DUTY TO DISCLOSE INFORMATION ON HAZARDS: TAKING A LEAD FROM ZIPPER MANUFACTURER WARNING OF ZIRPI RISK

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Abstract

This study is an exploration of the duty of producers for products manufactured for the end-user. The focus of this study is on the liability of zipper manufacturers for Zipper-Related Penile Injury (ZIRPI) sustained by consumers. The study adopts the doctrinal approach, where cases and legislations related to product liability are examined in-depth, undertaking an observation from the law of contract, tort, and the statutory duty of manufacturers. To date, there has not been any successful litigation on ZIRPI pursued in the civil courts. Finally, this study will produce an explanation on the duty owed by zipper manufacturers to ZIRPI victims with regards to the warning of the risk, and to avoid the risk from materialising.

Introduction - Understanding ZIRPI as a Risk to Consumers

The zipper was invented by Gideon Sundback, a Swedish immigrant, who was an electrical engineer by training.[1] He made improvements to the "clasp locker," a boot-lacing mechanism developed by inventor Whitcomb Judson, which frequently jammed. He was then awarded the patent for the "separable fastener" in 1917, whereby his basic design remains unchanged to this day.[2] Judson and Sundback's Meadville, Pa. company, Talon, Inc., has been the world's main supplier of zippers for over half a century until it was eclipsed by YKK, the Tokyo-based corporation founded by Tadao Yoshida.[3] The zipper has since become popular as a fastener on many products that include luggage, jackets, boots, tents, and ultimately on trousers for men. The use of zipper as a fastener in these products provides convenience to the user in which the mechanism could attach and detach the openings very effectively. On a snatch of pull, users can close the zipper and a pull in reverse would open the zipper. Compared to other types of fasteners, for example, the buttons, which the user needs to give some attention for every button to be done or undone, the zipper, however, provides a greater degree of convenience. However, the use of zippers as a fastener for these products are not free from the risk of personal injury on the consumer. For example, the zippers on the jackets could injure the chin or lips; zippers on hoodies can catch the eyelids; zippers on boots may catch or aggress against the skin of the feet, just to name a few.

In this paper, particular regard is given on the use of the zipper as a fastener attached to trousers for men without notice of caution about the risks of personal injuries. In most designs

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1 RD Friedel, *Zipper: An Exploration in Novelty* (WW Norton & Co, 1996).

2 Ibid.

3 Ibid.

of trousers for men, the zipper is usually placed at the front, slightly under the belt, and ultimately near the genitals. To a certain extent, it is believed that the zipper is located there to allow the user to expose the penis rapidly to answer the call of nature. Precaution is necessary as the use of the zipper as a fastener on the fly for trousers is not without any risk of personal injuries. In particular, users are exposed to the risk of getting zipper-related penile injuries (ZIRPI) while using the zipper as a fastening mechanism for the fly (albeit being ignorant, careless and / or reckless).

The machinery of a zipper consists of the slider with 'v' shape facet joining the two separable linings of metal (or plastic) teeth together on a pull in an upward direction. Upon pulling in a downwards direction, the slider separates the interlocked zipper teeth. In the operation of this interlocking mechanism, where the slider is being moved up and down frequently, there is a risk that something could be caught in between the teeth of the zipper during the movement of the slider, which includes any part of the human body (where the zipper is used as a fastener in garments). For this reason, there is a real risk of the penis getting caught in the zipper on the trousers for men.

Whether the risk of ZIRPI is an obvious risk to the users or a risk that manifests the appearance of safety under circumstances cloaking a reality of danger is still unclear. Any prudent and reasonable man would be entitled to expect that the garments they use on their body should not cause any bodily injuries. Be it as it may, the warning of the risk of ZIRPI (or any bodily injuries) is rarely found in most trousers for men in the market. Hence there could be many tragic incidents where the victim sustains ZIRPI due to the lack of knowledge of the risk, forgetfulness, carelessness, or recklessness during a moment of haste. According to Wyner, the risk factors for ZIRPI include the victims being uncircumcised or insufficiently circumcised, victims not wearing underwear, and being of a young age (under 18) who are either ignorant of the risk, careless or reckless while dressing themselves.[4]

The phrase zipper-related penile injury -'ZIRPI' was coined by a medico-legal scholar, Bagga, whose research revealed that the annual incidents of ZIRPI were about 2,000 per year in the United States of America alone.[5]

To date, there is yet to be any successful litigation on ZIRPI in civil courts in England and Wales. The question as to why zipper manufacturers are yet to be liable for ZIRPI remains a mystery. On the other hand, other self-inflicted injuries, such as contaminated underwear causing the consumers to suffer dermatitis and injuries caused by the buckles and straps on babies' sleeping bags have received different treatment by the courts. The following section seeks to examine the potential liability of zipper producers regarding the risk of ZIRPI from the perspective of civil law.

Liability of Producer under Civil Law

In English law, a producer of a product is under an obligation to ensure their products will not cause harm to their end-users[6]. In this study, the duty of producers of the zipper are scrutinised

4 Lawrence M Wyner, 'Prepare for ZIRPI!' (2018) 2(1) Ann Urol Res 1014.

5 HS Bagga, GE Tasian, J McGeady, SD Blaschko, CE McCulloch, JW McAnich, & BN Breyer, 'Zip-related Genital Injury' (2013) 112(2) BJU Int 191-4.

6 *Donoghue v Stevenson* [1932] All ER Rep 1.

from a wider perspective, that includes the law of contract, common law of negligence, and the statutory duty under the Consumer Protection Act 1987.

Liability under the Law of Contract

Before the case of *Donoghue v Stevenson*[7] was decided, the only remedy for users of defective goods was the law of contract.[8] The law of contract provided that someone who had bought a defective product could sue the person from whom the product was purchased for breach of contract. The protection of consumers under the law of contract was provided by various statutes, which the first among all, is the Sales of Goods Act 1893. This piece of legislation stated that certain terms regarding the quality of the goods sold should be implied into the contract, even though the parties themselves had not particularly agreed to it, *ipso facto,* the buyer would be able to claim for remedy if the goods bought had not met the standard imposed by the Act. The Act has since been regularly updated and extended by later legislation.

Under the law of contract, only the person who purchased the defective product would have the *locus standi* to sue for the alleged breach of contract. This rule is known as the doctrine of privity in contract, which *inter alia* has the consequence that only the purchaser who has a contract with the seller can sue for breach of contract, and not, in particular, the user of that product. For example, if A bought a defective product from B, and gave it to C who used it and suffered harm as a result of the defective quality of the product, then C cannot sue B since he has no contract to purchase the item from B.[9] The only person who can sue is A, who is privy to the contract. In this sense, consumer protection was very much limited under the law of contract because of the operation of the doctrine of privity of contract.

The passing of the Contracts (Rights of Third Parties) Act 1999, however, has altered the above position. The 1999 Act provides that a third party (who is not a privy to a contract), is able to enforce a contractual term where the contract either expressly states that the term (or perhaps the entire contract) should give rights to a third party, or any specific term in the contract intends to confer a benefit onto the third party. Nonetheless, if the contract does not indicate that it gives rights to third parties, then the court will examine other evidence that could suggest the relevant term was intended to confer a benefit on a third party.

Despite the modification on the law of privity of contract by the 1999 Act, the common law rule still remains, which provides that only the person who has actually sold the product can be sued, and not anyone else. It is commented that this rule may cause hardship to the purchaser of defective goods if the seller cannot be traced, is bankrupt, or is impecunious, then the purchaser would have no claim at all. It can be further criticised that it may cause the seller to be in trouble where the defects were not caused by him, but instead by the manufacturer. On the operation of the doctrine of privity of contract, the purchaser cannot sue the manufacturer of the goods since the contract was between him and the purchaser. The manufacturer will get caught-free and the seller would have to compensate the unfortunate purchaser for the defects caused by the defective product.

> Under contract law, a product can be considered defective in any of these two ways: (1) where the product fails to perform as expected, or of adequate quality;

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7 Ibid.
8 Ibid (n 6) 6 (Lord Buckmaster)
9 Ibid (n 6).

> (2) where the product is dangerous (it may damage other property or injure people). Either or both of these defects can give rise to a claim for a breach of contract. A claimant does not need to prove that the product was defective because of something that the seller had done or had failed to do. In a claim for breach of contract, the claimant need not prove fault on the part of the seller. On the other hand, the claimant has to prove that there was a term in the contract which stated that the product would be of a certain quality and that the defect concerned means that this term has not been fulfilled. The term referred to could be something that the purchaser and the seller had particularly agreed to in the contract between them. Nonetheless, the law also covers situations where the purchaser insists on terms implied into the contracts by the Sales of Goods Act 1979. *Inter alia,* the main terms implied by the 1979 Act are that the goods sold are 'of satisfactory quality' and reasonably fit for their purpose.

In cases of ZIRPI, the only person who can be sued is the fashion retailer and not the manufacturer of the zipper or the garment producer. The victim of ZIRPI might want to argue that the risk was not drawn to his attention or the product does not contain any warning of such hazards. Therefore, the zippered trousers in the instant case could be said to be defective as there are no warnings on the risk of ZIRPI. Furthermore, a contract only exists between the user and the retailer (probably the fashion store), and there is no contract between him and the manufacturer of the trousers; (or the manufacturer of the zipper). In this instant, the user may only sue the retailer for the defective product. The users, however, cannot sue the manufacturer of the trousers because there is no contract between them in the first place. Therefore, it is not a proper avenue for the ZIRPI victim to sue the producer of the zipper and/or fashion producer under the law of contract.

Liability under the Law of Negligence

When the case of *Donoghue v Stevenson*[10] was decided, the House of Lords established the principle that the producers of products owe a duty of care to the end-user.[11] The principle is known as the 'neighbour principle'. Lord Atkin in his judgment explained that:

> The rule that you are to love your neighbour becomes in law: You must not injure your neighbour, and the lawyers' question: 'Who is my neighbour?' receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who then, in law, is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.[12]

Since then, the tort of negligence has played an extremely significant role in consumer protection and remains important even since the passing of consumer protection legislation.

In *Donoghue,* Lord Atkin explained that a manufacturer of a product owed a duty to the end-user for their products, and this duty was further widened by the later sittings of the courts. The duty not only includes the manufacturer of products meant for consumption but also

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10 Ibid (n 6).
11 Ibid (n 6).
12 Lord Atkin in *Donoghue v Stevenson* [1932] All ER Rep 1, 11.

includes repairers whose service was engaged,[13] erectors who build structures,[14] and distributors who buy and sub sell the products.[15] The duty extends further to cover situations not only for someone who has actually used the products but has sustained injury as a result of the defect in it, as seen in cases of *Brown v Cotterill*[16] and *Stennett v Hancock.*[17] Case law has illustrated that anyone involved in the supply chain of a defective product may also be liable for negligence.[18]

The duty applied in the case of *Donoghue v Stevenson* could have been read as a duty applied only to food and drinks, but the courts soon extended the scope beyond this to any type of product. Cases have shown that products ranging from underpants to tombstones are covered, that includes their packaging and labels or instructions for use.[19] A product liability action in negligence can only be brought in respect of dangerous products; however, defects which make a product less well, or products which are of low quality are not recoverable. Since the action under negligence requires the claimant to prove damage, the product concerned must be dangerous and has caused some harm as a result. A claim under negligence cannot be brought on the basis that the product would potentially cause harm, but the claimant must show on the balance of probabilities that such harm had transpired. A claim in negligence will compensate both personal injury and damage to property, but it does not cover damage to the defective product itself. The defective product itself is instead classified as pure economic loss, and not recoverable in negligence. Therefore, a ZIRPI victim can claim for the injury he has sustained against the producer of the trousers, but in the event the trousers need to be cut off for rescuing purposes, the cost of the trousers itself may not be recoverable as it is classified as pure economic loss.

Product liability cases in the tort of negligence are subject to ordinary rules of negligence, that requires proof of fault; and the rule of causation that requires the claimant to prove that the defendant's failure to take reasonable care caused the defect that made the product dangerous. Although the claimant must prove that the defect was due to the defendant's lack of reasonable care, they need not show exactly what it was that the defendant did wrong.[20] In principle, where it is established that damage has been caused by a defect in the manufacturing process of goods, it is not necessary to show exactly what was wrong with the process.[21] In the famous case of *Grant v Australian Knitting Mill*s,[22] the claimant suffered a painful condition after wearing new underpants. Tests showed that the fabric of the pants contained high residues of a chemical which was used in the manufacturing process and that this had caused the problem. The claimant could not point to a specific defect in the manufacturing process, and the manufacturers argued that they had taken reasonable care to prevent the risk, by putting in place a quality control system which complied with industry standards. However, the court held that this was not only insufficient to prove reasonable care had been taken but

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13 *Stennett v Hancock* [1939] 2 All ER 578.
14 *Brown v Cotterill* (1934) 51 TLR 21.
15 *Watson v Buckley, Osborne, Garrett & Co* (1940) 1 All ER 174.
16 See (n 14). In this case, where a tombstone fell on a child, the erectors were held liable for the injury the child had sustained.
17 [1939] 2 All ER 578. In this case, a pedestrian was hit by part of a defective wheel on a passing lorry, the repairers were held liable for losses and injuries caused by the defective items.
18 *Andrews v Hopkins* (1957) 1 QB 229.
19 *Watson v Buckley, Osborne, Garrett & Co* (1940) 1 All ER 174.
20 *Mason v Williams & Williams Ltd* (1955) 1 WLR 549.
21 *Carroll v Fearon* (1998) PIQR P416.
22 [1936] AC 85.

in fact could be taken as evidence of negligence. The court explained that if there was a system in place, the problem could only have arisen if one of the company's employees had been careless and prevented the quality control system from operating properly. Thus, the manufacturers would be vicariously liable for the acts of their employees, and therefore the claimant won his case.

Tortious liability under the tort of negligence does not cover defects that are not dangerous, *ipso facto* it is of no use in cases where the product does not work, if of poor quality, or does not last, but only covers harmful products. The tort of negligence requires the claimant to prove fault, by showing the defendant had failed to take reasonable care. In cases of ZIRPI, the victim needs to show that the producer of the trousers has failed to take reasonable care in providing label or instructions to warn the users of the risk in getting ZIRPI. As seen in the case of *Kubach v Hollands,*[23] providing a label or a warning of risk could save a defendant from liability in negligence. This comes from the principle of reasonableness, which examines whether the defendant had taken reasonable steps to avoid the occurrence of such harm by providing sufficient warning. The facts of this case were that a schoolgirl was injured when chemicals used in a science lesson exploded. The manufacturer of the chemicals had sold the chemicals to a retailer, with a warning that they should be tested before resale. However, the warning provided was ignored and the retailers sold the chemicals to the school without testing them and without passing on any warnings. The court held that the retailers were liable, but the manufacturers were not.

Statutory Liability under the Consumer Protection Act 1987

The Consumer Protection Act 1987 was passed to rectify the drawbacks and to fill in the lacunae in the law of negligence to protect consumers against dangerous products. The passing of this Act is to respond to the European Union Directive of 12 July 1985[24] laying down requirements to harmonise laws affecting trade in different countries. The Directive and the 1987 Act are often thought to impose strict liability in the area of product liability; however, there are contentions to it. The Act imposes liability on the 'producer' of the defective product and gives this term a wide definition. It is stated to include the manufacturer of the product and the person who 'wins or abstracts' it. The liability also extends to any parties responsible for a process, which is of 'essential characteristics' to the product.

Section 2(1) of CPA 1987 defines a 'product' as 'any goods or electricity'. 'Goods' is further explained in the Act as including 'substances, growing crops, and things comprised in the land by virtue of being attached to it, and any ship, aircraft or vehicle'. The term 'product' also includes 'a product which is comprised in other products, whether by virtue of being a component part, raw material or otherwise'. The Act also further lists several types of items which do not fall within the term 'product' *inter alia*, the immovable, and pure information. However, producers can be liable for injuries caused by errors or omissions in instructions or warnings for a product. In ZIRPI cases, it could be said that there is an omission on the part of the producer of the trousers to warn the users of the risk of personal injury by the zipper.

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[23] (1937) 3 All ER 970.
[24] 1985/374/EEC.

Furthermore, the zipper is located very near to the genital thus there is an increased risk for users to contract injury. Therefore, a warning is indeed needed in this circumstance.

The CPA 1987 only covers defects that are dangerous and excludes liability for products which perform less well or become less valuable. Section 3 of CPA 1987 states that a product is held defective under the Act if 'the safety of the product is not such as persons generally are entitled to expect'. The word 'entitled' in the Act means that the courts can set the standard according to what is reasonable to expect from a particular type of product. In assessing the standard, the Act directs the courts to take into account 'all the circumstances', and its stated three factors which are considered relevant:

(i) The way the product is marketed, including any advertising claims, instructions or warnings that come with the product,
(ii) What might reasonably be expected to be done with or in relation to the product,
(iii) When the product was supplied by the producer to another.

In *Bogle v McDonald's Restaurants Ltd*,[25] the claimants were McDonald's customers who had been scalded after spilling coffee on themselves. The claimant raised the argument that the coffee was defective because it was too hot, and also because the cups sold had lids which came off easily. Nonetheless, the court found that the temperature at which the coffee was sold was acceptable, given that customers would want it to be served hot, and the design of the cups was also reasonable based on the *ratio* that the lids had to be easily removed so that the customers could add milk and sugar. Therefore, it may be said that the reasoning concerning the Act was that the standard of safety was such as 'persons generally are entitled to expect' because no one would expect McDonald's to sell cold coffee to prevent a risk of scalding. Therefore, the court based their judgment on objective standards as to what is reasonable to be expected by the people generally, and not based on the subjectivity of the claimant. Applying the principle to cases of ZIRPI, the court should gauge the situation objectively on whether it is reasonable to expect the use of the zipper on trousers would be free from harm.

The case of *Richardson v LRC Products Ltd*[26] concerns a condom, where its tip had broken off at a fairly crucial moment, resulting in Mrs Richardson becoming pregnant. In the action, she sued the producer of the condom for the costs of raising the baby. The court held that it was in the nature of condoms that they would occasionally fail, and the fact that this one had broken did not necessarily mean it was defective under the CPA 1987. Nonetheless, the main reasons why the action failed was because the claim for the costs of raising a healthy baby is not claimable following the *ratio* in the case of *McFarlene v Tayside Health Board*.[27] The court also explained that the claimant could have mitigated her loss by taking the 'morning-after' pill when she realised the condom had broken. This, therefore, forms some part of blameworthiness on the claimant and the producer of the condom cannot be held liable.

In *Abouzaid v Mothercare*[28] the claimant, who was 12 at the time he was injured, had been helping his mother to retrieve a baby sleeping bag known as 'cosytoes' attached to his little brother's pushchair. It was designed to be attached by two elastic straps, which went around

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25 (2002) All ER (D) 436.
26 [2000] PIQR P164.
27 [2000] 2 AC 59.
28 *The Times,* 20 February 2001.

the back of the pushchair and was clipped together with a metal buckle attached to the end of one of the straps. As the claimant tried to fix them, one of the straps slipped from his grasp, and the buckle flew back and hit him in the eye. It damaged his retina, leaving him with severely reduced vision in that eye. The defendant's main argument was that, in 1990, when the sleeping bag was sold, they did not know that there was a danger of injury from the straps. No similar accident had been reported to them nor recorded in the database kept by the Department of Trade and Industry. However, the Court of Appeal referred back to the fact that the test for a defect under the Act is simply that the level of safety is less than that which persons generally are entitled to expect under all the circumstances. It held that expectations were no lower in 1990 than they are now, so the time gap was not relevant. The risk was one which the defendants could have prevented, by using a different method of attaching the straps, and/or providing a warning of the risk.

In *Worsley v Tambrands*,[29] the claimant suffered a condition called toxic shock syndrome (TSS) which is known to be associated with the use of tampons. The tampon she bought carried warnings about TSS on leaflets inside the boxes, which included advice about what to do if the symptoms of TSS appeared, but the claimant's husband had thrown away the leaflet from the box she was using at the time. The claimant argued that due to the seriousness of the disease, the warnings should have been printed on the boxes, or the warnings on the leaflet should have been more strongly presented. The court held that the claim failed on the *ratio* that the presence of the leaflet was mentioned on the box, the leaflet itself was clear and easy to read, and the manufacturers could not be expected to take precautions against people losing the leaflet or throwing it away. As such, the claimant failed to establish that the product was defective under Section 3 of CPA 1987 since sufficient warnings had been provided.

Recently, the High Court in 2016 (though the litigation was not concerning injury caused by the zipper), had an opportunity to consider the meaning of the provision under Section 2 and Section 3 of CPA 1987. The Court in the case of *Wilkes (Anthony Frederick) v Depuy International Ltd*[30] took some time to provide guidance on the meaning of 'defect' under Section 3 which has not been defined satisfactorily all this while. According to Mr Justice Hinkinbottom, the previous authority in the area has not provided concrete definition on the word 'defect' for the purpose of Section 3 CPA 1987. The learned judge provided the following ratio which is reproduced *in extenso*, below:

> …The reference to judges being able to deal with matters on a case-by-case basis reflects the fact that—as is rightly common ground before me—the test for safety in this context requires an objective approach. Therefore, the relevant level of safety is not that which a particular patient considers the product should provide; nor even the level of safety which members of the public generally may consider it ought to provide. The level of safety is not assessed by reference to actual expectations of an actual or even a notional individual or group of individuals. Section 3(1), reflecting article 6 of the Directive (which refers to "the safety which a person is entitled to expect"), defines "defect" in terms of "the safety of the product is not such as persons generally are entitled to expect …" (emphases added). That can only be a reference to an entitlement as a matter of law, not actual individual or even general expectation. As Burton J put it in *A v NBA* [2001] 3 All ER 289, para 31:

[29] [1999] 48 LS Gaz R 40.
[30] [2016] EWHC 3096.

> (iv) The question to be resolved is the safety or the degree or level of safety or safeness which persons generally are entitled to expect. The test is not that of an absolute level of safety, nor an absolute liability for any injury caused by a harmful characteristic.
> (v) In the assessment of that question the expectation is that of persons generally, or the public at large.
> (vi) The safety is not what is actually expected by the public at large, but what they are entitled to expect …" (Emphasis in the original.)
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> [70] The fact that "expectation" in this context is objective in that sense is vitally important; because "expectation" can be (and, in common parlance, is often) used in a different way. Mr Myhill gave an example. A person undergoing spinal surgery with a 1% chance of being rendered paraplegic as a result of his operation due to a non-negligent complication, of which he is appropriately warned, if asked, would not say that he "expected" that complication to occur. It could be said that he does not expect it to occur. However, the patient is not entitled to expect that it will not do so, or that paraplegia will not happen to him, because there is a known (if very small) risk that it will, about which he was properly informed. The surgeon does not guarantee the aspired outcome. It is a risk that the patient bears.
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> [71] In *A v NBA* the parties had agreed that the question raised by the definition of "defect" under the Directive and Act concerned the "legitimate expectation" of persons generally; a formulation to which Burton J assented: see para 31(vi). However, Mr Myhill submitted that the use of the phrase "legitimate expectation" in this context was an unnecessary and unhelpful gloss on the Act, particularly as it is used as term of art elsewhere, eg in public law. I agree. If by "legitimate expectation" here is meant simply "expectation as a matter of law", it would be unobjectionable; but, in my respectful view, a test of what persons generally are "entitled to expect" requires no gloss, and does not benefit from being re-described.
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> [72] Therefore, in considering whether a product suffered from a defect, the court must assess the appropriate level of safety, exercising its judgment, and taking into account the information and the circumstances before it, whether or not an actual or notional patient or patients, or indeed other members of the public, would in fact have considered each of those factors and all of that information.

The Court concluded that there was no defect in the product concerned, since warnings were provided about the possibility of the injury, and the design was compliant with relevant standards. The Court also held that the benefits of this design outweighed any associated risks. It is noted that the clarity provided by this decision has been welcomed as it has provided some much needed clarity in this area on the meaning of the defect. Subsequently, this decision was closely followed by a decision from the Court of Appeal that also elaborated on the meaning and application of Section 3 CPA 1987 in the case of *Baker v KTM Sportmotorcycle UK Ltd and another*.[31]

In this case, the respondent claimant, Mr Baker, was riding his KTM Supermoto 990 motorcycle along Manor Road, Derby. He was travelling within the speed limit, when suddenly, and without warning, the front brake of the motorcycle seized, causing Mr Baker to

[31] [2017] EWCA Civ 378, [2018] 35 ECC 434.

be thrown from the motorcycle, as a result of which he sustained severe personal injuries. He then sued the defendant, KTM Sportmotorcycle AG, the manufacturer of the motorcycle, alleging that the accident and the resulting injuries were caused by a defect in the motorcycle contrary to section 3(1) of the CPA 1987 and / or KTM's negligence. The High Court upheld Mr Baker's claim under the CPA and awarded him for provisional and special damages. The Recorder found that the cause of the seizing of the brakes was a galvanic corrosion which had happened "as a result of a design defect combined with faulty construction or the use of inappropriate or faulty materials". KTM appealed on the ground that there was no or insufficient evidence before the court that the galvanic corrosion was caused by a defect in the motorcycle within the meaning of the CPA 1987. On appeal, the Court of Appeal explained the meaning and application of the word 'defect' under Section 3 of CPA 1987 as follows:[32]

> …It is 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. In my judgment, however, 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.
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> 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, i.e. after limited and normal use and notwithstanding proper servicing, cleaning and maintenance. 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.

This case serves as a further iteration of the way the CPA 1987 operates, namely that liability for damage or injury caused by a defect is strict. It is not necessary for the claimant to demonstrate how the defect was caused it is enough for the claimant to demonstrate the inference of a defect.

Though the recent cases concern other products, however, from this point onwards, it is safe to conclude, that for a claimant to bring a case for ZIRPI against the manufacturer, he must be able to prove that the trousers were defective for want of warning which would sufficiently indicate the presence of the risk. For the manufacturer to be liable, it is necessary for the claimant to prove that a ZIRPI was caused wholly or partly by a defect in the trousers concerned. Highly likely, it is not necessary for the claimant to demonstrate how the defect in the trousers caused ZIRPI, nonetheless it is enough for him to demonstrate the inference of a defect in the trousers (which does not contain any warnings of ZIRPI) had caused him to suffer such injury.

Discussion and Analysis - The Need for Warnings on ZIRPI

Ultimately, the use of the zipper as a fastener on trousers for men provides some form of convenience to users. Though the risk of ZIRPI cannot be avoided completely, the risk of its occurrence can be reduced by giving sufficient warning indicating the presence of such danger. As discussed in section 1 of this paper, the risk of ZIRPI could materialise from many

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[32] Ibid 440 [34]-[35].

factors including, ignorance of the risk i.e. users may not be aware that zippers can cause injuries or can be the cause of unforeseen extended injuries. By giving sufficient notice to users, manufacturers of the zipper may discharge their burden following the case of *Abouzaid v Mothercare*[33] and *Worsley v Tambrands.*[34] In these cases, the court held that the producer of dangerous goods might be able to negate liability when sufficient notice or warning has been given to the users. This, therefore, implies a duty on the manufacturer to disclose hazards associated with their products. Though the courts did not list down the extent of the warning, it is however concluded that a duty to disclose the hazard exists on the part of the manufacturer. Regardless of whether the warnings given should be able to attract the attention of the users, so long it is provided, then the manufacturer has discharged their duty as per the *ratio* in *Worsley v Tambrands*.[35] In this case, the court rejected the argument that the warnings on specific risks should have been printed on the boxes, or the warnings on the leaflet should have been more strongly presented, meaning that it is sufficient for the manufacturer to provide the warnings in any way. Based on that reason, in cases of ZIRPI, the warning could be provided by the manufacturer in any way, as long as that warning is sufficient to indicate the presence of danger and precautions that users should take to avoid/minimise its occurrence.

As discussed in the earlier section, ZIRPI could be considered as a real harm of personal injury to male users. However, there is no litigation on ZIRPI to-date. There is no concrete explanation as to why ZIRPI victims have not pursued the matter in court. However, the following hurdles in the law may be argued to be the challenges. ZIRPI might be seen as a type of injury which is too trivial. In other words, the injury inflicted onto the victims is not serious. According to a study by Stephen W. Leslie; Roger S. Taylor, this injury may be associated with bleeding, swelling, pain, and direct tissue damage.[36] The injury may not ordinarily result in permanent disabilities of the genital, amputation, or anything more serious, thus litigation on this matter may not be desirable. Furthermore, an action under civil law must satisfy the *de minimis* rule, which requires the damage or injury suffered by the victims to be substantial. On the ground that the ZIRPI was not substantial, there is a likelihood that advocates may advise a victim not to proceed with the claim in court, otherwise, such claim would be considered frivolous and vexatious for having no merit. Another possible reason is that the injury would be regarded as too personal for the ZIRPI victim to come to court claiming compensation against others for his own self-inflicted manhood injury. The hurdles in having the case to be publicly heard, giving testimony on the injury on his private parts, showing evidence of the injury and exposing his identity, would probably make him tolerate the options of suing the zipper manufacturer in civil courts, thus no action being pursuit on this.

Would a Prudent and Reasonable Man Regard A Zipper as a "Dangerous" Device?

If we ask any man on the street or on the Clapham omnibus, whether he would consider a blade as a dangerous device, he would probably laugh and almost certainly say 'yes'. However, if we ask that same person, 'would you consider a zipper as a dangerous device?', we would probably have different answers among different respondents. Here, it is much

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33 *The Times,* 20 February 2001.
34 [1999] 12 WLUK 93; [2000] PIQR 95.
35 [1999] 48 LS Gaz R 40.
36 SW Leslie, H Sajad & RS Taylor, *Zipper Injuries* (National Center for Biotechnology Information, 2019).

contentious to conclude whether a zipper is a dangerous device, thus the use of the zipper as a fastener in fashion should be intervened by law to protect the end-user. A study should be undertaken on this matter to show how people would appreciate the zipper as a dangerous device. According to Christian Witting, the test is whether the risk to person and property posed by the product in the context of its common use or uses exceeds what is generally acceptable.[37] He provides the following illustration: "Take the example of a sharp knife marketed as a kitchen knife for chopping vegetables and packaged so as to be reasonably child-proof on display. If the knife cuts off the tip of one's finger, one cannot claim that the injury resulted from a defect. A sharp cutting edge is a risk one accepts as the price for a knife which does its job. But if the same knife were marketed as a 'Marvellous Magic Dagger' and a child should cut herself, the defect would be easier to prove: a risk to children in such a product (clearly aimed at children) would be generally unacceptable. Ultimately, the question is one of whether the manufacturer ought to issue a warning as to dangers one would not expect the product to present. If the danger is both obvious and inherent, and if it is part and parcel of what the consumer would expect, there is no defect".[38]

Conclusion

Based on the discussion above, it is concluded that ZIRPI is a risk that must be guarded against. The use of zipper as a fastener on trousers for men exposes this group of consumers to this type of injury. For users without prior knowledge or experience contacting ZIRPI, the occurrence of ZIRPI may not be reasonably contemplated or foreseen. Thus a warning of the risk of ZIRPI must be given to protect users from contracting injury. As seen in decided cases, producers of the product with some risk of danger can discharge their liabilities by providing sufficient warning to the end-user to avoid or minimise the risk from materialising. Though it is yet to see any successful claims of ZIRPI in court, it is now clear that the victims may have a cause of action.

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37 Christian Witting, *Street on Torts,* (15th edn, OUP 2018) 400.

38 Ibid.