Department for Science, Innovation and Technology

A pro-innovation approach to AI regulation

A response by the Association of Personal Injury Lawyers

May 2023

Introduction

APIL is grateful for the opportunity to respond to the Department for Science, Innovation and Technology white paper proposing a regulatory framework for AI.

APIL recognises the need for the law and regulators to adapt to new technological advancements. We support the use of AI as where its safety risks are properly understood, monitored, and the routes for redress are appropriate should harm occur. However, as an organization representing injured people, APIL is concerned that the consultation paper is focused on the commitment to make the UK the leader for businesses developing and using AI at the apparent expense of appropriate safety monitoring and routes to redress. We believe that the risks of AI should not be overlooked, and legislative controls should not be discarded with or minimised in order to reduce the burden on businesses and attract investment in AI. As mentioned in the white paper, building public trust in AI is essential to guarantee that its benefits can be capitalised. We suggest that the focus should be on building public trust by updating the current consumer rights laws and the consideration, where appropriate, of further legislation to ensure that there are appropriate redress routes in place for those injured by AI.

There are risks that these new technologies could significantly change the nature of civil claims. If the law does not adapt there is a danger that those injured by AI vehicles driven or assisted by AI; or by an AI medical device, might have to pursue complex product liability claims against manufacturers of software and/or hardware. Product liability claims are awfully complex, difficult for consumers to pursue and extremely expensive. There is also uncertainty in relation to whom the claim should be addressed, which will become even more problematic from a consumer's point of view when trying to obtain redress. We believe that it is critical that those who have sustained injuries because of AI failure in control of, or design of, a device or vehicle can access compensation to put them back into the position they were in prior to the harm, as far as possible.

We believe that all claimants injured by AI should have a simple route to restitution. The Employers Liability (Defective Equipment) Act 1969 and the Automated and Electric Vehicles Act 2018 are sensible approaches that should be followed. We have not responded to the paper's questions but have provided recommendations concerning routes for redress for consideration.

Consumer Protection Act 1987 and emerging technologies generally

The Consumer Protection Act 1987 (CPA) fails to establish a high enough bar for safety. It is extremely challenging for a consumer to face a well-resourced manufacturer in a product liability claim due to the unlevel playing field. There should be consideration of how to better protect consumers in light of new technologies, particularly AI.

The Office for Product Safety and Standards has recognised in a call for evidence response[1] that the current product liability provisions need changes to fully address the challenges raised by technology including developments in machine learning and AI. The current law does not reflect new technologies and AI, which are complicating how liability can be attributed when something goes wrong.

The increasing use of software and emerging technologies in consumer products make claims even more complex and challenging for consumers to pursue. There is a consumer protection point here – if these cases remain so complex and costly to take on, manufacturers will not be held to account, and coupled with issues of lax regulation – it will mean that unsafe products are tested on the UK market, as there are unlikely to be repercussions for any harm suffered by consumers. In particular, we are concerned that people who are injured in the UK will be forced to bring complicated, costly international claims against, for example foreign-based software developers, and will be left with no route to redress in the UK courts.

We are disappointed that the white paper does not consider new rights or new routes to redress at this stage, given that product liability claims often result in the claimant being unsuccessful in securing compensation for their injuries which were sustained through no fault of their own. We are concerned that this could undermine access to justice.

Consumer Protection Act 1987 – areas for reform and the new European Directives

With the advent of the new AI Liability Directive and the revised Product Liability Directives, now is the correct time to review the Consumer Protection Act. We do not believe that the UK should adopt the new Directives as a whole; however, there are certain aspects of the new Directives that should be taken into account and implemented within UK legislation. This is an opportunity for the UK to go further than the Directives in ensuring that consumers are protected, in relation to both AI and non-AI products.

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.

We suggest that the CPA should be amended in order to ensure that it is simpler to understand and also to make the enforcement of consumer rights easier. APIL has identified below areas of the CPA which we believe are outdated and should be changed.

Issues identifying the producer

[1] UK Product Safety Review – Call for evidence response https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1035917/uk-product-safety-review-call-for-evidence-response2.pdf

There are often delays with CPA cases at present because potential defendants do not identify who the producer/manufacturer of a product is. The request in the act for potential defendants to identify the producer of a product within the definition of the Act is weak. Delays are felt more keenly in these cases, particularly given the ten-year-long stop to bring a claim. Defendants can employ delaying tactics in order to simply run down the clock until the claim is extinguished.

In relation to AI specifically, we believe that there should be a requirement for the importer and operator of the AI system to be based in the UK or have a representative in the UK so that the injured person could pursue a claim directly against them. We suggest that the model should mirror the Employers' Liability (Defective Equipment) Act 1969, which provides that there is a strict liability on the employer to compensate the employee where they are injured as a result of defective equipment regardless of fault, and then the employer can claim an indemnity or contribution against the manufacturer if so advised. A similar provision for personal injury claims as a result of AI-caused damage would ensure that the claimant has a needed straightforward route to redress. The claimant would pursue a claim directly against the UK representative or operator who would then sue the manufacturer if so advised. We believe that this would address the imbalance between the well-resourced manufacturer and the consumer fairly and proportionately.

Further, Article 3 of the AI Liability Directive provides that a court may order the disclosure of relevant evidence about specific high-risk AI systems that are suspected of having caused damage. Requests for evidence are addressed to the provider of an AI system, a person who is subject to the provider's obligations laid down by Article 24 or Article 28 (1) of the AI Act[2] or a user pursuant to the AI Act. The requests should be supported by facts and evidence sufficient to establish the plausibility of the contemplated claim for damages and the requested evidence should be at the addressees' disposal. Requests cannot be addressed to parties that bear no obligations under the AI Act and therefore have no access to the evidence. Article 3(5) also introduces a rebuttable presumption of non-compliance, which provides that "a national court shall presume the defendant's non-compliance with a relevant duty of care, (…) that the evidence requested was intended to prove for the purposes of the relevant claim for damages."[3] We believe that the UK Government should adopt this provision in the Directive as it provides a proportionate balance between the claimant's rights and the need to ensure that disclosure would be subject to safeguards to protect the legitimate interests of all parties concerned, such as trade secrets or confidential information.

Presumption of liability

Article 4 of the new AI Liability Directive introduces a rebuttable presumption of a causal link in the case of fault. This aims to provide an effective basis for claiming compensation in connection with the fault consisting in the lack of compliance with a duty of care under Union or national law. According to this Article, when applying liability rules to a claim for damages,

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[2] EU Artificial Intelligence Act https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A52021PC0206

[3] Directive of the European Parliament and of the Council on adapting non-contractual civil liability rules to artificial intelligence (AI Liability Directive) https://commission.europa.eu/system/files/2022-09/1_1_197605_prop_dir_ai_en.pdf

national courts shall presume the causal link between the fault of the defendant and the output produced by the AI system or the failure of the AI system to produce an output. We recommend that the UK Government adopts this provision.

Further, the current approach of the courts in the UK is that if a product is regulated, there is a presumption that it is safe and not defective. We take issue with this presumption and there should be an alternative presumption that if the product is taken off the market, this is sufficient to demonstrate that it is defective. One area where the revised PLD may cure this is Art.9(3) "The causal link between the defectiveness of the product and the damage shall be presumed, where it has been established that the product is defective, and the damage caused is of a kind typically consistent with the defect in question"[4].

Vehicle technology: Automated vehicles and Remote driving – strict liability

The Automated and Electric Vehicles Act 2018 introduced strict liability for autonomous vehicles. The act states that "Where (a) an accident is caused by an automated vehicle when driving itself on a road or other public place in Great Britain, (b) the vehicle is insured at the time of the accident, and (c) an insured person or any other person suffers damage as a result of the accident, the insurer is liable for that damage." Unfortunately, the provisions of the Act are still not effective because the Secretary of State has not yet listed any vehicle capable of being driven autonomously. Thus, no vehicles currently have the benefit of strict liability under the Act. The legislation is not currently operating as Parliament intended yet there are vehicles already on UK roads which are driving autonomously where software is dynamically and adaptively controlling the vehicle's steering and speed. In the event of such a collision, the issue will inevitably be whether the software was a defective product within the meaning of CPA.

We recommend that the liability provisions in the Automated and Electric Vehicles Act 2018 should now be extended to all software-controlled and remote driving, or that similar new legislation is enacted so that vehicles capable of automated or remote driving are under a strict liability regimen. Pursuing a claim against a motor insurer on a strict liability basis in relation to a road traffic collision is far preferable to requiring a claimant to bring their claim under the Consumer Protection Act 1987 against the manufacturer with the burden of proving that the entire system is defective. The manufacturer would have every incentive to spend millions of pounds defending such criticisms. We believe that any other way of pursuing a claim involving an automated or remotely driven vehicle would be extremely unfair to the injured party and might make it virtually impossible for innocent but injured persons to obtain redress.

In remote driving cases, the injured party may need to bring an action against both the manufacturer and the operator, both with better resources to pursue long and complex claims. Product liability claims often result in the claimant being unsuccessful in securing compensation for their injuries due to the manufacturers' ability to fund expensive and complicated litigation. There is also an inequality of arms as manufacturers have the in depth knowledge of their own products, which the claimant will not be able to replicable. These factors create an unlevelled playing field resulting in the claim being unviable for the individual claimant to pursue. It is well documented that early access to rehabilitation therapies improves recovery outcomes for people who have been injured. Complex product

[4] ibid

liability claims where liability can take often more than a year (often several) to be established will hinder access to rehabilitation. For the reasons stated, product liability claims would make it challenging for claimants to be compensated for their injuries which were sustained through no fault of their own. Substantial resources are required to investigate and challenge any defences brought under the 1987 Act. It would be disproportionately costly for the claimant to bring a claim under the 1987 Act if the injury arising is a “low value” injury. This could defeat claims and undermine access to justice. The costs saved from litigating liability would reduce legal costs and make redress a very efficient process.

For any queries about this response, in the first instance please contact:

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