

The 'Peter Parker principle'

Sarah Moore & Stuart Warmington discuss product liability & the platform economy at home & abroad



You don't have to be a statistician to know that the pandemic has transformed our shopping habits. Perhaps forever. The closure of physical stores during lockdowns in response to COVID-19 forced a nation of voracious consumers (of the necessary and not so necessary) onto online shopping platforms, supercharging our use and their profits.

Yet, the 'Peter Parker principle' states that with 'great power comes great responsibility'. There is little doubt that online platforms now wield even more power over consumers in terms of what, how and when we buy. The more vexing question for regulators, consumer advocates and those adversely affected by products purchased through online platforms, is how to balance this great power with appropriate legal responsibilities.

The issue of 'platform' accountability is not entirely new for US lawmakers: a series of cases filed even before the pandemic against Amazon involve a range of products, including flammable hoverboards (*Fox v Amazon.com, Inc.*, 930 F.3d 415 (6th Cir. 2019)), a retractable dog lead (*Oberdorf v Amazon.com, Inc.*, 936 F.3d 182, (3d Cir. 2019)), and lethal caffeine powder (*Stiner v Amazon.com, Inc.* (Ohio Ct. App. 2019) 2019-Ohio-586, 2019 WL 757822). All raised the common issue of whether Amazon should be held strictly liable for products sold on its marketplace by third-party sellers. To date, with one notable exception, the US courts have refused to extend strict liability to online platforms.

The 2016 *Bolger* case is the one notable US exception (*Bolger v Amazon.com*, 53 Cal. App.5th 431 (Cal. Ct. App. 2020)): Angela Bolger, a San Diego resident bought a replacement laptop battery on the Amazon website from Lenoge Technology Ltd, operating on Amazon under the name E-Life. The purchase was charged by Amazon and the battery was shipped in Amazon packaging from an Amazon fulfillment centre. Within a few months, the battery exploded and Ms Bolger was hospitalised for two weeks with serious burns. She duly sued Amazon (and several other defendants): Amazon argued that it could not be held liable under product liability law because it

did not distribute, manufacture, or sell the offending battery. The Californian Court of Appeal disagreed, holding Amazon liable as 'an integral part of the overall producing and marketing enterprise'. Although the plaintiff's success at trial in this case is currently the exception, in California the principles of the *Bolger* decision have since been codified into state law such that the 'electronic retail marketplace' will be subject to strict liability under Californian law in the same way as conventional retailers. Where California goes, the rest of the US may not follow; however, *Bolger* and legislative shifts at state level may indicate that in the US online platforms can no longer rely on falling outside the conventional product liability paradigm.

Contrast this with developments in the EU, where the European Commission is considering tools to proactively regulate the product liability responsibilities of the platform economy. These tools currently include:

- ▶ The Commission's 'Product Safety Pledge' (2018): signed by many of the major online marketplaces, including Amazon. The pledge includes a series of voluntary commitments designed to assist platforms in detecting dangerous products through the kind of 'market surveillance' activities that have traditionally fallen to manufacturers. Crucially, the commitments are voluntary and do not provide for consumer redress where harm occurs.
- ▶ In 2019, the European Law Institute (ELI) published its Model Rules on Online Platforms. The rules focus on increasing the transparency and provision of information between consumer and platform. The principle of 'predominant influence' is advocated as the basis for legal liability following the notion that where a provider puts itself in a place of influence over the supplier and consumer, it should, with a nod to the reasoning in *Bolger*, assume legal liability.

The necessity of developing these entirely new soft law principles in the EU reflects the difficulties inherent in applying laws, ie the Product Liability Directive 85/374/EEC, 1985 (PLD) to 21st century e-commerce models.

Furthermore, in contrast with the US, there is relatively little case law development under the PLD as it currently stands.

Without reform through case law precedent and/or through new tailor-made 'hard' legislation, we query how successful the EU's soft-law approach will be in regulating the platform economy and harnessing its powers to improve product safety for consumers.

In post-Brexit UK, the Office for Product Safety and Standards at the Department for Business, Energy and Industrial Strategy (BEIS) is currently undertaking a review into the future of product safety regulation. The review is focusing on the regulation of product safety in online sales, new models of distribution, the availability of information to online consumers and the role of voluntary standards within the 'platform economy'. It will be interesting to see what comes of the review and where the UK will strike its balance between the US-style development of e-commerce regulation through case law, and the EU's preference for proactive, albeit mostly soft-law, regulatory interventions.

With the value of Amazon's stock having surged by nearly 80% during the COVID pandemic, it was reported in August 2020 that its founder Jeff Bezos had amassed a personal fortune of over \$200bn—a figure worthy of a Marvel superhero. To put that figure into context, BEIS's core departmental spend in 2019-20 was reportedly £3.1bn: what the UK lacks in budget to regulate the platform economy it will need to make up for by harnessing the powers and capabilities of the web to improve product safety. To do that, the UK needs to adopt proactive and progressive regulation in this space which aims at ensuring that the platform economy falls in line with the Peter Parker principle for better protection of consumers in the UK and beyond.

The UK has a real opportunity to become a trailblazer, positioning itself ahead of the curve of platform regulation. We hope it will grasp it. With both hands.

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