

# Assistant: How can I avoid a product liability claim?

Liability for connected products

# Why are we here?

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What product liability issues might arise for a connected product?

A reminder of the product liability landscape

Is the law fit for purpose when it comes to AI / connected products?

Risk mitigation strategies: what works & what doesn't

Changes and challenges on the horizon



# But first some questions for you...

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How worried is your business about product liability litigation?

How do you prevent consumer complaints escalating to litigation claims?

Where in the world do you see consumers taking action?

What sort of risks do you see resulting in future claims ?

# Digging a little deeper ...

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What now when potential product issues are raised?

**Who** receives the information? Where is it escalated?

**How** do you deal with local in-market complaints ?

**When** does Legal get involved?

Looking ahead...

What sort of potential product liability claims concern you?

What would be the features of those claims?

What sort of consumer behaviour do you anticipate and warn/guard against?

# Products live in the wild



I tried using the new IOS 8 feature WAVE where you can charge your phone with a microwave, does not work @Apple

← Happy → Network ★ Favorite ... Share



# How could your connected product get you into trouble?

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## Product liability – civil claims

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graph LR; A[Product liability – civil claims] --> B[Statutory claims]; A --> C[Tort]; A --> D[Contractual claims];
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### **Statutory claims**

- ❖ Strict liability rules may be applied to favour the consumer, defences may be limited

**Tort** (e.g. breach of duty to take reasonable care; negligent design or manufacture)

- ❖ Significant differences across jurisdictions as to how principles of fault liability are applied and what kind of harm is recoverable

### **Contractual claims**

- ❖ The precise legal basis for claims in contract will vary, depending on national legal doctrines – even within the EU

# How could your connected product get you into trouble?

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## Regulatory investigations



Investigations by regulators  
into potential breaches of  
regulatory regime



## Potential criminal liability



Potential criminal sanctions  
/ prosecution





# And now: The data protection liability regime (eg GDPR)

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- There's a **strict (no-fault) liability regime** applicable to data controllers and processors
- To avoid liability, the defendant controller or processor must prove they weren't responsible for the event that harmed the data subjects
- Joint liability when several controllers or processors involved





## And now: The data protection liability regime (eg GDPR)

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- Very broad concept of 'damage' under GDPR
- **Both material and non-material damages** can be claimed
- National laws determine the criteria to assess the recoverable damages



# Statutory product liability claims in the EU/UK...

## Product Liability Directive 85/374/EEC

- Establishes a "**no fault**" civil liability regime under which consumers can bring claims against producers of "**defective**" products.
- Manufacturers and suppliers may also face **criminal liability** if their products are defective or unsafe
- The **claimant** has to **prove** the **damage**, the **defect** and the **causal relationship** between defect and damage (Article 4)
- Multiple actors can be **jointly and severally liable** for damage (Article 5)

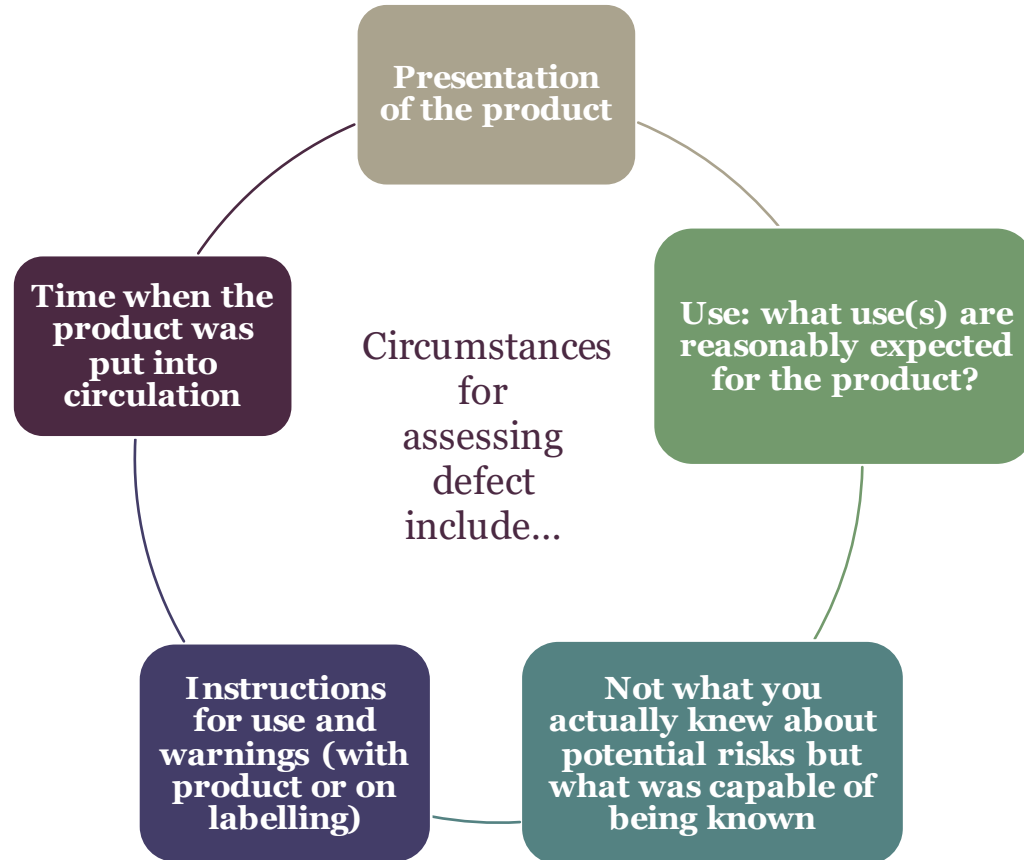
Other countries have followed the EU lead...

# What is a “defect” under EU law?

A product is  
“defective” when it  
does not provide the  
safety which a person  
is entitled to expect,  
**taking all  
circumstances into  
account...**

# Understanding the concept of “defect” under EU law

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Objective test!

# The role of warnings?

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Is a warning a defence ?



How could the assistant be used?

What standards do you apply?

What caused the harm?

Data breach AND a safety / product liability issue?

Software: embedded or third party?

How does the protect connect?

Where does GDPR fit in?

Do instructions need to be printed, or verbal ok?

What does “safe” mean ?

Vulnerable users?

Voice assistant used for a medical purpose?





Do we need to start thinking about  
a new product liability landscape?



Airlines ✈️  
Automobiles 🚗  
Telephone 📞  
Electricity 💡  
Credit Cards 💳  
Television 📺  
ATMs 🏧  
Computers 🖥️  
Mobile Phones 📱  
Internet 🌐  
Facebook 📘  
WeChat 🗨️  
Pokémon Go 🎮

3y 7y 12y 14y 18y 22y 28y 30y 46y 50y

# Reaching 50 million users

The fastest speed to 50 million users was set by **Pokémon Go**, which did it in 19 days.

Could the next big thing do it in mere hours?



# What's troubling the experts?

Existing liability laws may not  
create a fair result!

Findings set out in the Expert  
Report on Liability for Artificial  
Intelligence and other emerging  
technologies...

## An extract that caught our eye:

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*“If a **smoke detector in a smart home environment** fails to trigger an alarm because of flawed wiring, this defect may be identifiable (and in this case is even visible).*

*If, on the other hand, the smoke detector did not go off because of some **firmware error**, this may not be proven as easily...if only because it **requires a careful analysis of the firmware’s code** and its suitability for the hardware components of the smoke detector.”*

- Report from the European Commission Expert Group on Liability and New Technologies – New Technologies Formation, 2019

# Experts' conclusions...

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Liability regimes currently in force ensure "at least basic protection" of individuals whose damage is caused by emerging digital technologies.

Despite advancements in technologies and the increased complexities of modern products, the PLD continues to serve its purpose – at least for the time being.

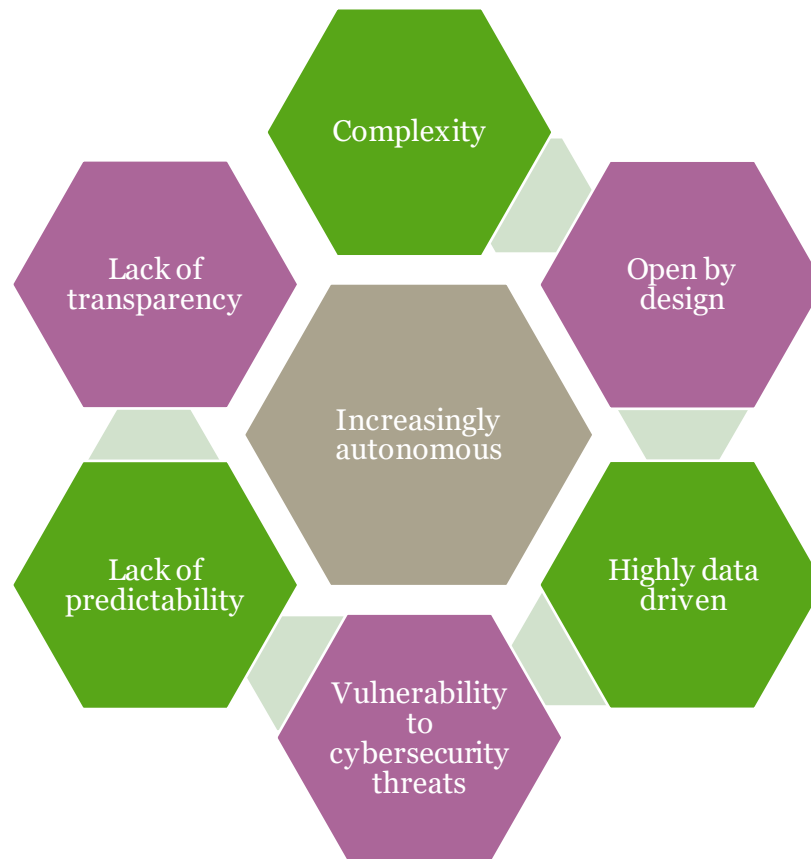


BUT: certain characteristics specific to emerging technologies are noted as potentially making it more difficult for compensation to be achieved....

...adjustments 'need to be made' to EU and national liability regimes in order to ensure that the rights of individuals are adequately protected.

# Challenges of emerging technology for liability law

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# Potential risks

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Where does liability lie?

**New elements of liability and onus**

**Built in bias** of the algorithm informing decisions

Integrity & provenance of data could be a defect?

Extent of MR's role in product prototyping

Other legal risks

**Data integrity and ownership**

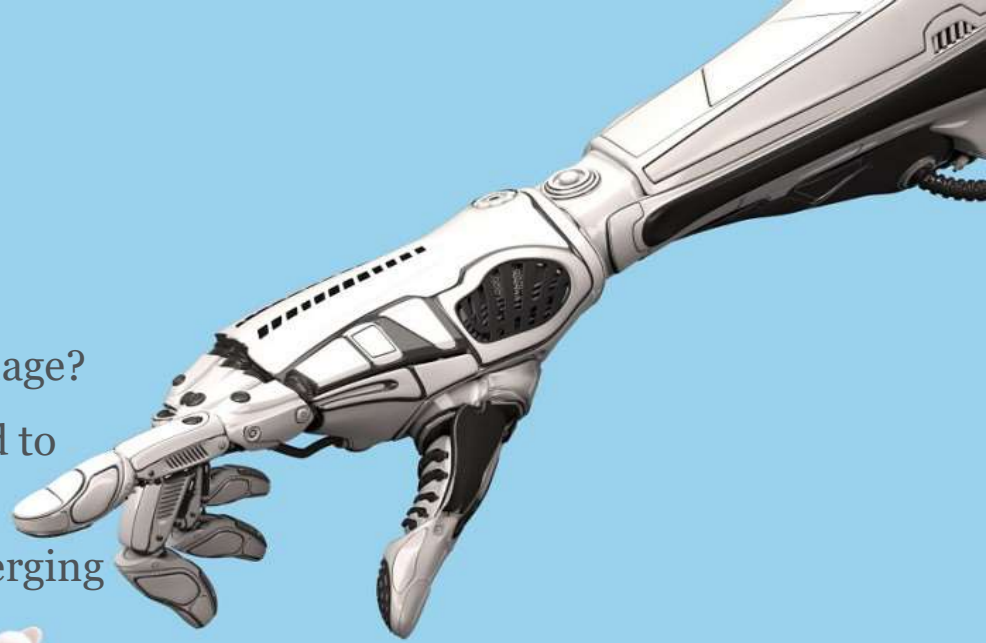
**Updating contracts for AI services**

**Consents for future uses of data**

# Changes ahead?

## Should the liability landscape change?

- ❖ Reversal of the burden of proof?
- ❖ Destruction of data to be regarded as damage?
- ❖ Should responsibility for a “defect” extend to someone other than the manufacturer?
- ❖ Should we extend legal personality to emerging digital technologies and AI?



EU commission report February 2020  
questions adequacy of the current  
concept of ‘safety’ for connected and  
AI products



# Risk Mitigation



# Food for thought

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## What works

**Be responsible**

**Be responsive**

Have a clear strategy  
in place at the outset

## What happens when it goes wrong...

**Corrective actions  
& the "R" word**

**Litigation and  
Class actions**

On-going **brand  
damage**, and lack of  
consumer trust in  
future products

# Good product liability risk mitigation measures?

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## Regulatory compliance



- ❑ Testing to standards
- ❑ Using marks, labels and warnings on the device/packaging and in-box or online
- ❑ Importance affirmed in recent UK case law: *DePuy*
- ❑ Regulatory compliance has “considerable weight”

## Safety by design



Reasonable use expectations  
guard → warn

## State of the art



**Active** scientific and  
technical monitoring relevant  
to potential risks

# Other product liability risk mitigation measures

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## Stakeholder engagement



- ❑ Engaging early with the regulator
- ❑ Keeping consumers updated
- ❑ Consistency in campaign or good explanation as why changes might be made only in a specific market

## Own your message



Being at the **forefront of communications** and "owning up" if there is an issue, means you control the message

## Social media



**Active** monitoring and engagement of social media for tracking consumer complaints and dealing swiftly with negative messaging – decreases the likelihood of consumer groups pooling over social media

# Some trends

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- 2019 saw more Group/Class Actions and more involving products
  - Medical devices - Vehicles - Smart devices
  - Impact of social media forums
  - Global effects
- Focus on 'Big Tech' – Google group action in the UK

- Impact of 'judicial hellholes' – they aren't just in the USA

## Factors include

- Expertise
  - Procedural rules
  - Experts and evidence
- New funding models: eg Seroxat Group action

# Preparing for the future... what to do NOW?

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1. Monitor the product after putting it into circulation
2. Build in logging features
3. Ensure that operators know enough to comply with a range of duties of care
4. Apply the “Ethics Guidelines for Trustworthy AI” and similar...



# Let's come back to data... we promised you more...





# Connected homes and cybersecurity issues

## Orvibo

- Event occurred in July 2019
- Database called SmartMate used as a platform for managing smart home appliances
- Platform supports various Orvibo-made smart products, i.e. security cameras, smart lightbulbs, thermostats, HVAC systems, home entertainment systems, smart power plugs, smart window curtain systems, smart door locks, and more...
- Exposure of the personal information of over 2 billion customers
- Impacted information included email addresses, passwords, account reset codes, precise geolocation, IP address, username, user ID, family name, family ID, smart device, devices that accessed account, and scheduling information
- Access to people's smart home hub accounts could allow them to spy on users, their schedule, or security video feeds. Criminal groups could orchestrate robberies when homeowners are away or could sabotage homeowners by spiking energy usage by tampering with smart electric plugs, HVACs, or thermostats

## Ring

- A hacker accessed a Ring camera in an 8-year-old girl's room in Mississippi and used it to harass her
- A couple in Texas woke up to a hacker saying via their Ring camera that they would "get terminated" unless they paid a 50-bitcoin ransom



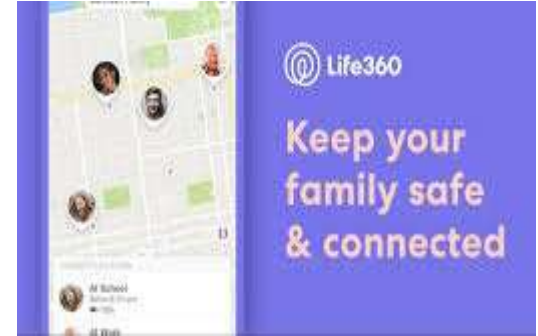
**Here's The  
Wi-Fi Password**



# Children and cybersecurity issues

## TicTocTrack

- Event occurred in 2019
- Smartwatch that allows parents to track their children's whereabouts
- Available for sale in Australia for \$149
- Riddled with security issues that could allow hackers to track and call children
- Flaws exposed sensitive data of 35,000 children
- Resulted in TicTocTrack temporarily suspending its service until it could confirm the validity of the flaws and subsequently fix them
- TicTocTrack also announced it would be offering customers refunds on subscriptions if they were unable to resolve the potential issue



## Family Locator

- Event occurred in March 2019
- Tracking app that allows family members to track each other's location in real-time
- Family Locator leaked data exposing more than 238,000 users
- The locations of users were left accessible on an unprotected server and included additional information such as name, email address, profile photo, and passwords

# Key contacts

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