A basic overview of product liability in contract law

Introduction

Consider the following examples:

- ***Stuart buys an MP3 player from an electrical store. He later finds out that it does not work, because a small but crucial component is missing.***
- ***Chris buys an MP3 player from an electrical store. He later tries to connect it to his computer but the wiring is faulty; he receives a small electric shock.***
- ***Theresa receives an MP3 player for her birthday. She later finds out that it does not work because a small but crucial component is missing.***
- ***Alison buys a car for Marion. Two weeks later, one of the tyres explodes while Marion is driving, causing the car to swerve into her garden wall, which will cost £500 to rebuild. The car costs £1,000 to repair.***
- ***Rosie buys a car for Molly. After a year, the two front tyres need replacing. Two weeks later, one of the replaced tyres explodes while Molly is driving causing the car to swerve into her garden wall, which will cost £500 to rebuild. The car costs £1,000 to repair.***
- ***Josh takes a drug to stop his head aching, but later finds out that he has a stomach ulcer caused by an unusual reaction to the drug.***

As we indicate in the book (Introduction to **Chapter 12**), most of us are more accustomed on a day-to-day basis to dealing with 'products' and the consequences of their defects via contract law. We also state that it is therefore useful to be aware of the protections against defective products given to consumers in contract law before considering the protections that tort law adds. With that in mind, this online section is designed either as a memory refresher on contractual liabilities for defective products, for those that have already studied contract law, or as a basic overview for those not yet familiar with the area. Whichever category you fall into, we think it would be useful to read through this section *before* getting into the intricacies of the way tort law protects us from defective products.

W.1 Defective products—claims in contract

When there is a defect in a bought product, the purchaser has the unequivocal right to take a claim for breach of contract against the retailer. Stuart, in the example just given (and at the beginning of the book chapter), would be able to claim for his broken MP3 player in this way. Contractual remedies are generally sought in relation to goods that are simply of poor quality (that is, 'defective'). This can include the cost of replacing or repairing the goods, although they are also available, subject to the restrictions of the doctrine of privity of contract,[1] where the defect in the goods causes consequential loss, such as personal injury (as in the scenario with Chris) or property damage.

The rights held by purchasers are what are commonly referred to as our 'statutory rights'. Primarily, these come from the Sale of Goods Act (SGA) 1979 and related legislation and regulations. Section 14 of the SGA implies terms regulating the quality and fitness of goods into all contracts of sale[2] as follows:

Sale of Goods Act 1979

14(2) Where the seller sells goods in the course of a business, there is an implied term that the goods supplied under the contract are of satisfactory quality.
14(2A) For the purposes of this Act, goods are of satisfactory quality if they meet the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances.
14(2B) For the purposes of this Act, the quality of goods includes their state and condition and the following (among others) are in appropriate cases aspects of the quality of goods—

(a) fitness for all the purposes for which goods of the kind in question are commonly supplied,
(b) appearance and finish,
(c) freedom from minor defects,
(d) safety, and
(e) durability.

1. The privity doctrine is explained further later. In relation to the scenarios outlined previously, it would prevent Theresa claiming against the retailer, even though she suffered the same harm as Stuart (who will be able to claim), as she did not purchase the MP3 player herself.

2. Where the seller sells goods in the course of a business. This excludes private sales, where the risk to the purchaser is defined by the maxim *caveat emptor*—'let the buyer beware'.

So, it can be seen that a breach of contract will occur if goods are not deemed to be 'of satisfactory quality' according to the definitions in section 14 of the SGA. The missing component and faulty wiring mean that Stuart and Chris's MP3 players are clearly not of satisfactory quality. Some of the things taken into account when determining whether there has been a breach of contract are the safety of the item, its freedom from minor defects and its 'fitness for purpose'. This is an idea mirroring section 14(3), which implies a further term into sale contracts (where the seller sells in the course of a business) that goods should be 'fit for the purpose'[3] they were supplied for, if this purpose has been made known (expressly or by implication) to the seller. Further implied terms from the SGA relate to sale by sample or description (it is an implied term that goods will correspond with the sample (s 15) or the description (s 13) of them).

We can see, therefore, that consumers are protected to a considerable extent if the goods they purchase are not of satisfactory quality. Furthermore, these 'statutory rights' cannot *ever* be limited or excluded in consumer contracts (see the Unfair Contract Terms Act 1977, s 6(2)). What this means in practice is that if goods are sold in the course of a business, and they turn out to be unsatisfactory in the sense that they are defective in some way, the customer has the unqualified right to a remedy. What this remedy consists of *may* depend on who the customer is: that is, whether they are a consumer or not. Section 14(6) of the SGA tells us that the implied terms from section 14(2) and (3) are 'conditions'. In contract law, what this means is that the non-breaching party (the customer) has the right to bring the contract to an end, or 'terminate' it. In the sense of sale of goods, this means the customer has a choice:

- they can keep the goods in question but demand that they be fixed;
- they can give the goods back and receive their money back; or
- they can give the goods back and receive alternative goods.

This can otherwise be expressed by saying that the customer has the right to the 'three Rs': Repair; Refund; or Replacement.

Non-consumers[4] are treated differently. Section 15A of the SGA modifies the remedies available for breach of these conditions in non-consumer cases as follows:

Sale of Goods Act 1979

15A(1) Where in the case of a contract of sale—

(a) the buyer would, apart from this subsection, have the right to reject goods by reason of a breach on the part of the seller of a term implied by section 13, 14 or 15 above, but

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3. 'Fit' here means the goods should be both appropriate for the purpose made known and able to do what was expected of them.

4. For our purposes, a non-consumer would be someone purchasing the goods in the course of a business, or for purposes related to their business, as opposed to someone doing so for private use and/or consumption. This definition is refined by *Stevenson* v *Rogers* [1999] where the Court of Appeal found that a fisherman who sold his boat was selling it in the course of a business, on the basis that it is not the nature of the goods that defines it, but the transaction.

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(b) the breach is so slight that it would be unreasonable for him to reject them, then, if the buyer does not deal as consumer, the breach is not to be treated as a breach of condition but may be treated as a breach of warranty.

Consumers are therefore given greater legal protection in contracts than non-consumers, who, if a breach is only 'slight', or has minor consequences, will not be able to access the same remedies to which a consumer would be entitled. By implication, however slight the breach in a consumer contract, the consumer retains the right to any of the remedies outlined earlier.

Pause for reflection

In the latter half of the twentieth century, there was a visible increase in consumer protection through various contract law statutes, including the modified provisions within the SGA (and the corresponding Supply of Goods and Services Act 1982) as well as the Unfair Contract Terms Act 1977 and, at the highest point of consumer protectionism, the Unfair Terms in Consumer Contracts Regulations 1999. John Adams and Roger Brownsword have indicated that the *courts* have also moved towards a more 'consumer-welfarist' approach.[5] Do you think it is fair that consumers should enjoy better rights under the law of sale of goods than non-consumers? Why? Take into account the fact that consumers are generally in a weaker bargaining position than non-consumers and may be more likely to incur greater harm (personal or financial) by defective products. But should these rules apply only when a 'real' harm has been suffered? The statutory provisions apply to any goods deemed not to be of satisfactory quality (including those with 'minor defects') so we are not talking simply about *harmful* goods here; in fact, the only harm that may be incurred as a result of purchasing goods with a minor defect is to the consumer's pocket.

The only time a consumer loses the right to reject the goods is when it can be deemed that the goods have been 'accepted'. According to section 35 of the SGA, this occurs either when the buyer intimates this to the seller, or when, after delivery, the buyer 'does any act in relation to [the goods] which is inconsistent with the ownership of the seller'. So, for example, if a consumer buys a car, then after it is delivered fits a new sound system into it and then drives it to Scotland and back, it is likely that this would be deemed inconsistent with the seller retaining 'ownership' of the car. Put another way, the buyer is clearly intimating that they have accepted—and therefore own—the car because of what they are doing with it.

Section 35 also states that where goods have not previously been examined by the buyer, the law will not deem the goods to have been accepted until there has been a

5. See John N Adams and Roger Brownsword *Understanding Contract Law* (5th edn, Sweet & Maxwell, 2007), especially Ch 8.

'reasonable opportunity of examining them' for the purpose of determining whether they are of satisfactory quality. Encompassed in this is the idea that goods will be deemed to have been accepted after lapse of a 'reasonable time' if the buyer is silent. Clearly, what is 'reasonable' on both these counts will depend on the nature of the goods (that is, delivery of the weekly grocery shopping will take less time to inspect than delivery of more complex items). While all this may already seem eminently protective of all buyers, particularly consumers, still more protection for consumers is added by the SGA. Part 5A of the Act[6] is entitled 'Additional rights of the buyer in consumer cases'. This Part contains, within sections 48A–F, further rights in relation to the acceptance or rejection of goods by consumers, the remedies that they are entitled to and, not least, the fact (from s 48A(3)) that the consumer retains the right to their remedies for breach of the statutory rights outlined earlier for six months after the date of delivery of the goods. What this means is that if a fault or defect appears in an item bought by a consumer *any time within six months from delivery*, the consumer can terminate the contract and avail themselves of the appropriate remedy.

W.2 The limits of contractual protection

All this considered (and the earlier discussion was merely scratching the surface),[7] it appears that consumers are very well protected by contract law. Why, then, is an additional layer of protection present in tort? One answer is that, in terms of product liability more generally, contract law has some serious limitations. Clearly, to take advantage of contract law, there needs to be a contract in the first place, containing terms stipulating that the goods sold should be non-defective. As we have seen, this is unproblematic when the seller operates in the course of a business, but will not be in private sales (where neither party deals in the course of business) unless an express term is created. That said, as those with any prior knowledge of contract law will know, there may be the potential for a claim in misrepresentation in a private sale depending on what was and was not said by the seller before entering the contract. Furthermore, in non-consumer contracts at least, it is possible for the retailer to exclude or otherwise restrict their liability for any harm caused by a defect in a product they have sold by using a term of the contract to do so. Such exclusions or limitations have, however, been ruled out in consumer contracts.[8]

In addition, some people may not want to make claims against a retailer if the defective or inferior quality of the product in question was clearly not the retailer's *fault*. While many would have no qualms about returning sub-standard goods to many large retail chains or High Street stores—and while these retailers would be obliged to provide a remedy unless it could be deemed that the goods had been 'accepted'—what

6. The whole of Part 5A is a later insertion by the Sale and Supply of Goods to Consumers Regulations 2002, SI 2002/3045.

7. For a more detailed account, see Colin Scott and Julia Black *Cranston's Consumers and the Law* (3rd edn, Butterworths, 2000).

8. By the Unfair Contract Terms Act (UCTA) 1977, s 6(2) and also, it would seem, by reg 5(1) of and Sched 2 to the Unfair Terms in Consumer Contracts Regulations (UTCCR) 1999, SI 1999/2083.

about smaller retailers/sellers? Evidently, the retailer in question would also have bought the goods from someone and so would also have a contract either with the manufacturer or, if not, a chain of contracts will exist eventually leading back to the manufacturer, however this seems a relatively inefficient way of making manufacturers ultimately liable for defects in the products that they produce.

Furthermore, contract law is greatly limited by the fact that it may not be a party to the contract who was harmed by a defect in the goods. If so, the party who suffered the harm has no claim (nor does the purchaser as they had suffered no loss).[9] This is, in very basic terms, the essence of the doctrine of privity of contract, which operated as a substantial bar to product-related claims for many years. According to the doctrine, only a party to a contract can sue or be sued under it—so if a retailer sells a defective product to someone that causes harm to someone else, the person harmed has no way of suing the retailer for breach of contract. To some extent, the harshness of this doctrine has been ameliorated by developments in case law and, more recently, by legislation. The Contracts (Rights of Third Parties) Act 1999 makes it possible for a third party to sue under a contract in some circumstances, namely if 'the contract expressly provides that he may' (s 1(1)(a)) or if 'the term purports to confer a benefit on him' (s 1(1)(b)). To take advantage of either of these provisions, the party concerned (the third party) must be either 'expressly identified in the contract by name, as a member of a class or as answering to a particular description' (s 1(3)). Therefore, if I entered a contract stipulating that the product I was buying was for 'my mother', technically she will have been expressly identified and could therefore sue. Or, if I bought items for 'my children' they would be identified as members of a particular class (or fitting a particular description).

Counterpoint

How helpful does the Contracts (Rights of Third Parties) Act 1999 sound to people who suffer injury or harm from a defective product that they did not buy? While some people may be able to avail themselves of these provisions, how often when you buy something, even if for someone else, do you include a term in the contract that identifies that person or expressly states that he or she can enforce the contract? This generally does not happen in a retail context or, even where it does, there is often no proof that a person bought something for someone else (this factor may be contributing to the rise of the 'gift receipt' that more and more retailers appear to be offering).

Generally, it would seem that contracts of a larger scale than mere consumer retail transactions were in mind when these provisions were drafted—perhaps because by then other mechanisms existed to protect consumers and others against manufacturing defects, for example, those arising from tort law, as we discuss in the book (**Chapter 12**).

Overall, then, it seems that contract law protects some people better than others when defective products are concerned. Those *not* party to the contract under which

9. This was the position of the claimant in ***Donoghue*** v ***Stevenson***.

a defective product was sold are left with only limited protection. The limitations of contractual claims in relation to defective products are illustrated in **Table 1**.

TABLE 1 Disadvantages to claims in contract

Problem	Solution?
There must be an express or implied term that the product should not be defective in order to be able to claim.	In all contracts of sale where a seller sells goods in the course of a business, an implied term will exist regarding the 'satisfactory quality' of the goods, as well as implied terms about sale by sample or description where relevant (SGA, ss 13, 14, 15). This does not, however, cover private sales.
A seller can sometimes exclude or limit their liability for breach.	Such exclusions or limitations of liability in relation to products are subject to the UCTA and the UTCCR—exclusions and limitations are not allowed in consumer contracts (UCTA, s 6) and/or would be deemed 'unfair' (and so ineffective) under UTCCR, reg 5.
Although a chain of contracts may go all the way back to the manufacturer, claims for breach of contract can only be made against the retailer.	Claims in negligence or under the Consumer Protection Act 1987 may be made against the manufacturer of defective products where a recognised harm has occurred.
Privity of contract means that only the person who entered the contract (i.e. the party who actually bought the product from the party who sold it) can sue.	The doctrine of privity used to be fairly absolute (though see *Shanklin Pier* v *Detel Products Ltd* [1951]) but its harshness was lessened to a certain extent by the enactment of the Contracts (Rights of Third Parties) Act 1999, as well as developments in the law of negligence which allowed claims to be taken against manufacturers and the enactment of the Consumer Protection Act 1987 (see **sections 12.4–12.5**).