

# Investigating Defective Products under the Consumer Protection Act 1987

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It is not necessary to show how a defect in a product was caused but it is necessary to establish that there is a defect.

In *Baker v KTM Sportmotorcycle UK Ltd & Another* [2017] EWCA Civ 378, the Court of Appeal considered what is required to prove that a product is not as safe as persons generally are entitled to expect, pursuant to the Consumer Protection Act 1987 (the "CPA"). The CPA implemented the European Product Liability Directive (85/374/EEC) but judicial interpretation of its terms has been sparse.

In *Baker*, the Court of Appeal returned to its earlier judgment in *Ide v ATB Sales Ltd & Another* [2007] EWHC 1667 (QB), [2008] EWCA Civ 424 (CA) to conclude that motorcycle brakes were defective in that they allowed corrosion to develop following normal use in circumstances where standard, non-defective brakes would not have done.

## The accident and first instance decision

In February 2010, Mr Baker, the Claimant/ Respondent, was riding his KTM Supermoto 990 motorcycle along a road, travelling within the speed limit, when suddenly and without warning, the front brake of the motorcycle seized, causing Mr Baker to be thrown from the motorcycle. He suffered severe personal injuries as a result.

Mr Baker sued the manufacturer of the motorcycle, KTM Sportmotorcycle ("KTM"), the Defendant/ Appellant, alleging that the accident was caused by a defect in the motorcycle contrary to section 3(1) of the CPA and / or KTM's negligence.

On 8 May 2015, the judge, Mr Recorder Mainds QC, upheld Mr Baker's claim under the CPA and awarded him damages. The Recorder found that the cause of the seizing of the brakes was galvanic corrosion which had happened "*as a result of a design defect combined with faulty construction or the use of inappropriate or faulty materials*".

## Expert evidence at the Appeal

KTM brought an appeal on the ground that there was no or no sufficient evidence before the court that the galvanic corrosion was caused by a defect in the motorcycle within the meaning of the CPA.

At appeal, Lord Justice Hamblen reviewed the expert evidence that had been before the court. In particular, Mr Baker's engineering expert had noticed a discolouration of the surface of the brake disc, suggesting that it had been subject to high operating temperatures and that the brakes were not operating in an evenly balanced way.

Deposits were found containing copper, iron, chromium, nickel and zinc. These were considered to be aluminium oxide / hydroxide, produced by galvanic corrosion rather than a build-up of road salt. The expert noted that this deposit was insoluble in water and would be difficult to wash out of confined spaces within the brake by the recommended procedure for cleaning. His conclusion was that, although there might be some provision in the brakes of the motorcycle for resistance against galvanic corrosion, it did not appear to provide sufficient protection.

The appellant's expert said that the seizing of the brakes could be explained through a failure to undertake the recommended maintenance and cleaning.

## When is there a defect? Guidance from *Ide v ATB Sales*

According to Section 3 of the CPA, a product is defective "*if the safety of the product is not such as persons generally are entitled to expect*". In determining what persons are entitled to expect, all the circumstances pursuant to Section 3(2) are to be taken into account, including any instructions for use, any warnings and what might reasonably be expected to be done with or in relation to the product.

In applying Section 3 to the evidence before the court, the case of *Ide v ATB Sales* was cited. In that case the handlebar of a mountain bike fractured and the issue was whether the fracture occurred because the handlebar was defective or whether it fractured when the claimant fell.

At first instance in *Ide*, Gray J had explained that he did "*not consider it to be necessary for me to determine the precise mechanism which led to the handlebar fracturing but rather whether the evidence supports the conclusion that, as a*

*matter of probability, the handlebar was defective in a way which caused it to fracture.*" The Court of Appeal in *Ide* held that this was a permissible approach and upheld the judge's decision that the handlebar was defective.

In the present case, Lord Justice Hamblen concluded that the *"Ide case accordingly illustrates that there may be a defect within the meaning of section 3 of the CPA, even though the precise mechanism by which that defect arose is not proven. In the Ide case, the handlebar was defective in that it failed following normal use and in circumstances where a standard non-defective handlebar would not have failed"*.

## How much detail is needed to prove a defect?

Returning to the issue before the court in *Baker*, KTM submitted that to prove his case Mr Baker had to show that there was a particular feature of the design or manufacture of the braking system which led to galvanic corrosion and that he had not done so.

However, Lord Justice Hamblen ruled that *"there was no need for Mr Baker to plead and prove a specific design or manufacturing defect. As the Ide case makes clear, it is not necessary to show how a defect was caused; it is sufficient to find that there is a defect"*.

In the present case the defect found was a susceptibility for galvanic corrosion to develop in the front brake system when it should not have done. Use of the motorcycle had been limited and normal. Proper servicing, cleaning and maintenance had taken place. It was open to the Recorder to infer that the susceptibility of this motorcycle's braking system to such corrosion was a defect.

The Judge noted that a heavily corroded brake system was not expected to be found in a recently purchased, low mileage motorcycle which had been properly serviced and maintained. *"There must have been a defect for the galvanic corrosion to develop as it did. It was also open for the Recorder to infer that this susceptibility must have been a result of a defect in design and / or manufacturing process, but there was no necessity for him to identify the precise nature of that defect."*

Accordingly, KTM's appeal was dismissed and the Court of Appeal found that the motorcycle's breaks had seized due to a defect. Mr Baker was successful in his claim.

## Comment

While not requiring the claimant here to prove a specific design or manufacturing defect, the Court did not lack plenty of expert evidence as to the nature of the defect.

While defendant manufacturers understandably may have wanted the claimant to explain exactly how the defect had come about, the presence of a clearly identified causative defect was not in dispute. In this case, the brakes were defective in that they allowed galvanic corrosion to develop following normal use *"in circumstances where standard non-defective brakes would not have done"*. At the time of the accident the motorcycle was less than two years old, its mileage was low, it had been fully serviced, it was only halfway through its service cycle, it was regularly and appropriately cleaned and its use was normal.

It is interesting to note that the Court of Appeal adopted the idea of standard and non-standard products, as set out in *A v National Blood Authority [2001] 3 All ER 289*, the Hepatitis C litigation. Much of the reasoning from that decision was challenged in the recent case of *Wilkes v DePuy [2016] EWHC 3096*. However, the Court of Appeal made no specific reference to these judgements

Instead, the reasoning of Lord Justice Thomas in *Ide* was followed: *"In determining whether the loss or injury has been caused by a defect or by some other cause, although the process of reasoning may involve an explanation of how the defect was caused, the task of the court is simply to determine whether the loss was caused by the defect and not by another cause"*.

Here, the Recorder had identified the relevant issues and had made findings which were open to him on the evidence and were consistent with the primary findings of fact made by him. In these circumstances, no error of law had occurred and the appeal was dismissed.

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