Product liability: *Baker v KTM*: It is not necessary to show how a defect was caused

"*The most complicated skill is to be simple*." — Dejan Stojanovic

The EU Product Liability Directive 1985[1] and the consequent Consumer Protection Act 1987 ("CPA") were introduced in the aftermath of the Thalidomide scandal. The legislators' intention was to provide a level playing field for EU manufacturers and, more importantly, a simple and uniform no-fault consumer protection system throughout the EU.[2] Despite the latter aim, product liability has created some of the most complex litigation ever to hit the UK courts. Pleadings can resemble – to those who can remember them – telephone books. There are often detailed and complex requests for further information about the precise mechanisms alleged to have caused the defect or injury in issue. This has created a far more complicated legal process than the fault-based system the Consumer Protection Act was meant to supplant.[3] In short, as stated by Emily Jackson:

> "The Consumer Protection Act, despite its name, has proved to be a remarkably consumer-unfriendly piece of legislation."[4]

However, appellate judges have again now provided relief from the unnecessary complexities prevalent in consumer protection litigation in another simple "back to basics" lesson, *Baker v KTM Sportmotorcyle UK Ltd.*[5] The Court of Appeal reiterated the straightforward approach it took in *Ide v ATB Sales Ltd.*[6] In short:

> "….it is not necessary to show how a defect was caused; it is sufficient to find that there is a defect."[7]

Mr Baker sued KTM on the basis that an accident and resultant injuries he sustained were caused by a defect in KTM's motorcycle contrary to section 3(1) of the CPA.[8] Recorder Mainds QC at first instance found that the cause of the accident was the seizure of the motorcycle's brakes due to galvanic corrosion. He rejected the contention that the seizure of the brakes was due to a failure to clean them. He held that the corrosion represented "defects in the braking system" which meant

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[1] Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products

[2] The preamble/recital to the EU Product Liability Directive stated: "the liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production". The progenitors of the Directive had to address who should bear the economic burden of an individual damaged by a defective product. They thought an "insurance solution" was best and hence the producer was best placed to pass those economic costs onto all non-damaged users of non-defective products by a slight increase in the final product price.

[3] For a background review of the law see "A personal (and selective) introduction to product liability law" Christopher Johnston QC JPIL 2012

[4] *Law and Regulation of Medicines*, Bloomsbury, pg 125

[5] [2017] EWCA Civ 378

[6] [2008] EWCA Civ 424

[7] §35

[8] http://bit.ly/2rF1Pre

that the safety in the braking system was not such as persons generally were entitled to expect. Hence KTM was liable as the motorcycle was defective within the CPA.

KTM appealed on the basis that there was no or no sufficient evidence before the court that the galvanic corrosion was in fact caused by a defect in the motorcycle within the meaning of the CPA. KTM contended that there was no specific design or manufacturing defect which would lead to galvanic corrosion "advanced in Mr Baker's pleaded case or in the evidence." Their central contention was that in order 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."

The Court of Appeal disagreed. Hamblen LJ noted that the *Ide* case showed that there may be a defect within section 3 of the CPA even though "the precise mechanism by which that defect arose is not proven". Thus, 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."

The defect found by the Recorder was that there was a susceptibility for galvanic corrosion to develop in the front brake system when there should not have been. He emphasised that the motorcycle had been regularly and appropriately cleaned and its use was normal. Thus the motorcycle's prior history was not relevant. The Court of Appeal agreed that it was open to the Recorder to infer that the susceptibility of this motorcycle's braking system to corrode was a defect and that there must have been a defect for the galvanic corrosion to develop as it did. There was no need to go further. Whilst it was open to infer this susceptibility must have been a result of a defect in design and / or manufacturing process, "there was no necessity for [the Recorder] to identify the precise nature of that defect."

Hamblen LJ stressed that:

> "In the present 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."

KTM further submitted that a finding of a defect could not be supported without some evidence that there had been a departure "from the standards employed by other motorcycle manufacturers and there was no such evidence". The Court of Appeal rejected this attempt by KTM effectively to introduce negligence by the back door into what should be a no fault assessment. Quite simply there was "galvanic corrosion when there ought not to have been". Thus, the position was simple and "there was no necessity for comparative evidence".

Thus, there had be no error of law and the appeal was dismissed.

The Court of Appeal have therefore made clear once again that it is wholly inappropriate in a "no fault" consumer protection case to impose pleading and evidential constructs which may be appropriate in the context of a negligence action. The focus must be simply on whether the product was "not such as persons generally are entitled to expect" and not on the precise mechanics and reasons why the product failed that standard.

As a footnote, as with the first instance decision in *Wilkes v DePuy,*[9] the *Baker* judgment does not cite the leading – and only – definitive ECJ decision on the question of the appropriate assessment of "defect", namely *Boston Scientific*.[10] It is not clear whether either *Baker* or *Wilkes* should be considered *per incuriam*[11] as that would turn on whether in fact the decision was cited to either court – but certainly it was not cited by either court. Nevertheless, it is hard to conceive why citation of the ECJ judgment in *Boston Scientific* would have led to a different outcome in *Baker*. It seems clear how both the Recorder and Court of Appeal would have answered the key ECJ question derived from *Boston*: did the motorcycle have an "abnormal potential for damage which those products might cause to the person concerned"[12]? The simple answer to that must logically be that the motorcycle – by reason of the galvanic corrosion – did have an "abnormal potential damage", a potential which eventuated in the accident which injured Mr Baker.

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[9] [2016] EWHC 3096 (QB)

[10] *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt - Die Gesundheitskasse* (Case C-503/13, 504/13) [2015] 3 CMLR 173 (CJEU)

[11] A judgment of a court which has been decided without reference to a statutory provision or earlier judgment which would have been relevant.

[12] *Boston Scientific* ibid. §40 (and see also AG decision at §AG30)