Law Commission of England and Wales.

Building the 14th Programme of Law Reform.

A response by the Association of Personal Injury Lawyers

July 2021

Introduction

APIL has over 30 years' experience of campaigning on subjects that affect the rights of people injured through the negligence of another.

Our members represent injured people in all areas of personal injury and clinical negligence. APIL has dedicated specialist lawyers practising in these areas. Of the ideas for reform included in the consultation paper we are particularly interested in product liability and emerging technologies. We believe that there is a pressing need to reform the current framework of product safety regulation as it is complicated and difficult to understand. There is also a misalignment between local and central governments and other regulators resulting in the infective protection of consumers. Coupled with those difficulties is the need to redefine producer and manufacturer to ensure that it is fit for purpose with the advent of on-line sellers such as Amazon. Reform is also needed to the Consumer Protection Act 1987 to remove the ten-year longstop that prevents a consumer that has been injured by a product after that time, being able to pursue a claim.

We also suggest that the Law Commission looks at the unfairness around bereavement damages the law is out dated and not fit for purpose in the 21st Century. Not everyone who loses a relative is entitled to compensation and those that are only receive a token amount. The law needs re-examining against what happens in Scotland.

Whilst digital technology has the ability to improve justice, there is not enough joined up thinking to protect those who are digitally illiterate. We suggest the Commission could develop a framework to protect those vulnerable members of society who risk being overlooked as digital advancements are made.

Product liability and emerging technology

New technological developments are continually raising questions about how they fit into the more traditional product liability laws. Recent developments include autonomous cars, 3D printing and artificial intelligence. Technology develops much faster than the law. The law is not interested in stifling innovation, in fact, greater use of technology and innovation could be effective in informing consumers of product recalls or corrective action required for defective and unsafe products. Registering warranty or registering the purchase at the point of sale may ensure that consumers are more aware of product recalls, thus protecting consumers from potential harm.

The need to reform the current framework

The current framework of product safety regulation is complicated to understand. Specialist lawyers find it challenging to comprehend and follow at times, so there is no doubt that

individuals and businesses will find it complex. The regulations are written with manufacturers in mind rather than individuals. There are likely to be few circumstances in which a consumer will be navigating the system of regulations themselves so the crucial aspect for consumers is that they understand the system of regulation and redress in relation to product safety. The regulations seek to avoid an injury in the first place by placing a duty on the manufacturers of products not to put unsafe products on the market. Any person who places an unsafe product on the market is committing a criminal offence and aware of this needs to be heightened.

The regulations should be re-written in order to ensure that they are more simply to understand but also make the enforcement of consumer rights easier.

The current framework is not effective in protecting consumers because the system is fractured between the local and central governments and other regulators. A more centralised, national system would ensure that consumers are protected from unsafe and defective products.

Defining producer and manufacturer

A reform of our product liability legislation should include an improved definition of term "producer" and "manufacturer".

UK consumers are now familiar with using online platforms such as Amazon to buy products, due to competitive prices and ease of use. Consumers assume their statutory rights in such platforms are broadly equivalent to making a purchase on the High Street. However, that is not the case. For example, Amazon's terms and conditions include a jurisdiction clause providing that the contract is made according to foreign law. Amazon themselves do not guarantee that the product is of satisfactory quality, fit for purpose, reasonably durable or have any of the statutory consumer rights.

Also, consumers cannot be sure of the safety of the product which they are purchasing via an online platform from a third party which may be in a different jurisdiction. It cannot be clear what level of scrutiny, if any, the product has had in relation to its safety.

APIL believes that the Government should impose joint and several liability on big platforms such as Amazon so that consumers have a statutory right when they purchase a product through a platform from a third party. In addition, regardless of where the product came from, it should be subject to the law in the jurisdiction in which it was purchased. If the product was purchased by a consumer in England and the product was produced by a third party in China, the product safety issue should be dealt with under English law. This would require the Government to change legislation to make platforms such as Amazon a producer rather than a supplier under the Consumer Protection Act 1987 (CPA). This should also be implemented into the Sale of Goods Act 1979 and Consumer Rights Act 2015 to ensure that such platforms owe a statutory duty of satisfactory quality.

There is also the need for the definition of manufacturer to be reviewed in light of the way technology is changing. If a consumer 3D prints a product and hires it out or sells it on, they should become a producer by definition and thus liable for any harm. We suspect that these types of cases will become more frequent in years to come.

Whilst we do have the EU Product Safety Pledge, whose objective it is to increase the safety of products sold online by third-party sellers through online marketplaces, this is only a voluntary initiative. Voluntary schemes are not effective enough in ensuring products are

safe. It is crucial that such schemes are mandatory. These standards are vital in ensuring public safety and therefore should be enforceable.

Reform needed to the Consumer Protection Act 1987.

This Act is derived from the European Product Liability Directive 1985 which was designed to effectively level the playing field between the consumer and the manufacturer where it will be very difficult to prove negligence in relation to certain products that cause injury. The theory behind the Act is that if a product is not produced to the level of safety that persons are generally entitled to expect then that product is defective and if that causes injury then compensation should follow.

The first time that this was properly tested in the courts of England and Wales was in what became known as the "blood products case"[1]. Patients who received contaminated blood sued the relevant Government department. Its evidence was that it had done all that is possibly could to avoid the contamination but it nevertheless arose. The court acknowledged these efforts but applying the Act properly, explain that avoidability was irrelevant; and that the product was defective and compensation followed.

That case has long been criticised by manufacturers of devices and products, their insurers and the lawyers that represent them. Regrettably in the last few years we have seen three High Court Judges take a different approach to the Judge in the Blood Products case and these have considerably diluted the effect of the Act[2]. They have effectively allowed avoidability to be taken into account; they have suggested if a product is the subject of regulatory approval, then that is a very significant factor in favour of saying that the product is not defective. It is clear the regulatory approval and the granting of a CE mark is not a measure of safety. It merely confirms the product has been manufactured to its stated specification.

We have seen unsuccessful claims involving artificial hips where two judges have found in favour of the manufacturers even on products that no clinician would use today. In reality where we are now is that we would need a judge to steer back towards the type of decision of defect as in the Blood Products case which would be challenging. If they did not do so in the future, we would need to get a case in front of either the Court of Appeal or the Supreme Court to take the courts back to the Blood Products way of implementing the Act. The difficulty is finding a case to do this where prospects are high enough. We therefore urge the Law Commission to look at the issue and make recommendations for reform.

Additionally, it is unfair and unjust for the CPA to impose a ten year long-stop limitation date on product liability claims. This means that after the product has been in circulation for over ten years and a consumer has been injured by a product after that time, they will have no right of action. A consumer may have a reduced time to take action because they may not receive the product until years after circulation. This is a particular issue where a consumer may have purchased a second-hand product or in medical products where the defect often does not occur until years later. There is no justifiable reason for this restriction. A manufacturer's liability diminishes over time due to wear and tear of the product in any event. Products can cause serious harm to consumers. In other areas of litigation, the judiciary often have a discretion to extend this long-stop, however this does not apply to product liability cases. The operation of the 10-year longstop is absolute and cannot be

[1] A and Others v National Blood Authority and another [2001] EWHC QB 446
[2] Wilkes v DePuy International Limited [2016] EWHC 3096 (QB), Gee v DePuy International Limited [2018] EWHC 1208 (QB) and Hastings v Finsbury [2021] ScotCS CSIH_6 (26 January 2021).

overcome, extended or displaced by agreement or by court order. The ten year long-stop therefore unnecessarily impedes access to justice.

This serious access to justice issue needs urgent review. The focus should be on consumer protection and ensuring only safe products are being manufactured and sold. Abolishing or modifying the ten year long-stop for product liability claims would meet this aim by providing UK consumers with enhanced protection.

Greater use of technology

Greater use of technology and innovation could be effective in informing consumers of product recalls or corrective action required for defective and unsafe products. Registering warranty or registering the purchase at the point of sale may ensure that consumers are more aware of product recalls, thus protecting consumers from potential harm.

In the call for evidence document[3], the OPSS seems to criticise the CPA for being out of date in light of current technological advancements in products. There does not seem to be any evidence in support of this or any suggestion as to how this could be rectified. In APIL's members' experiences, the CPA is equipped to deal with new technology, however the act fails to establish a high enough bar for safety. The development risk defence within the Act can deal with changing technology in a flexible way.

However, the CPA fails to protect consumers and their right of action if they are harmed by a defective or unsafe product. It is extremely challenging for a consumer to face a well-resourced manufacturer in a product liability claim because it creates an unlevel playing field. The OPSS fails to outline any credible alternatives to the CPA to better protect consumers in light of new technologies.

We recommend that the Law Commission conduct a review of public liability law to make it fit for purpose.

Bereavement damages

APIL has long campaigned for reform of the law of bereavement damages in England and Wales. The amount of statutory bereavement damages in England and Wales is decided by the Government and since May 2020 has been set at £15,120. Not everyone who loses a close relative is entitled to compensation for their grief and trauma, only the spouse or civil partner of the deceased, a cohabitee if they had lived with the deceased for at least two years, parents if they lose a child who was under the age of 18 and not married. However, the law says that if the child is 'illegitimate', only the mother can claim.

Compare that with Scotland, where for more than 40 years the law has provided meaningful compensation to a wide range of bereaved relatives. The amount of compensation paid after a wrongful death relies on legal precedent and a proper review of the bereaved person's closeness to the deceased. Bereaved relatives are treated in a way which reflects families and relationships in a modern society. The law in Scotland recognises that a parent's love for a child does not diminish just because the child is over the age of 18. The law also recognises, the huge part a grandparent can play in the life of a grandchild, and the closeness of siblings.

[3] Office for Product Safety & Standards UK Product Safety Review Call for Evidence March 2021

A change was made to eligibility for bereavement damages in England and Wales in 2020 to include couples who have co-habited for at least two years. The Government did this only because the Court of Appeal ruled that the exclusion of cohabitees was incompatible with European Convention on Human Rights. The proposals to extend eligibility were scrutinised by the UK Parliament's Joint Committee on Human Rights, which called for the Government to go further and conduct a wider consultation on bereavement damages. The joint committee concluded that "the current list of eligible claimants is unprincipled, discriminates against other family members in analogous positions to existing eligible claimants and stigmatises children". It warned the law "risks further legal challenge"[4].

Research conducted by YouGov, and commissioned by APIL, shows that there is public support for reform of the out-of-date law. The research is included in our publication, '*Bereavement Damages: A Dis-United Kingdom'*[5]*.* It found that 73 per cent of British adults think the amount of compensation for grief and trauma should vary according to the circumstances of each case, and 56 per cent of British adults think that each relative's claim for compensation should be individually assessed. It also revealed that an overwhelming majority – 86 per cent – thank a father should still receive compensation, even if he was not married to the mother of his child[6].

Until there is meaningful reform, the law on bereavement damages in England and Wales remains unfit for the 21st century. Bereaved people will remain discriminated against, and their relationships with deceased loved ones will remain unacknowledged. This is an area of law that is ripe for examination and we would urge the Law Commission to review the position and make significant recommendations for its improvement.

Technology and the impact on the digitally disadvantaged

Digital technologies have the potential to make justice systems more accessible and efficient. However, ensuring access to justice for all is a huge challenge, one acknowledged by Lord Justice Briggs in his review of the civil court structure.

The Government is undertaking an extensive court modernisation project and this will not be the only reform the Government is undertaking to introduce technology to improve public services. It is essential that all this work has a framework or set of criteria that must be followed to ensure that the most vulnerable members of society are fully included. This is where the Law Commission can assist.

Access to the online system

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[4] Joint Committee on Human Rights, Proposals for a draft Fatal Accidents Act 1976 (Remedial) Order 2019, Twenty-First Report of Session 2017-19, July 2019 https://publications.parliament.uk/pa/jt201719/jtselect/jtrights/2225/2225.pdf

[5] https://www.apil.org.uk/files/online-files/473-207505/Bereavement-Damages-A-Dis-United-Kingdom.pdf

[6] All figures, unless otherwise stated, are from YouGov Plc. Total sample size was 2197 adults. Fieldwork was undertaken between 4 and 5 June 2019. The survey was carried out online. The figures have been weighted and are representative of all UK adults (aged 18+). APIL's analysis of YouGov's polling does not include British adults who responded "don't know" or "prefer not to say".

Justice is a key principle of the rule of law and must be accessible to all. Justice includes access to information, advice and remedy, whether that be through the court or another means. It is essential that digital exclusion is tackled head on. Whilst the trend is towards digital capability, we are not yet in position where such systems are easily accessible to all. It is crucial that reforms have a user focused approach, they are inclusive and when necessary, users are assisted. Reform should focus on the user's needs, learn from their experiences and provide significant investment to do that.

Whilst 92% of adults in the UK were recent internet users in 2020, up from 91% in 2019[7] there needs to be consideration for the members of our population that don't have access to the internet, have limited access to the internet, or need help to use it. Access to Justice will be seriously impeded if these issues are not considered as a matter of course across all digital reforms.

Research shows that in Great Britain in 2020 an estimated 4 per cent of households (c. 1.1 million households) did not have internet access[8]. However, internet access varied significantly by age. Of households with one adult aged 65 years and over, 20% did not have internet access[9]

In the UK in 2020, 8 per cent of adults (4.2 million adults) were "non-users" of the internet. "Non-users" are defined as people who had not used the internet within the past 3 months, or who had never used the internet[10]. The elderly and disabled were more likely to not use the internet. 46 per cent of those aged 75 and over were "non-users" of the internet, while 18 per cent of disabled people were "non-users" [11]

Further opinion polling suggests there has recently been a significant increase in the number of people who use the internet, with the percentage of UK adults who do not use the internet falling to 5 per cent in 2021[12]. However, this still means that 2.6 million people are offline. Furthermore, in certain regions the percentage of "non-users" is significantly above the national average – in Wales it stands at 13%. The research also suggests that 13 per cent of people living with an impairment were non-users[13]. Further research undertaken by Lloyds found those who remain digitally excluded state a variety of barriers to getting online, including:

- Expense
- No broadband access in their area
- Poor connectivity
- Security concerns
- Thinking the internet is too complicated to use

According to the research, it is "increasingly difficult" for the digitally excluded "to make the transition online without significant sustained support and perhaps new approaches to digital inclusion".

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[7] Office for National Statistics, Internet users, UK 2020.
[8] Office for National Statistics, Internet access- households and individuals, Great Britain 2020.
[9] See note 4 above.
[10] See note 3 above.
[11] See note 3 above.
[12] Lloyds Bank UK Consumer Digital Index 2021.
[13] See note 8 above.

This research also shows that not all internet users can confidently use the internet. In 2021, 6 per cent of UK internet users said they were not very confident in using the internet, while a further 1 per cent said that they were not at all confident in using the internet. It also found that, in addition to the 2.6 million people still offline, 20.5 million adults have low or very low digital engagement.

In 2021, 7 per cent of UK adults said they did not have a PC, laptop, netbook, tablet or smartphone in their household. This rose to 17 per cent among those aged 65 and over, and to 20 per cent among those whose household income was less than £11,500[14].

The data clearly shows that there are significant issues with digital vulnerability, including 2.6 million[15] people offline, lack of confidence using the internet and limited access to laptops, smartphones etc. It is essential that digital systems are designed to be inclusive, that includes addressing the challenges posed by access to technology before digital reform is rolled out.

Proper support systems for vulnerable users

It is important that we look beyond just the need for modernisation and at how we will overcome barriers to justice and make digital systems truly accessible to all. Reliance should not be placed on pro-bono work, the voluntary sector or Charites to provide the gaps in that access. The option of a printed form equally does not provide the solution.

Any online process has to be properly resourced and developed so that any person on the street could use it. This means a combination of IT helplines and face to face support for users. Specialist support and assistance must also be put in place for vulnerable users.

Vulnerable users may be deaf or hard of hearing, they may be blind or partially sighted. Any electronic means of communication deployed must be capable of being 'disability friendly'[16]. Any timetables imposed would also need to reflect the speed of interaction: paper will be much slower, for example.

All communication channels will require a significant on-going commitment to funding and support beyond the initial setup period, with a system of regular reviews.

Adequate pilot of new systems

Before a nationwide roll-out of the online court, the system must be piloted to ensure that it is sufficiently robust for mass public use. Statistics indicate that members of the public may be

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[14] Ofcom, Usability and accessibility research.
[15] See note 8 above.
[16] "While we have seen a notable increase in internet usage across all groups in recent years, many older and disabled people are still not online, with two-thirds of women over 75 having never used the internet." Writes Pete Lee, Surveys and Economic Indicators Division, Office for National Statistics.

25% of disabled adults have never used the internet: There were 0.5 million disabled adults who had last used the internet over three months ago, making up 50.0% of 0.9 million lapsed internet users. In 2016, 97.3% of disabled adults aged 16 to 24 years were recent internet users, compared with 99.4% who were not disabled. Of disabled adults aged 75 years and over, 30.8% were recent internet users, compared with 48.1% who were not disabled. Across all age groups, the proportion of adults who were recent internet users was lower for those that were disabled, compared with those that were not.
(https://www.ons.gov.uk/businessindustryandtrade/itandinternetindustry/bulletins/internetusers/2016)

reluctant to use an online system, and feedback from pilots would identify how to make the online process as user friendly as possible.

Any reform programme should be capable of withstanding scrutiny and robust challenge from a range of court users. It is especially important where people are unrepresented or witnesses.

An agreed framework across all Government departments for dealing with these access challenges could be developed by the Law Commission to ensure that these issues are consistently addressed. The document should cover what new approached to digital inclusion are needed, provide recommendations to ensure proper avenues of support and assistance are included for vulnerable user and deliver suggestions for adequate piloting and scrutiny.

About APIL

The Association of Personal Injury Lawyers (APIL) is a not-for-profit organisation which has worked for over 30 years to help injured people gain the access to justice they need, and to which they are entitled. We have around 3,000 members who are committed to supporting the association's aims, and all are signed up to APIL's code of conduct and consumer charter. Membership comprises mostly solicitors, along with barristers, legal executives, paralegals and some academics.

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