

Practice questions for Chapter 15 – Business-related torts

Problem question

Identify who (if anyone) could be liable in the following situations under Part I of the Consumer Protection Act 1987. Explain the reasoning behind your answer with appropriate legal authority.

- BE Systems have been contracted to create a new stealth aircraft for use by the British Air Force. The aircraft is being tested at a BE test facility, but due to a defective component, the test pilot, John, is killed.
- Better Heating Ltd have supplied a number of heaters to Multisoft's offices in London. One of the heaters is defective and explodes, damaging the premises. Fortunately, the office was empty at the time, so no one was injured
- High-definition plasma screen TVs are manufactured by an Asian firm called HD Screens Ltd. They provide these screens to TeleSell who then add their logo to the TV and sell them on to consumers. The TVs are defective and are prone to electrocuting those who touch the metal casing. After purchasing one of these TVs, Ceri is injured. Can Ceri sue TeleSell? Would your answer differ if the TVs had a large sticker on the back of the TVs indicating that the TVs were actually manufactured by HD Screens Ltd?
- CompuPro Ltd supplies a defective batch of computer micro-processors to Laptop Ltd. The processors overheat very easily and pose a fire risk. Laptop Ltd incorporates the processors into their laptop PCs and sell them to the public. Mr. Smith purchased a laptop and left it on overnight to download some large files. In the morning, he awoke to find the laptop had overheated and caught fire, damaging the antique oak desk it was placed upon.
- Andrew buys a car from his local car dealer. The brakes are defective and, as a result, he crashes and injures himself. The car is a write-off. Advise Andrew. Would your answer be different if the defective brakes were added at the car's first service?
- GKS Ltd develop an inoculation to the common cold. Injections of this new medicine are used widespread and the disease is all but wiped out. However, 4 years later, a number of young children start exhibiting a loss of motor control and deteriorating co-ordination. It is discovered that, in a small number of cases, the inoculation can affect a foetus' development and lead to latent neurological conditions at a later date. Joanne, who received the inoculation, whilst pregnant, 4 years ago, has a young boy who is beginning to exhibit the above symptoms.

BE Systems have been contracted to create a new stealth aircraft for use by the British Air Force. The aircraft is being tested at a BE test facility, but due to a defective component, the test pilot, John, is killed. Does John's estate have a claim against BE?

- Section 4(1) lists 6 possible defences. Section 4(1)(b) provides a defence where 'the person proceeded against did not at any time supply the product to another.' Therefore, as it is still being tested and has not been supplied, there can be no claim against BE under the CPA 1987, Part I.

Better Heating Ltd have supplied a number of heaters to Multisoft's offices in London. One of the heaters is defective and explodes, damaging the premises. Fortunately, the office was empty at the time, so no one was injured.

- The CPA 1987, Part I does not impose liability for all types of damage – only certain types of damage can result in liability, with s 5 providing that only 3 types of damage are covered under the Act, namely:

1. Death
 2. Personal injury, and
 3. Damage to 'private' (as opposed to business) property
- Therefore, Multisoft cannot sue Better Heating under the CPA as the property that is damaged is business property, and therefore not protected under Part I.

High-definition plasma screen TVs are manufactured by an Asian firm called HD Screens Ltd. They provide these screens to TeleSell who then add their logo to the TV and sell them on to consumers. The TVs are defective and are prone to electrocuting those who touch the metal casing. After purchasing one these TVs, Ceri is injured. Can Ceri sue TeleSell? Would your answer differ if the TVs had a large sticker on the back of the TVs indicating that the TVs were actually manufactured by HD Screens Ltd?

- Section 2(2) and (3) provides that four types of person can be liable under the CPA 1987, Part I. Of relevance is s 2(2)(b) which places liability upon 'any person who, by putting his name on the product or using a trade mark or other distinguishing mark in relation to the product, has held himself out to be the producer of the product.'
- Very often, parties who sell goods, or parties who have their logo placed upon a good, will not have actually produced that good. However, it is unlikely that a person would come within s 2(2)(b) merely because he affixed a logo onto the good. In order to come within s 2(2)(b), the person must in some way hold out that they produced the good. Accordingly, if TeleSell have simply placed their logo on the TVs, it is unlikely that they will come within s 2(2)(b).
- Certainly, if a sticker is placed on the TV indicating that the TVs were manufactured by HD Screens, then TeleSell would not be holding out that they were the producer and so liability would not be imposed.

CompuPro Ltd supplies a defective batch of computer micro-processors to Laptop Ltd. The processors overheat very easily and pose a fire risk. Laptop Ltd incorporates the processors into their laptop PCs and sell them to the public. Mr. Smith purchased a laptop and left it on overnight to download some large files. In the morning, he awoke to find the laptop had overheated and caught fire, damaging the antique oak desk it was placed upon.

- The basic rule can be found in s 2(1) which states:

Subject to the following provisions of this Part, where any damage is caused wholly or partly by a defect in a product, every person to whom subsection (2) applies shall be liable for the damage.

- As liability is established for defective 'products' we need determine what a product is. This is defined in s.1(2) and states:

product means any good or electricity and ... includes a product which is comprised in another product, whether by virtue of being a component part or raw material or otherwise...

- It is therefore clear that both the laptop itself and the faulty micro-processors are considered as 'products' for the purposes of the Act.
- Now, we need determine who can be liable. Primary liability is placed upon the 'producer' and through statute and case law, persons who could come under the definition of 'producer' include:

1. the manufacturer of the finished product – s 1(2)(a).
 2. the manufacturer of a component part – Product Liability Directive, Art 3.
 3. the producer of raw materials – s 1(2)(b).
 4. a person who has subjected the product to an industrial or other process – s 2(2)(b).
 5. a person who imports goods into the EC from elsewhere – s 2(3).
- It is therefore apparent that both CompuPro (as the manufacturer of the defective component) and Laptop Ltd (as manufacturer of the finished good) could be liable under the Act.

Andrew buys a car from his local car dealer. The brakes are defective and, as a result, he crashes and injures himself. The car is a write-off. Advise Andrew what he can claim for. Would your answer be different if the defective brakes were added at the car's first service?

- Section 5 states that only 3 types of damage are covered, namely:
 1. Death
 2. Personal injury, and
 3. Damage to 'private' (as opposed to business) property.
- Andrew will therefore be able to claim for the injuries he has suffered. However, can he claim under the CPA 1987 for the cost of replacing his car?
- The answer would appear to be no. Section 5(2) states that 'A person shall not be liable ... in respect of any defect in a product for the loss of or any damage to the product itself ...' Therefore, if he wishes to claim for the cost of replacing his car, he will need to claim elsewhere, probably under the Sale of Goods Act 1979.
- If the brakes were added after Andrew bought the car, this changes things. In this case, the defective product in question would be the new brakes, and these have caused the car to crash – this would amount to damage to private property, which is recoverable. Andrew would be able to claim against the 'producer' of the brakes for his injuries and the damage to the car.

GKS develop an inoculation to the common cold. Injections of this new medicine are used widespread and the disease is all but wiped out. However, 4 years later, a number of young children start exhibiting a loss of motor control and deteriorating co-ordination. It is discovered that, in a small number of cases, the inoculation can affect a foetus' development and lead to latent neurological conditions at a later date. Joanne, who received the inoculation, whilst pregnant, 4 years ago, has a young boy who is beginning to exhibit the above symptoms. Advise Joanne.

- There are 2 issues to consider here:
 1. Is there a limitation period for claims, and
 2. The 'development risks' defence.

Limitation period

- For Joanne, the basic limitation period is 3 years from:
 - (i) The date on which the action accrues, or

(ii) (if later) the date on which he first discovered (or should have discovered) the relevant facts.¹

- Therefore, providing that the conditions of Joanne's son present within 3 years of the date of discovery of the inoculation's defect, then Joanne will be able to claim.

The 'development risks' defence

- Section 4(1) lists 6 possible defences. Section 4(1)(e) provides a defence for the producer where:

the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products while they were under his control.

- This is the 'development risks' defence (also known as the 'state of the art' defence) and is probably the most controversial aspect of the Act.
- The issue here is was the state of scientific knowledge at the time such that GKS might be expected to have discovered the defect. You are not really told enough to make a conclusion, so you will have to hypothesise both outcomes.

Essay question

The development risks defence was not implemented correctly and has served to adversely affect the protection offered by the Consumer Protection Act 1987, Part I.

Do you agree with this statement? Provide reasons for your answer.

Introduction

- This question involves a discussion of the development risks defence found in the CPA 1987, s 4(1)(e). The defence has proven to be extremely controversial and many believe that the UK's implementation of the defence has resulted in a reduction of the protection afforded to consumers under Part I of the Act.

History and rationale

- Under the CPA 1987, Part I, liability is placed primarily on producers in order to minimize the number of parties that need to obtain insurance. However, insurance cannot always be obtained. Unknown risks, by their very nature, cannot be quantified, and so insurance might not be available.
- Given an inability to obtain insurance, producers might be unwilling to produce innovative products for fear of unknown defects. These innovative products might be highly beneficial.
- This is even more important given that the encouragement of innovation has become a major aim of the EU's policy to develop growth and competitiveness and to decrease unemployment. Accordingly, the Community in their White Paper on Competitiveness and Growth have stated that:

it is essential to create a legal environment which will stimulate the development of ... investments [and that] effective legal protection is a vital incentive for innovation.

¹ Limitation Act 1980, s 11.

- Given this, producers need to be given some leeway in relation to innovative products. Art 7(e) of the Directive that led to the 1987 Act therefore provided that it would be a defence for a producer to prove:

that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of the defect to be discovered.

- This defence, known as the 'development risks' defence or the 'state of the art' defence, caused considerable controversy. Pro-consumer groups immediately campaigned against it. Many academics argued that it would completely undermine the strict liability philosophy.
- A compromise was reached by allowing the defence to be optional in national law. Therefore member States had the option of not including the development risks defence in their implementing legislation.
- Ultimately, all the member States, except Finland and Luxembourg, included the development risks defence. A similar defence is found in the consumer legislation of Australia, Japan and most US States. Germany included the defence but excluded its operation in relation to medicines, as did Spain.
- One possible consequence of this inconsistent application is that certain member States may become testing grounds for newly developed products, and these products may be delayed to States that have not implemented the defence or modified it.

The UK implementation

- The controversy did not end here however. All the member States except the UK, adopted verbatim the wording of the Directive. The House of Lords introduced an amendment to bring the defence into line with the Directive, but a General Election was called and Lordships were forced to accept the current wording, otherwise the Bill would have failed for lack of time. Section 4(1)(e) CPA states (italics added):

that the state of scientific and technical knowledge at the [time when the product was supplied] was not such that a producer of products of the same description as the product in question *might be expected* to have discovered the defect if it had existed in his products while they were under his control.

- Many commentators believed that the UK wording was considerably wider and more favourable to producers, than the Directive's wording. The Directive asks was the scientific and technical knowledge such that the defect could be discovered – this test is entirely objective and is capable of a yes or no answer. The UK wording asks might another producer of the same product be expected to have discovered the defect – this appears to be more subjective and favourable to the producer.
- If the two tests were different, then the UK Government would be in breach of its EC Treaty obligations. Accordingly, the Commission infringement proceedings commenced under Art. 169 of the EC Treaty, alleging that the UK had not properly implemented the Directive.

Commission of the EC v UK²

- The Commission argued that the test in Art 7(e) was purely objective, whereas the words 'might be expected' in the CPA 1987, s 4(1)(e) introduced a subjective assessment that widened the scope of

² [1987] All ER (EC) 481.

the test and made it easier for producers to establish. The UK government agreed that Art 7(e) created an objective test, but denied that s 4(1)(e) had introduced a subjective element.

- The ECJ held that s 4(1)(e) implemented the Directive correctly. Note that it did not say categorically that s 4(1)(e) did not introduce a subjective element, but that the Commission failed to prove it had.
- In any case, the ECJ noted that the CPA 1987, s 1(1) specifically imposes a duty on UK courts to interpret the Act in accordance with the Directive. This was upheld in the case of *A v National Blood Authority*.³

Problems still exist

- The above cases have not cleared up the central difficulty in applying the development risks defence. The court will still have to determine the level of scientific knowledge existing at the time and whether or not that knowledge is accessible or in circulation.
- The Directive and the CPA 1987 both use a test of discoverability – was the scientific and technical knowledge such that would enable the producer to discover the defect. Some academics have argued that this test is unworkable given that *any* defect can be discovered with enough testing. The issue is how much testing is required – on this the legislation is silent.
- Opinion is still fundamentally split on whether the defence should be included. Pro-consumer groups have objected to the inclusion of the defence, whilst manufacturing and insurance industries have regarded it as essential.
- The defence does not sit well with a strict liability regime based on no fault. Many have argued that the inclusion of the development risks defence converts the strict liability regime into a negligence-based fault-liability regime. The European Commission did not want the defence for this reason, but was forced to comply otherwise certain member States would have resisted the notion of strict liability.
- The scope of the defence under the Act is arguably wider than under the Directive and, in theory, makes it easier for a producer to establish. However, the cases to date have not borne this out inasmuch as the development risks defence has, to date, never succeeded.

Problem question

Elen owns a factory that specialises in the tanning of leather. This factory is near a number of residential properties, one of which is owned by John. John and his partner, Ricardo, have complained about the fumes that the factory emits, and contend that they cannot sit in their garden, as the fumes smell so unpleasant.

The leather is tanned using chromium sulphate, which is stored in large metal drums. One of the drums is cracked and the chemical has seeped out and into the soil. The chemical seeps into the fishpond of another nearby resident, Georgie. The pond contained a number of award-winning Koi carp. All of the carp have died and tests conducted on the water show that the pond water was heavily contaminated with chromium sulphate.

Following this discovery, Georgie approaches Elen to discuss the death of her fish. Georgie walks through the factory gates, on which is displayed a prominent sign which states 'Trespassers will be prosecuted.' Georgie finds Elen and complains about the death of her fish. Elen tells Georgie to 'clear off' and Georgie tells Elen that she will be seeking legal advice. As she approaches the exit to the factory, Georgie slips on a loose concrete slab and injures her ankle.

³ [2001] 3 All ER 289 (QB).

Elen is concerned about her liability regarding the above events, and seeks your advice (note, do not discuss Elen's possible liability in negligence).

Introduction

- This problem question involves a discussion of several business-related torts, namely nuisance, the tort in *Rylands v Fletcher* and occupiers' liability. The question specifically states not to discuss Elen's liability in negligence, so do not. Always follow the instructions given in the question.

The emission of fumes

- It is important to note that the scope of many torts overlap, and so a single act can constitute numerous torts. The emission of fumes could potentially result in liability under the tort of nuisance or the tort established in the case of *Rylands v Fletcher*.
- There are two types of nuisance, namely public nuisance and private nuisance. It is important to note that the two types of nuisance are not mutually exclusive and it is possible for an act to amount to both a public nuisance and a private nuisance. Certainly, the emission of fumes is the type of action that, depending on the facts, could amount to a public and/or private nuisance. Therefore, discuss both.

Private nuisance

- Begin by defining what a private nuisance is. Numerous definitions exist, but Winfield & Jolowicz's is regarded by many as the most authoritative. They define a private nuisance as 'an unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it.'
- Only persons with a proprietary interest in the land concerned can commence a claim under the tort of private nuisance (this requirement does not exist for public nuisance). As John and Ricardo are occupiers of the premises affected, this requirement has been met.
- This is clearly a tort with a wide scope. As noted on p 476 of *Card & James'*, there are numerous types of activity that can potentially amount to a private nuisance. The emission of fumes could constitute physical interference if the fumes damage property.⁴ This does not appear to be the case in our scenario, but the emission of fumes do appear to have affected John and Ricardo's enjoyment of their property (this is often known as 'amenity nuisance').
- There is little doubt that the emission of fumes can amount to a private nuisance. To establish liability, John and Ricardo will need to establish three things (i) the emissions caused damage (ii) the interference is unlawful, and (iii) Elen was in some way at fault.
- There is no doubt that the interference has caused damage. As noted above, the damage need not be physical and the interference with the enjoyment of land will constitute damage.
- The interference must be shown to be unlawful. This requires the court to strike a delicate balance between the right of an occupier of land to do what he likes with his own land, and the right of neighbours not to have their use or enjoyment of their land interfered with.
- Given the breadth of possible forms of conduct that could amount to private nuisance, the courts had adopted a flexible test, namely the courts will determine unlawfulness based on the reasonableness of the interference. In determining this, the courts have established that several factors are of relevance (e.g. extent of damage suffered, duration of the interference, the locality etc).
- You should apply any relevant factors to the facts of the case, bearing in mind that you are not provided with sufficient facts to make a definitive determination of liability. Therefore, feel free to

⁴ *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642 (HL).

engage in reasonable hypothesis. For example, the duration of the interference is important. If the factory emits foul smelling fumes constantly, this is more likely to amount to a nuisance than if the factory only emits fumes for a short period of time late at night.

- John and Ricardo will need to establish that Elen was at fault. However, fault in nuisance does not mean the same as establishing fault in negligence. In *The Wagon Mound (No 2)*,⁵ Lord Reid stated that the claimant will not need to establish that the defendant breached his duty of care – all that need be established is that the defendant failed to meet the standard of a reasonable man.
- Highlight the available defences. There is nothing to indicate that any of the available defences are relevant, but you may want to hypothesize (e.g. if the factory has been emitting fumes for over twenty years, then the defence of prescription may be available).
- Finally, discuss the potential remedies available to John and Ricardo should they succeed. The primary remedy would be an injunction, but John and Ricardo could also claim damages instead of, or in addition to, seeking an injunction.

Public nuisance

- Define what a public nuisance is and how it differs from a private nuisance (and the importance of the distinction). The significant distinctions are (i) while a private nuisance is only a tort, a public nuisance is both a tort and a crime, and (ii) the claimant does not need a proprietary interest in the land concerned.
- To establish that Elen has committed a public nuisance, John and Ricardo will need to establish that (i) the claimant must prove the existence of widespread harm (ii) the act must cause a common injury to the class of persons concerned, and (iii) the claimant must prove that he suffered special damage. Given the lack of information you are provided with regarding the extent of the emissions, you will not be able to establish these conclusively.
- As with private nuisance discuss defences and remedies, but note the differences (e.g. the defence of prescription is not available in cases of public nuisance).

Rylands v Fletcher

- The tort established in *Rylands v Fletcher*⁶ is very similar to private nuisance. In order to establish liability, John and Ricardo will need to establish five things:
 1. The defendant must bring something onto, or allow something to accumulate, on the land. Elen would have brought onto her land the chemicals that cause the fumes.
 2. The thing, if it escaped, would be likely to do mischief. The thing need not be dangerous per se, but would likely cause mischief if it escaped.
 3. John and Ricardo must show that the thing that was likely to do mischief has escaped. The emission of fumes would qualify.
 4. The bringing of the thing onto the land, or the accumulation of the thing on the land, should be a non-natural user.
 5. The harm caused must be reasonably foreseeable.⁷ It must be regarded as reasonably foreseeable that the emission of noxious or foul-smelling fumes would cause the type of harm that John and Ricardo are claiming for.

⁵ *Overseas Tankship (UK) Ltd v Miller Steamship Co Pty Ltd (The Wagon Mound)* [1967] 1 AC 617 (PC).

⁶ (1868) LR 3 HL 330 (HL).

⁷ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL); *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61.

- As with nuisance, you are not provided with enough facts to establish definitively whether or not the tort in *Rylands v Fletcher* has been committed. What is clear is that the emission of noxious fumes can result in the tort being committed – see the case of *West v Bristol Tramways Co.*⁸

The death of the fish

- This clearly involves a discussion of the tort established in *Rylands v Fletcher*. As noted, for liability to arise, Georgie will need to establish the five requirements.
- First, the defendant must bring something onto, or allow something to accumulate, on the land. Elen has brought onto the land chromium sulphate, so this requirement has been met.
- Second, the thing, if it escaped, would be likely to do mischief. The thing need not be dangerous per se, but would likely cause mischief if it escaped. There is little doubt that many chemicals (such as chromium sulphate) would, if they escaped, be likely to cause mischief.
- Third, Georgie will need to show that the thing that was likely to do mischief has escaped. Tests conducted on the water show that it is heavily contaminated with chromium sulphate, so this requirement will be met.
- Fourth, the bringing of the thing onto the land, or the accumulation of the thing on the land, should be a non-natural user. Bringing a potentially dangerous chemical onto land will almost certainly qualify as a non-natural user.
- Fifth, the harm caused must be reasonably foreseeable.⁹ This would depend on the likelihood of the chemical contaminating Georgie's pond upon it seeping into the soil. Expert evidence may be required to establish this.

Georgie's injured ankle

- This involves a discussion of the law relating to occupiers' liability. It first needs to be determined whether or not Elen is an occupier. The case of *Wheat v E Lacon & Co Ltd*¹⁰ established that anyone with a 'sufficient degree of control' over the premises could be an occupier. As Elen owns the factory, she would appear to qualify.
- It then needs to be determined whether or not Georgie is a lawful or non-lawful visitor. It is likely that Georgie will be a non-lawful visitor for two reasons: (i) a sign at the main gate indicates that trespassers will be prosecuted, and (ii) Elen tells Georgie to 'clear off.' As Georgie is likely to be a non-lawful visitor, the relevant Act will be the Occupiers' Liability Act 1984.
- The 1984 Act provides the Elen will owe a duty to Georgie providing that:
 1. She is aware of the danger or has reasonable grounds to believe that it exists. You are not told whether or not Elen knew of the loose slab. If she did not, or if she was reasonably unaware of the loose slab, then Elen will owe no duty to Georgie.
 2. Elen knows, or has reasonable grounds to believe, that Georgie is in the vicinity of the danger concerned, or that Georgie will come into the vicinity of the danger. If Elen knew of the loose slab, it would be likely that she knew that Georgie would be in its vicinity as the loose slab is near the exit to the factory.
 3. The risk is one against which Elen may reasonably be expected to offer Georgie some protection.

⁸ [1908] 2 KB 14 (CA).

⁹ *Cambridge Water Co v Eastern Counties Leather plc* [1994] 2 AC 264 (HL); *Transco plc v Stockport Metropolitan Borough Council* [2003] UKHL 61.

¹⁰ [1966] AC 552 (HL).

- If the three conditions are met, Elen will owe Georgie a duty of care. Section 1(4) establishes the standard of care, namely that the occupier is to take such care as is reasonable in all the circumstances to see that the entrant does not suffer injury on the premises by reason of the danger concerned. As with many problem questions, you are not provided with enough facts to make a definitive conclusion, but a broken paving slab near the exit of the factory could definitely pose a danger and, if Elen was aware of it, it would seem likely that the duty was breached.
- However, s 1(5) provides that the duty owed by the 1984 Act will be discharged if Elen takes such steps as are reasonable to give warning of the danger concerned or to discourage persons from incurring the risk. However, Elen has not posted a warning of the danger and a sign providing that trespassers will be prosecuted will not constitute a sufficient warning under the OLA 1984 (or the OLA 1957).
- The defence of contributory negligence is available. Accordingly, if Georgie contributed to her injury (e.g. by not looking where she was going), then any damages she may be awarded may be reduced.