COMPENSATION FOR INFECTED BLOOD PRODUCTS: A and others v National Blood Authority and Another

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1. Introduction

It is estimated that in the United Kingdom in the 1970s and 1980s, 14,000 people contracted Hepatitis C from blood transfusions, and more than 1,200 haemophiliacs were infected with HIV following treatment with imported Factor VIII, a blood-clotting agent. Many non-haemophiliacs were also infected with HIV following blood transfusions and tissue transfer during that time.\(^1\) Claims in negligence against a number of Government agencies responsible for the blood supply were commenced in respect of the HIV infection\(^2\) but proceedings were not pursued after negotiations with the Government led in 1988 to the creation of a compensation scheme for those that had contracted post-transfusion HIV infection, a scheme now administered by the Macfarlane and the Eileen Trusts. The quest for compensation by those that contracted post-transfusion Hepatitis C has only recently, however, been successful, and only partially at that. On 26 March 2001, the case of A and others v National Blood Authority and another\(^3\) made legal history for being the first case in the United Kingdom to succeed against the producer of a medical product. The case, brought under the strict liability provisions of the Consumer Protection Act 1987 (CPA), which implemented the Product Liability Directive (the Directive)\(^4\) involved claims by some of the English victims of post-transfusion Hepatitis C infection, and signified the success of some of the reforming aspirations motivating the introduction of the Directive.

The Directive had been the product of a long and protracted process of reform in product liability laws, inspired, in part, by the tragedy of Thalidomide and the difficulties that

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\(^2\) HIV Haemophiliac Litigation (1990) 41 BMLR 171.

\(^3\) A and others v National Blood Authority and another [2001] 3 All ER 289. Note that it has been agreed that the judgment will not be appealed.

The claimants faced in seeking compensation for their injuries in negligence. The Directive sought to create a scheme of strict liability, removing the need to prove fault, or that the producer’s conduct was not reasonable in the production of the product, in order to obtain damages. The Directive imposes primary liability on producers for damage caused by their products. Liability is limited to three years following the date that the claimant becomes, or ought to become aware of the damage, the defect, and the identity of the producer, and ten years following the date that the product was put into circulation. The claimant must prove the damage, the defect, and the causal relationship between the two. The claimant must also prove that the product is defective, namely, that ‘it does not provide the safety which a person is entitled to expect, taking all circumstances into account’. However, as a result of concessions primarily intended to assuage industry concerns, the Directive contains a defence of development risks, albeit capable of derogation by Member States. The producer is provided with a defence where they are able 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’. The inclusion of such a defence, and its adoption in the United Kingdom in the CPA, has caused concern that the strict liability scheme is little more than a modified version of negligence. This possibility would be of particular concern in relation to injuries caused by medical products, where the particular difficulties of establishing liability in negligence are well known. The success of the claimants in A and others has therefore come as a welcome confirmation that despite the inclusion of the development risks defence, some of the reforms have been achieved. It has also been a welcome success for some of those that have tragically been the victim of post-transfusion blood infection. This paper considers the judgment in A and others and the implications that it has had for the development of the law in this area, and suggests that despite important improvements some difficulties remain, and that the situation for future victims of post-transfusion infection, and those yet to obtain compensation, is far from settled.

2. Claims for infected blood: The background

A and others involved claims by 114 persons infected with the Hepatitis C virus following blood transfusions given to them in the course of medical treatment between 1 March 1988, the date that the provisions of the Directive were implemented in domestic law, and 1 April 1991, the date from which the defendants agreed not to dispute the majority of claims. The
risks of post-transfusion Hepatitis had been known since the 1940s, and a screening test was developed in 1971 after the identification in 1964 of Hepatitis B - then the only known serum version of the virus. By 1975 another type of serum Hepatitis was suspected, and this type, eventually named Hepatitis C, was not identified until 1988. A screening test was developed in 1989, and introduced into the United Kingdom in 1991, all but eliminating the incidence of post-transfusion Hepatitis infection. The trial was structured around a consideration of the generic issues raised by the claims, and six lead cases. Much of the judgment is related to findings on complex factual issues and to determination of the nature and measure of damages in each of the lead cases. Burton’s consideration of the generic aspects of the claims were still, however, considerable, and despite it being a judgment of the High Court, the case can be considered to be the most authoritative and exhaustive exposition of the Directive in the United Kingdom to date.

Burton’s detailed judgment demonstrated a firm commitment to realise the reforming purposes intended by the Directive. In the course of the judgment, he sought very clearly to distinguish the provisions of the Directive from the rules in common law negligence and to eschew notions of reasonableness, as far as possible within the terms of the Directive, from liability that is supposed to be strict. In particular, Burton placed at the heart of his judgment, the principles of consumer protection and the facilitation of compensation that he perceived to be central to the spirit of the Directive. It is also worth noting another distinctive aspect of the case, that being Burton’s decision to refer to the wording of the Directive, rather than that of the CPA, throughout. Cognisant of the differences in wording between them and the dispute that had arisen between the European Commission and the United Kingdom Government regarding the difference between the wording of the development risks defence in the Directive and the CPA, Burton chose ‘to go straight to the fount’.

The judgment then centred on two issues, namely, whether the blood was defective, and, if so, whether the defendants could plead the development risks defence to exculpate the otherwise strict liability for the defect in the product. The possible preliminary questions of whether blood was a product and whether the defendants were producers did not arise, since both parties agreed that blood constituted a product under the Directive, and the National Blood Authority and others were producers of the blood.

3. Determining the defectiveness of blood products

As indicated above, the Directive provides that ‘[a] product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account’. The test is framed in terms of consumer expectations rather than in the test

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12 Discussed below.


14 A and others, 298. For discussion of the question of natural products, such as biological ones constituting products under the Directive, see Grugg, A. and Pearl, D. S. (1990) Blood Testing, AIDS and DNA Profiling Bristol, Family Law, and imprint of Jordan & Sons Ltd, 135-42.

15 Article 6(1).
familiar in negligence of producer reasonableness. The defendants, however, sought to argue that the relevant test was as to the conduct that a consumer could reasonably expect of the producer in ensuring the safety of the product. The defendant’s proposed test, however, barely concealed a negligence standard of reasonable producer conduct, and would, if accepted, have proven to be a distortion of the more objective, product-related test of consumer expectations. Burton agreed with the claimants that the relevant test related to the legitimate expectation of the public in relation to the safety - or not - of the product in question: ‘I do not consider that the legitimate expectation of the public at large is that legitimately expectable tests will have been carried out or precautions adopted. Their legitimate expectation is as to the safeness of the product (or not).’

The framing of the defectiveness enquiry in this way demonstrates Burton’s aforementioned commitment to eschewing a negligence-based standard from interpretation of the strict liability standard in the Directive. Indeed, this was important, since the tendency for strict liability to collapse into negligence and for there to be a conflation of the two standards had been glimpsed in the few cases that had previously considered the provisions of the CPA. In Worsley v Tambrands, for example, involving a claim concurrently in negligence and under the CPA, it was argued that tampons were unsafe because they did not provide adequate health warnings on the box, although warnings were contained on an enclosed leaflet. Negligence and strict liability were not distinguished, and it was held that ‘[t]he defendant had done what a menstruating woman was, in all the circumstances, entitled to expect’ the manufacturer to do, and the way in which the warnings were given was sufficient. In Richardson v LRC Products Ltd, involving a claim only under the CPA for pregnancy resulting from a fractured condom, significant reliance was placed on the compliance of the producer with quality standards, and the adequacy of the defendant’s manufacturing process. The claim that the condom was defective because it fractured was rejected on the basis that contraception was not expected to be perfectly effective, but there was, however, no consideration of what level of safety a consumer would be entitled to expect in relation to the safety of a condom, and why the user would not be entitled to expect that it would not fracture or be subject to an ‘inexplicable failure’. Similarly, in Foster v Biosil there was limited explication of the nature of legitimate consumer expectations, in relation to the safety of a silicone breast implant that had ruptured, and instead attention was paid to the apparent adequacy of the manufacturing process and unlikelihood therefore, of the manufacturing process giving rise to the defect leading to the rupture. Ultimately, the case

16 A and others, 335.
19 Worsley v Tambrands, per Ebsworth, J, 104.
20 Richardson v LRC Products Ltd [2000] PIQR 164.
21 Excluding the costs of upbringing for a healthy child, per McFarlane v Tayside Health Board [2000] 2 AC 59.
22 Foster v Biosil 59 BMLR 178.
failed on a simple, but curious aspect of proof, being that the claimant could not prove the cause of rupture in a breast implant, although it was accepted that the rupture did not occur during the surgery and that the rupture had indeed rendered the implant unsafe. In Abouzaid v Mothercare (UK) Ltd, the fourth cases to consider the CPA, and in which liability under the CPA, but not in negligence was established following eye injury caused by a buckle attached to a recoiling elastic strap, there is less tendency to conflate a product- and producer-orientated enquiry, although it is exhibited in places. In the instant case, therefore, Burton’s clear distinction between a product- and a producer-orientated enquiry, was a welcome setback to the conflation between strict liability and negligence that had so far beset consideration of the CPA to date.

The product-orientated enquiry having been made explicit by Burton in A and others, it became necessary to engage in the more complex determination of legitimate consumer expectations. In conducting this enquiry, Burton introduced a distinction between standard and non-standard products that was previously unfound in case law in the United Kingdom. Burton rejected the traditional distinction between manufacturing, design, and information defects on the basis that they were not apt to include, or at least appropriately characterise, some defects that might arise, for instance, as a result of flaws in the design of a manufacturing process. Burton saw the distinction between a standard and non-standard product as crucial, and incorporated this as an essential step in the test that he developed for determining whether the product was defective. Burton’s formula based on the standard/non-standard distinction was first to identify the harmful characteristic that caused the defect. In the instant case, the harmful characteristic was clearly the Hepatitis C virus. The second step was to determine if the product was a standard or non-standard product. Burton’s definition in this respect was that:

... a standard product is one which is and performs as the producer intends. A non-standard product is one which is different, obviously because it is deficient or inferior in terms of safety, from the standard product: and where it is the harmful characteristic or characteristics present in the non-standard product, but not in the standard product, which has or have caused the material injury or damage.

The principal comparison to be made in determining the standard or non-standard nature of the product was with other products of the same type or series as the product in question. In the instant case, therefore, the comparison was with other bags of blood intended by the producer. On the face of it, therefore, the bags of blood containing the harmful characteristic (the virus) were different from the other bags - not containing the harmful characteristic (the virus) that were intended by the producer, and the blood products in question were therefore to be regarded as non-standard. This conclusion is, however, not the only one possible. It would, for example, have been possible to regard the bags of blood containing the virus as standard products, since they did not differ from the other products in the series, since it could be argued that all of the products in the same series contained the same risk of viral infection that the actually infected bags of blood did. However, Burton dismissed as philosophical the suggestion that all blood products should be regarded as carrying the same risk of infection, and therefore as standard, those products that materialised the risk.

23 Abouzaid v Mothercare (UK) Ltd. 21 December 2000 WL.

24 A and others, 317.
Having characterised the product as non-standard, Burton then stated that the relevant question simply became, ‘whether the public at large accepted the non-standard nature of the product - i.e. they accept that a proportion of the products is defective’. Then, the legitimacy of that expectation needed to be tested, taking into account all relevant factors, such as warnings and the presentation of the product. In testing the legitimacy of the consumers’ expectations, however, Burton made it clear that the conduct of the producer was an irrelevant consideration. Thus, whether it would have been possible, practicable, costly, or burdensome to avoid the harmful characteristic arising in the product was irrelevant. In that way, Burton excluded from consideration of legitimate consumer expectations, the issue of avoidability that he regarded as being relevant only to the question of development risks. Excluding avoidability demonstrates again Burton’s commitment to excluding enquiries as to the producer’s conduct, and therefore the reasonableness of it, from determination of whether the product was defective. Indeed, this rejection of the relevance of the producer’s conduct similarly applied to the (therefore irrelevant) fact that the defendants in this case had a statutory obligation to supply the product and therefore would not have been in a position to cease supply of the product in question.

Reasoning to support a rejection of the relevance of the producer’s conduct can also be found in other judgments within the European Community that have considered the provisions of the Directive. In *The German Bottle Case*, for example, the Bundesgerichtshof (BGH), the German Federal Supreme Court, found a carbonated mineral water bottle to be defective within Article 6 and § 3(1) *Produkthaftungsgesetz* (the Product Liability Act of 15 December 1989 which implemented the Directive), notwithstanding that the defect was caused by a very fine hairline crack in the bottle, which could not have been discovered by state-of-the-art factory inspections. The BGH described the bottle as a rogue product, and stated that the consumer expected that the bottle would not have obvious or microscopic damage that might cause it to explode. The unavoidability of the defect in the case was not relevant to the consumer expectations test: ‘The fact that it is not technically possible to detect and repair such defects in the bottle does not alter the consumer’s expectations.’ In the case of *Scholten v Foundation Sanquin of Blood Supply*, the unavoidability of the defect was also considered to be irrelevant to the test of consumer expectations. In that case, the County Court of Amsterdam found it to be irrelevant that the producer could not detect the presence of the HIV virus in blood during the ‘window’ period, that being the period between the donor contracting the infection and the development of the HIV antibodies upon which the HIV-1 RNA screening test was based. Although the producers in that case succeeded eventually in establishing the defence of development risks, the Court held the producer’s conduct to be irrelevant. Compliance with the relevant guidance for testing, and the fact that

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25 *A and others*, 340.

26 *A and others*, 319.


28 Quoted in *A and others*, 321.

29 3 February 1999, unreported, County Court of Amsterdam.

30 Considered below.
the screening test could not have detected the virus were not considered to be relevant to consumer expectations.

In these cases, and in the instant case, the consumer expectation test is clearly framed so as to exclude consideration of producer conduct at any stage. The exclusions clarified, however, leaves the still complex consideration of what actually constitutes legitimate consumer expectations in relation to a product. It might be, though, that, in order to ascertain an objective standard, some sort of risk/utility analysis might be relevant, albeit a consideration that is also incorporated within a negligence standard of liability. In A and others, however, Burton treated risk/utility with caution, deeming it to be irrelevant except in the limited circumstance 'of whether - with full information and proper knowledge - the public does and ought to accept the risk'. A risk/utility analysis would only therefore be relevant in ascertaining consumer expectations if, in fact, the public knew about and accepted the risk. Warnings, probably explicit and publicised, would have to be given. In the instant case, although the risk of infection in blood was known to doctors and to the small number of patients who asked about the possibility of infection, Burton did not believe that the public knew of nor accepted the risk of infection. Indeed, Burton believed that they regarded the product as being safe: ‘I do not consider it to be arguable that the consumer had an actual expectation that blood being supplied to him was not 100% clean, nor do I conclude that he had knowledge that it was, or was likely to be, infected with Hepatitis C.’ Burton’s emphasis on the actual expectation of the consumer may, in the event, have undermined the integrity of his stated test of legitimate consumer expectations. Indeed, perhaps tellingly, Burton thought it to be ‘impossible to inject into the consumer’s legitimate expectation matters which would not by any stretch of the imagination be in his actual expectation’. If warnings are given, however, their effect on whether a consumer had, or had legitimately accepted the risk is debatable. In Scholten, for example, the risk of infection had been estimated to be one in one million, and a leaflet provided by the defendants to the claimant indicated the presence of the risk. However, the leaflet stated that the risk was so small that it should be considered that there would, in fact, not be any infection. Moreover, considering the vital importance of blood, the lack of an alternative, and the legitimate public expectation that blood products had been free of HIV infection for some time, the blood had to be regarded as defective.

In the instant case, the fact that the product was characterised as non-standard, and the fact that no warnings had been given meant that it was not necessary to consider the complex question of whether the public legitimately accepted the risk of infection, rendering Burton’s conclusion that the Hepatitis C infected blood was defective, straightforward. As for the less straightforward cases, for instance those concerning standard products, Burton provided some guidance. He suggested that ‘standard products, if compared at all, will be compared with other products on the market’ and ‘[t]he sole question will be safety for the foreseeable

31 A and others, 340.
32 A and others, 334.
34 A and others, 335.
35 A and others, 319.
Again, in relation to standard products the risks of side effects would only be regarded as being ‘socially acceptable’ if they are made known. However, in relation to standard products as well as non-standard products, a warning even if made known might not preclude a determination of defectiveness if the warning could be construed as a provision seeking to waive or limit the producer’s liability, an event which is precluded by the no-waiver provision in Article 12 of the Directive.

4. The development risks defence: Discoverability of the defect

Having found the blood to be defective, it then fell to be considered whether the defendants could establish the defence of development risks. The Directive provides that a defence would be available where the producer was able to demonstrate ‘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’. As with the defectiveness enquiry, the framing of the test in relation to development risks defence proved central to its outcome for the defendants. At the relevant time, it was clear that the risk of Hepatitis C infection was known to exist in blood products, although it was only until the development of a screening test that it would have been possible for it to have been discovered in the particular blood products that were the source of the infection contracted by the claimants. Thus, the risk was known to exist in the population of products, but not in the particular product that caused injury to the claimants. The defendants argued that the relevant test was whether the state of scientific and technical knowledge was such as to enable the risk to be discovered in the particular product - the particular bags of infected blood. The claimants argued that the relevant test was as to the discoverability of the risk in the population of products.

Support for the former approach can be found in the Australian case of *Graham Barclay Oysters Pty Ltd. v Ryan*. This case concerned liability for Hepatitis A (viral Hepatitis) contracted from oysters that had contracted the virus from faecal contamination in the lake in which they were grown. Section 75AK(1)(c) of the Australian Trade Practices Act 1974 provides the manufacturer of a product with a defence if ‘the state of scientific or technical knowledge at the time when they were supplied by their actual manufacturer was not such as to enable that defect to be discovered’. Although the risk of infection in oysters generally was known, it would have been impossible to test for the presence of the virus in individual oysters, since the only test that would have revealed the infection would have destroyed the oysters tested. Nor would it have been possible to extrapolate reliably from testing a sample of the population of oysters. The Federal Court rejected the appellant’s claim that the relevant question was whether the state of scientific and technical knowledge was such as to enable the presence of the Hepatitis A virus to be discovered in the particular

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36 *A and others*, 340.
37 *A and others*, 338.
38 *A and others*, 339.
39 Article 7(e).
40 (2000) 177 ALR 18, Aust FC.
oysters, and held instead that the relevant test was as to the discoverability of the virus in the particular ‘good’, or particular oyster. A similar approach was adopted in the Scholten case, where the Court addressed the question of discoverability to the particular products infected. The Court in Scholten held that the scientific and technical knowledge at the time of the donation and transfusion of the HIV-infected blood to the claimant, would not have enabled discovery of the HIV infection in the blood, since the screening test could not have detected the infection in the ‘window’ period in the particular blood product.\(^{41}\)

The framing of the test as being the discoverability of the defect in the particular product was, however, rejected by Burton in \textit{A and others}. Burton noted that the particular product/population of products difference had not been argued in either \textit{Graham Barclay} or \textit{Scholten} and that, in addition, the Australian statute contained wording that was different to the Directive, and that, perhaps, was more conducive to the result that was reached, although he still maintained that the opposite conclusion might also have been legitimate within the wording of the statute. Moreover, the \textit{German Bottle} case supported Burton’s conclusion that the relevant test related to the discoverability of the defect in the population of products rather than in the particular product. In that case, the BGH concluded that, ‘Liability should only be excluded when the potential danger of the product could not be detected because the possibility to detect it did not (yet) exist at the time of marketing.’\(^{42}\) Because in that case the risk of the bottles exploding had been known of for some time, the defence was not available. From that case it is not clear whether the result is that the development risks defence could never be applied in the case of a ‘rogue’ product - or a defect arising out of a manufacturing flaw, but Burton thought that this implication was in any case unnecessary, and in any case probably the result of an assumption on the part of the BGH that ‘rogue’ - or non-standard products - were always manufacturing defects. Thus, in Burton’s analysis, there is no restriction on the availability of the defence according to the type of defect, but the availability of the defence is subject to a decisive limitation when the relevant defect is a known one. This conclusion regarding known defects is also supported in \textit{obiter} comments in \textit{Richardson}, where it was stated that the defence would only be available where ‘there was a defect of which the leading evidence of available scientific knowledge was ignorant’ and not ‘in the case of a defect of a known character, merely because there is no test which is apt to reveal its existence in every case.’\(^{43}\)

Burton’s say on the matter was thus: ‘The \textit{existence of the defect} is in my judgment clearly generic. Once the \textit{existence of the defect} is known, then there is the risk of that defect materialising in any particular product.’\(^{44}\) To find otherwise would have emaciated the effect of the consumer protection and facilitation of compensation intended by the Directive: ‘It would, in my judgment, be inconsistent with the purpose of the Directive if the producer, in the case of a known risk, continues to supply products simply because, and despite the fact that, he is unable to identify in which if any of his products that defect will occur or recur

\(^{41}\) Discussed in \textit{A and others}, 332.

\(^{42}\) Quoted in \textit{A and others}, 331.

\(^{43}\) \textit{Richardson v LRC Products Ltd.}, per Ian Kennedy, J, 172.

\(^{44}\) \textit{A and others}, 342.
The result of Burton’s decision to have regard to the discoverability of the defect in the population of products rather than the particular product has the result of imposing liability onto producers for defects that are known but undiscoverable in practice. There may be cogent legal and policy reasons for not imposing liability in these circumstances. It is arguable that the Directive did not intend this level of liability. However, in the absence of a preliminary reference, which was not sought in A and others or in the other cases decided under the Directive, this is a moot point. Certainly, in the case of a defect that is known but undiscoverable in practice the producer could provide the consumer with a warning, which might have the effect of eliminating liability at the defect stage. Thus, the effect of Burton’s judgment is not to remove from the producer any possibility of avoiding liability in the case of a known but in practice undiscoverable defect, but, instead, to provide the producer in these circumstances the opportunity of avoiding liability only at the earlier stage of determining defectiveness. It seems that the policy reasons for seeking to ensure that producers are not made liable for known but in practice undiscoverable defects should properly be the concern of policy makers rather than the courts. Indeed, the Directive contains provisions for a review of its impact at five-year intervals, and seeks proposals for reform, and there is therefore a forum within which some structured policy review takes place.

The exclusion of known risks from the development risks defence, therefore, prevented the issue of discoverability in the instant case really ever becoming a live one. However, it is in fact in cases in which the risk is not known that the most complex legal and conceptual issues will arise. Although it is well considered in academic literature, the dearth of case law in the United Kingdom thus far had prevented substantive consideration of the notion of discoverability by the courts. There was some consideration, however, in Abouzaid. In that case, it was argued that in the absence of a record on the relevant incident database or the risk of recoiling elasticated strap injury, the state of scientific and technical knowledge was not such as to enable the existence of the defect in the product to be discovered. However, the Court did not regard an incident database as scientific and technical knowledge and thought instead that the defence contemplated knowledge that shed light on the propensities of materials to behave in a particular way or to permit defects to be discovered.

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45 A and others, 341-342.
48 Article 21. The Directive also contained a requirement for the review of the development risks defence ten years following the adoption of the Directive: Art. 15(3).
51 Abouzaid v Mothercare, per Pill, LJ.
Indeed, one Judge in *Abouzaid* went so far as to indicate that it had not been the state of scientific and technical knowledge that had prevented the defect from having been discovered, but the simple fact that it had not been thought of.\(^52\) Thus, it would appear that by rejecting the development risks defence in that case for the reason that there was a failure to appreciate the connection between latent energy in the elastics straps and the resulting injury, the Judge was prepared to impose liability on a producer for a failure to make the creative or logical links that would have been necessary to realise that material with known propensities could behave in a particular way to cause a particular injury. *Abouzaid* aside, however, there had been no proper consideration of the notion of discoverability in the domestic courts.

In the absence of authority, Burton relied heavily on the case of *EC Commission v United Kingdom (Re the Product Liability Directive)*\(^53\) for inspiration first, for his restrictive approach to interpretation and second, for his conclusions on the issue of discoverability in the context of cases in which the relevant risk was not, in fact, known.

*Commission v UK* involved infringement proceedings brought by the Commission against the United Kingdom for failure to implement the Directive properly into domestic law. The Commission argued that version of the defence in the CPA was inconsistent with the Directive, providing the producer with a defence that was subjectively, rather than objectively based, namely, 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’\(^54\). The court held, however, that there was no case providing evidence of inconsistent interpretation (there was no case at all) and there was no likelihood of inconsistent interpretation, since the CPA contained a requirement that its provisions be construed in conformity with the Directive.\(^55\) In the course of their submissions, the Commission’s main contention was that the version of the defence enacted in the United Kingdom could imply the relevance of standards in a particular industrial sector as opposed to standards of knowledge generally. The Court confirmed, however, that the defence contemplated all sectors of knowledge, and, in particular, included the most advanced level of knowledge available. As long as the knowledge was available, it did not have to be the knowledge actually had by the producer, but knowledge of which it is presumed that the producer is informed. Accessibility, therefore, was key: ‘In order for the relevant scientific and technical knowledge to be successfully pleaded against the producer, that knowledge must have been accessible at the time when the product in question was put into circulation.’\(^56\) The Advocate General’s opinion gave an indication of when information became knowledge and when that knowledge became accessible. Isolated opinions, prior to the process of ‘beautification’ would not be knowledge, but once accepted, would constitute knowledge in terms of the defence. But, that knowledge would only then be deemed

\(^52\) *Abouzaid v Mothercare*, per Chadwick, LJ, 9.


\(^54\) S. 4(1)(e) (emphasis added).

\(^55\) S. 1(1).

\(^56\) *Commission v UK*, 940.
accessible once there was a reasonable opportunity for the actual information to circulate. Thus, drawing on an example from the submissions by the Commission, the Advocate General rejected the proposition that knowledge was capable of being known if it was known by anyone, anywhere in the world doing anything. For instance, knowledge would be accessible if known by a researcher in the United States and published in an international English language journal, but not if ‘carried out by an academic in Manchuria published in a local scientific journal in Chinese, which does not go outside the boundaries of the region’.

Burton relied heavily on these conclusions in his comments in *A and others*, endorsing the accessibility criterion, and, arguably, by implication the notion of a pseudo-reasonableness standard therein. Burton agreed that the relevant knowledge was the most advanced available to anyone, and that which was accessible. As for ascertaining accessibility, he approved of the Manchurian ‘test’, stating that: ‘It seems to me that the right approach is to look at “accessibility” and to regard as Manchuria perhaps an unpublished document or unpublished research not available to the general public, retained within the laboratory or research department of a particular company.’ Burton’s general rule, could therefore be simply stated thus: ‘If there is a known risk, i.e. the existence of the defect is known or should have been known in the light of non-Manchurianly accessible information, then the producer continues to produce and supply at his own risk.’

5. Conclusion

From the discussion above, it can be seen that the case of *A and others* produced significant and, it is thought, desirable improvements in the prospects of claims being successful against producers under the provisions of the CPA/Directive. Product-related injury, particularly in the medical sphere, poses difficulties to consumers in seeking compensation, where complex matters of proof frequently beset claims. *A and others*, however, confirmed, importantly, that the process of reform instigated by the Thalidomide tragedy, and long in coming to fruition, has been, at least partially, successful. Many issues have yet to be resolved, such as the impact of warnings on legitimate consumer expectations, both in relation to standard and non-standard products, the precise nature of the defect enquiry in relation to standard products and the still vexed question of discoverability in the case of a defect that is unknown. It still remains to be seen how the standard/non-standard dichotomy will be developed, and, how, as a decision of at first instance, the precedent of *A and others* will stand. Few cases concerning the CPA have been decided since *A and others*, one failing on the basis of causation prior to consideration of the substantive issues of defectiveness and

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57 *Commission v UK*, 934.
58 *Commission v UK*, 934.
59 *A and others*, 326.
60 *A and others*, 326-327.
61 *A and others*, 341-342.
development risks\textsuperscript{62} and another, showing support for Burton’s judgment but very much peculiar to its own facts.\textsuperscript{63}

It is of some concern, even following \textit{A and others}, that many claims involving medical products, and even others involving blood, might not fare so easily. For instance, warnings might be used to elide a finding of defectiveness and although, as Burton emphasised, warnings cannot always protect a producer from liability, they might. Indeed, it should be remembered that it is in the context of warnings, and acceptance by the public of them, that Burton would permit a consideration of the risk/benefit ratio. A life-saving product such as blood will always have a high benefit ratio, and the risk of the many infections that may be transmitted through blood are small. The risk of vCJD, for example, is said to be theoretical. It is not clear how a court in the future might have regard to a situation where there was a warning as to this risk, which was very small, in the context of the life-saving propensities of blood products. Thus, some difficulties remain for consumers seeking compensation in respect of product, and, more pertinently, blood product injury. In addition, it should be remembered that some of the victims are as yet uncompensated. The time limits imposed by the Directive have prevented some from claiming, and the Scottish victims are still awaiting the outcome of negotiations to secure a compensation settlement without recourse to the law. It is suggested that the conclusion of the Expert Group on Financial and Other Support, commissioned by the Scottish Executive to consider the issue of compensating those infected in Scotland be carefully considered, both to the north and to the south of the border:

\textit{We continue to believe that there is a moral obligation to provide compensation for people who have contracted Hepatitis C through receiving blood products from the NHS in Scotland, and that it is wrong that such people should be treated less favourably than people who have contracted HIV in similar circumstances.}\textsuperscript{64}

\textsuperscript{62} \textit{XYZ and others v Schering Health Care Limited and others} 2003 70 BMLR 88.

\textsuperscript{63} \textit{Sam B and others v McDonald’s Restaurants Ltd.} 25 March 2002 WL.