Product liability Q&A: Ireland

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Ireland specific issues raised by product liability claims.

This Q&A provides country-specific commentary on *Practice note, Product liability: Cross-border*, and forms part of *Cross-border commercial transactions*.

How a claim is brought in contract

1. Under what conditions can a buyer make a product liability claim in contract law? Can the buyer sue for breach of an implied term of the contract, or breach of express terms only?

A buyer can make a product liability claim in contract law if the product does not comply with the terms of the contract and as a result, the buyer suffers loss, damage or injury.

A buyer can sue for breach of both express and implied terms of a contract.

The Sale of Goods Act 1893 (1893 Act) and the Sale of Goods and Supply of Services Act 1980 (SGSSA) imply a number of terms into a contract for the sale of goods, including:

- **Title (*section 12(1), 1893 Act*)**. It is an implied condition that the seller has the right to sell the goods and an implied warranty that the goods are free from any charge or encumbrance not disclosed to the buyer and that the buyer will enjoy quiet possession of the goods.
- **Description (*section 13, 1893 Act*)**. It is an implied condition that goods must correspond with the description provided. If goods are sold by description and sample, it is not sufficient that the bulk of the goods correspond with the sample if the goods do not also correspond with the description.
- **Merchantable quality (*section 14(2), 1893 Act*)**. It is an implied condition that the goods must be of merchantable quality unless:
    - defects have been specifically brought to the buyer's attention before the contract has been made;
    - the buyer examines the goods before the contract has been made as regards defects which that examination ought to have revealed.

- **Fit for purpose (*section 14(4), 1893 Act*)**. Where the seller sells goods in the course of a business and the buyer, expressly or by implication, makes known to the seller a particular purpose for which the goods are being purchased, there is an implied condition that the goods are reasonably fit for that purpose, whether or not that is a purpose for which such goods are commonly supplied. This condition is not implied where the circumstances show that the buyer does not rely, or that it is unreasonable for him/her to rely, on the seller's skill or judgement.
- **Sale by sample (*section 15, 1893 Act*)**. There are implied conditions by sale of sample that:
    - the bulk must correspond with the sample in quality;
    - the buyer must have reasonable opportunity to compare that bulk with the sample;
    - the goods will be free from defect that would render them unmerchantable, which would not be apparent on reasonable examination of the sample.
- **Spare parts and servicing (*section 12, SGSSA*)**. There is an implied warranty that spare parts and an adequate after sale service will be made available by the seller in such circumstances as are stated in any offer, description or advertisement by the seller on behalf of the manufacturer or on his/her own behalf and for such period as is stated. If no period is stated, then it must be for a reasonable period.
- **Materials used (*section 39, SGSSA*)**. It is implied in a contract for the supply of a service where the supplier is acting in the course of a business that any materials used will be sound and reasonably fit for the purpose for which they are required.

In addition to the 1893 Act and the SGSSA, the European Communities (Certain Aspects of the Sale of Consumer Goods and Associated Guarantees) Regulations 2003 (2003 Regulations) will also apply where the buyer is a consumer. The 2003 Regulations require that consumer goods delivered under a contract of sale to a consumer must be in conformity with that contract. Consumer goods are presumed to be in conformity with the contract of sale if they:

- Comply with the description given by the seller.
- Are fit for any particular purpose for which the consumer requires them and which he/she made known to the seller at the time of conclusion of the contract.
- Are fit for the purposes for which goods of the same type are normally used.
- Show the quality and performance which are normal in goods of the same type and which the consumer can reasonably expect, given the nature of the goods and taking into account any public statements on the specific characteristics of the goods made about them by the seller the producer or his representative, particularly in advertising or on labelling.

2. Can a claim be brought by someone who is not a party to the contract?

No, as strict privity of contract rules apply in Ireland, whereby subject to limited exceptions, third parties generally do not have enforceable contractual rights under contracts governed by Irish law.

Under Irish law, agency, trust or deed poll arrangements are needed to enable benefits under a contract to be sued upon by a third party.

3. How does national law regulate consumer guarantees?

Consumer guarantees are regulated by sections 15 to 19 of the SGSSA. A guarantee is defined as any document, notice or other written statement, howsoever described, supplied by a manufacturer or other supplier, other than a retailer, in connection with the supply of any goods and indicating that the manufacturer or other supplier will service, repair or otherwise deal with the goods following purchase (*section 15, SGSSA*).

The SGSSA requires a guarantee to be clearly legible and to refer only to specific goods or to one category of specific goods. A guarantee must clearly state the following:

- Name and address of the person supplying the guarantee.
- Duration of the guarantee from the date of purchase (different periods may be stated for different components of the relevant product).
- Procedure for presenting a claim under the guarantee.
- What the manufacturer or other supplier undertakes to do in relation to the goods and what charges, if any, including the cost of carriage, the buyer must meet in relation to such undertakings.

(*Section 16, SGSSA*.)

A guarantee cannot exclude or limit the rights of the buyer at common law or under statute and any provision in a guarantee which purports to impose obligations on the buyer which are additional to his/her obligations under the contract will be void (*section 18, SGSSA*).

In addition to the SGSSA, the 2003 Regulations will also apply where the buyer is a consumer. Under the 2003 Regulations, a guarantee is defined as any undertaking by a seller or producer to the consumer, given without extra charge, to reimburse the price paid or to replace, repair or handle consumer goods in any way if they do not meet the specifications set out in the guarantee statement or in the relevant advertising. Regulation 9 of the 2003 Regulations provides that a guarantee is legally binding on the offeror and will:

- State that the consumer has legal rights under the 2003 Regulations and other enactments governing the sale of consumer goods and make clear that such rights are not affected by the guarantee.
- Set out in plain, intelligible language the contents of the guarantee and the essential particulars necessary for making claims under the guarantee, including the duration and territorial scope of the guarantee and the name and address of the guarantor.

4. On whom is the burden of proof?

The injured party bears the burden of proving a breach of contract, that is, proving the defect and the damage caused by the defect. The standard of proof is on the balance of probabilities.

5. What is the limitation period for bringing a claim for breach of contract?

In Ireland, the time limits within which a person is entitled to bring civil proceedings are contained, for the most part, in the Statute of Limitations Act 1957 and the Statute of Limitations (Amendment) Acts 1991 to 2000 (Statute of Limitations).

For a breach of contract, the limitation period to bring an action is six years from the date of accrual of action, that is, the date on which the breach of contract occurred and not when the injury or damage was suffered.

6. Are there any defences to a claim for breach of contract?

It is a complete defence to a claim for breach of contract to prove that the action is statute barred, that is, the claim is taken outside the statutory limitation period (see *Question 5*).

A defendant can defend a claim for breach of contract by proving that the basic rules of contract formation have not been complied with, that is, there has not been a valid offer, acceptance and/or consideration. Similarly, mistake,

misrepresentation, duress and inadequate capacity to contract will also affect the validity of a contract and may provide a defence to a claim for breach of contract.

A claim for breach of contract can also be defended by disproving one of the essential elements of the claim, or by relying on the terms of the contract. For example, if the parties to a contract have agreed to limited or excluded liability for either or both parties, this (where the clause is enforceable) will provide a defence or limitation to a claim for breach of contract.

7. What remedies are available for a breach of contract?

The remedies which are available for breach of a contract will depend on whether there has been a breach of an express term and/or an implied term of the contract. The main remedies for breach of contract are to sue for damages, injunctive relief or an order for specific performance.

Express term. The liability for breaching an express term of a contract varies depending on the nature of that term, namely whether it is a condition, warranty or an innominate term.

A condition is a fundamental term of the contract that goes to its root. Breach of a condition is known as a repudiatory breach and the innocent party is entitled to either:

- Terminate the contract (irrespective of whether it is prejudiced or not by the breach), not pay the contractual amount and/or sue for damages.
- Affirm the breach and claim for breach of contract.

A warranty is a contractual term which is less important than a condition. A warranty is a statement about a factual matter which one party makes in the contract. Breach of a warranty does not entitle the innocent party to terminate the contract or treat it as discharged; the innocent party only has the right to sue for damages and other remedies consistent with the contract remaining in place.

A term is considered to be an innominate term if the remedy for its breach depends on the effect of the breach at the time the breach occurred. It is generally considered to be a type of "no man's land" between a condition and a warranty. A term is likely to be considered to be an innominate term if the contract was silent as to the nature of the term at the time the contract was formed because the consequences of the breach vary from trivial to serious. If the effect of the breach is substantially to deprive the innocent party of the whole benefit of the contract then it will be a serious breach of the innominate term and the remedy will be for breach of condition. If this is not the case, then the remedy will be for breach of warranty.

Implied term. Breach of a term implied by statute is a breach of the contract for which the consumer will have both a statutory and common law remedy.

The 1893 Act and the SGSSA imply a number of terms into a contract for the sale of goods. The remedies available for breach of such an implied term will depend on whether that term is a condition or a warranty (see *Question 1*). All

of these implied terms are treated as conditions under Irish law, with the exception of the warranties as to implied encumbrances and charges in respect of the goods provided for in section 12 of the 1893 Act and the warranty with respect to spare parts and servicing in section 12 of the SGSSA. Breach of a condition may give the consumer the right to terminate the contract, reject the goods and sue for damages. Section 62 of the SGSSA makes it clear that breach of a warranty will give the consumer the right to sue for damages, but not the right to reject the goods and treat the contract as repudiated.

8. To what extent can liability for breach of contract be excluded?

The 1893 Act and the SSGSA imply a number of terms into contracts for the sale of goods (see *Question 1*). The implied condition and warranty as to title set out in section 12 of the 1893 Act may never be excluded. The implied conditions with regards to sale by description, merchantable quality and fitness for purpose, and sale by sample, can never be excluded where the buyer deals as a consumer. Any provisions attempting to exclude these conditions will be deemed void. In any other case, attempts to exclude liability for these implied conditions will not be enforceable unless it is shown that it is fair and reasonable (*section 55, 1893 Act*).

In addition, under the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995 (1995 Regulations), an unfair term in a contract concluded with a consumer by a seller or supplier will not be binding on the consumer. Where the contract is capable of continuing in existence without the unfair term, the contract will continue to bind the parties.

An unfair term is defined under the 1995 Regulations as a term which contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations under the contract to the detriment of the consumer. This is taking into account the nature of the goods or services for which the contract was concluded and all circumstances attending the conclusion of the contract and all other terms of the contract or of another contract on which it is dependent.

Schedule 3 of the 1995 Regulations includes an indicative and non-exhaustive list of the terms which may be regarded as unfair. These include, for example, terms which have the object or effect of:

- Excluding or limiting the legal liability of a seller or supplier in the event of personal injury to a consumer resulting from an act or omission of that seller or supplier.
- Authorising the seller or supplier to dissolve the contract on a discretionary basis where the same authorisation is not granted to the consumer.
- Enabling the seller or supplier to terminate a contract of indeterminate duration without reasonable notice (except where there are serious grounds for doing so).
- Irrevocably binding the consumer to terms with which he/she had no real opportunity of becoming acquainted before the conclusion of the contract.

- Enabling the seller or supplier to alter the terms of the contract unilaterally (without a valid reason which is specified in the contract) or to alter unilaterally (without a valid reason) any characteristics of the product or service to be provided.
- Giving the seller or supplier the exclusive right to interpret any term of the contract.

How a claim is brought in negligence

9. Under what conditions can a buyer make a product liability claim under negligence law?

A buyer can make a product liability claim under negligence law where the following elements are satisfied:

- The defendant owed a duty of care to the buyer.
- There was a breach of that duty of care by the defendant.
- The breach of the duty of care caused damage to the buyer.
- The damage to the buyer was reasonably foreseeable.

10. Against whom can a claim in negligence be brought?

Typically, a product liability claim in negligence will be brought against the manufacturer of the defective product, who owes a duty of care to those who may foreseeably be injured or damaged by the product.

However, a claim can also be brought against anyone in the supply chain who has breached a duty of care owed to the injured party, including, for example, a supplier, repairer, installer, assembler or retailer.

11. On whom is the burden of proof?

In general, the burden of proof is on the injured party to prove, on the balance of probabilities, that the defendant was negligent and that this negligence caused him/her injury or damage.

In certain limited circumstances, the doctrine of *res ipsa loquitur* (the principle that the mere occurrence of some types of accident is sufficient to imply negligence) may also be applied to reverse the burden of proof and place the onus on the defendant to disprove an allegation of negligence. This doctrine will apply, for example, where a particular element of the tort lies pre-eminently within the defendant's knowledge (see *Hanrahan v Merck Sharp & Dohme (Ireland) Ltd*).

12. What is the limitation period for bringing a claim in negligence?

Under the Statute of Limitations, subject to limited exceptions the limitation period for personal injury claims due to negligence or breach of a duty of care is two years from the later date of the:

- Accrual of the action.
- Injured person became aware of the accrual of the action.

13. Are there any defences to a claim in negligence?

There are three main defences to a claim in negligence (apart from asserting that any of the constituent elements of a negligence claim do not apply):

- **Contributory negligence**. Under the Civil Liability Act 1961 (1961 Act) contributory negligence is not an absolute defence to a claim in negligence. Where the damage suffered by the claimant was caused partly by the negligence or want of care of the claimant and partly by the wrong of the defendant, the damages recoverable will be reduced by such amount as the court thinks just and equitable having regard to the degrees of fault of the claimant and the defendant (*section 34(1), 1961 Act*). In particular, the failure of a claimant to mitigate his/her damage will be considered to be contributory negligence.

- **Voluntary assumption of risk**. This defence is regulated by section 34(1)(b) of the 1961 Act. A defendant will not be held liable where he/she can demonstrate that the claimant, before the act was agreed, waived his/her legal rights in respect of the act.
- **Illegality.** It will not be a defence in an action merely to show the claimant is in breach of the civil or criminal law (*section 57(1), 1961 Act*). However, the 1961 Act gives no further guidance as to what other factors are required for a successful defence of illegality. In certain limited circumstances, where the claimant was engaged in illegal activity at the time the loss was suffered, the defendant may be able to avail of the defence of illegality.

14. What remedies are available for a claim in negligence?

The main remedies for a claim in negligence are an award of damages as compensation for the wrong committed, or injunctive relief.

The purpose of damages in tort is to place the claimant in the same position that he/she would have been in had the wrong not occurred. There are two main types of damages:

- **General damages.** These are intended to compensate for non-pecuniary loss that results from the wrong complained of, for example, pain and suffering or loss of life expectancy. An award of general damages is at the discretion of the judge.
- **Special damages.** These compensate for actual financial loss that results from the particular circumstances of the case, for example, loss of earnings, cost of medical treatment, damage to property. Special damages are not recoverable unless proven, or agreed between the parties.

In certain circumstances, exemplary damages which are punitive and deterrent in nature may also be awarded.

In assessing damages in a personal injuries action, the court is required by section 22 of the Civil Liability and Courts Act 2004 to have regard to the Book of Quantum, which contains general guidelines as to the amounts that may be awarded in respect of specified types of injury. However, this does not preclude the court from having regard to matters other than the Book of Quantum when assessing damages in a personal injuries action.

15. To what extent can liability in negligence be excluded?

Under the 1995 Regulations, liability in negligence for fatal or personal injuries resulting from an act or omission by a seller/supplier cannot be excluded or restricted in a consumer contract (see *Question 8*).

In addition, under section 2 of the Liability for Defective Products Act 1991 (the 1991 Act), a producer is strictly liable for damages caused by a defect in his/her product. The liability of a producer under the 1991 Act cannot be limited or excluded by any term of contract, by any notice or by any other provision.

In business to business contracts, subject to the above the parties generally can exclude or limit liability in negligence by agreement.

Strict liability claims

16. How is strict liability implemented in national law?

In Ireland, strict liability is governed by the 1991 Act, which implements Directive 85/374/EEC on liability for defective products.

Under section 2 of the 1991 Act, a 'producer' (as defined) is liable in damages in tort for damage caused wholly or partly by a defect in his/her product. A product is defective if it fails to provide the safety which a person is entitled to expect, taking all circumstances into account, including the:

- Presentation of the product.
- Use to which it could reasonably be expected that the product would be put.
- Time when the product was put into circulation.

17. To what extent can strict liability be excluded?

The liability of a producer under the 1991 Act to an injured person cannot be limited or excluded by any term of contract, by any notice or by any other provision (*section 10, 1991 Act*).

However, an action for the recovery of damages under the 1991 Act may not be brought after the expiration of three years from the date on which the cause of action accrued or the date (if later) on which the claimant became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer. Moreover, a

right of action under the 1991 Act is extinguished on the expiration of ten years from the date on which the producer put the product which caused the damage into circulation (unless the injured person has in the meantime instituted proceedings against the producer).

18. What remedies are available for a strict liability claim?

A producer is liable in tort for damage caused wholly or partly by a defect in his/her product (*section 2, 1991 Act*). The main remedy for a claim in negligence is an award of damages as compensation for the wrong committed.

If damages in respect of loss of or damage to, or destruction of, any item of property other than the defective product itself would not exceed EUR441.41, then no damages will be awarded (*section 3, 1991 Act*). If damages amount to over EUR441.41, then only the excess will be awarded.

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