available from http://www.curia.eu.int.

[66] Although the Court of Justice held the fact that the liquid was used during the provision of a service was irrelevant, Advocate-General Ruiz-Jarabo Colomer took a different view. He thought that the Directive should not apply at all to the product in question in this case for three reasons. First, the Directive only applied to industrially produced moveables, whereas the liquid in question was prepared afresh for every transplant operation and was therefore not industrially produced. Second, the production of the liquid for a specific operation meant that it had not been put into circulation. Third, the product was produced as part of the provision of a service and the main objective was to provide a service, rather than to manufacture a product.

[67] At para. 16.

[68] In his Opinion, Advocate General Ruiz-Jarabo Colomer argued that the damage in this case should be treated as personal injury rather than property damage, since the latter would require it to have been ordinarily used for private use or consumption.

This most recent judgment is clear evidence that the case law on Directive 85/374, and the variety of issues raised, will continue to expand. It is noteworthy that the most of the cases are broadly linked to medical products or services and it may be expected that further cases under the Act or the Directive will also come from that direction.

CONCLUSION

This analysis of these recent decisions under Part I of the Consumer Protection Act reveals that the system has finally begun to develop. Initially, the courts appeared acutely aware of the dangers of opening the floodgates to product liability cases which seemed to lead them to dismiss these cases perhaps a little too readily without the rigorous reasoning that is required of product liability cases. This superficiality resulted in interpretations given to core aspects of the Act that were entirely untenable. *Abouzaid* and *A and others* have resolved this difficulty and have given clear guidance on how the Act should be utilised.

What, therefore can be deduced from these cases in terms of the value of the Act to consumers? First, the range of alternative defendants provided by section 2 have so far proved unnecessary, as in all the cases the action was brought against the manufacturer. Second, the alternative claim had the Act not existed (and indeed such claims were made by the claimants in *Abouzaid* and *Worsley*) would have been negligence. In *Worsley* the claimant was no better off by virtue of the Act, but in *Abouzaid*, strict liability afforded a remedy where none existed in negligence. Third, the meaning of the term "defect" has been elucidated a little further. In *Abouzaid* and *A and others* it was given a wide meaning, encompassing dangers of which the ordinary consumer was unaware, rather than dangers of which they should not reasonably have been unaware. However, in *Worsley*, *Richardson* and, apparently, *Foster*, the term was given a narrow meaning, applying only to dangers of which no reasonable consumer could have been expected to be unaware and which the claimant in the case could prove in detail. Indeed, it appears that the interpretation in *Foster* was unreasonably narrow. Fourth, if as was argued by critics of Directive 85/374, the wide range of defences has restricted the utility of implementing legislation, then it has deterred claimants rather than affected the outcome of decided cases. The controversial development risks defence has been the only defence pleaded (in *Abouzaid*, *A and others* and *Richardson*), and it has not yet been successful. It therefore appears that the fears of the consumer organisations in this respect may be unfounded.

The potential strength of the Act as an addition to existing remedies under English law lies in its introduction of strict liability into an area where it had previously been very difficult for an injured party to recover damages. *Abouzaid* indicates that this potential is being realised. In *Abouzaid*, the Court of Appeal also considered the position in negligence. It ruled that, in contrast to the claim under the Act, the extent of the risk of injury caused by the defect was relevant to the existence of a claim in negligence. The absence of comparable accidents in the past meant that the risk was small. In addition, although a serious injury could be foreseen as a result of elastic recoil, in the absence of contrary evidence, the risk of a serious injury occurring could reasonably be expected to be small. There was therefore no negligence.

This indication is particularly welcome given the indication in earlier first instance decisions that a negligence-style analysis might be adopted in relation to claims under the Act. However, following *Abouzaid*, it is now clear that the strict liability regime under the Act can work, and it is anticipated that future decisions will, like *A and*

others, follow the *Abouzaid* in their approach to the Act, rather than *Richardson* and *Foster*. Finally, hard evidence exists that that Part 1 of the Consumer Protection Act 1987 is fulfilling its purpose – protecting consumers.