

## **TALK ON PRODUCT LIABILITY ON 17 JANUARY 2018 FOR CII SOUTHAMPTON.**

### **A summary of some important issues**

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#### **Introduction**

Pitmans Risk and Insurance Department acts on behalf of UK and foreign insurers and businesses advising on product liability issues ranging from; Regulatory Compliance (eg with Essential Health and Safety Requirements 'EHSR' of Supply of Machinery Regulations), investigation and defence of civil claims, advice and representation in respect of investigations by prosecuting authorities to subrogated recovery actions.

We have advised manufacturers, retailers and distributors (and their insurers) on issues concerning numerous different categories of products from car crushing equipment to bicycles, pushchairs to industrial ovens, motor bikes to white goods, plumbing to electrical items.

When becoming aware of a new safety concern or reportable incident it is of paramount importance for businesses (and their professional advisors) to carefully consider adequacy of insurance cover for initial investigation work, remedial action and potential liabilities. If their products present a safety risk then businesses need to consider their position carefully and decide what action is appropriate including, if there is a serious safety risk, whether or not to issue a product recall as there are serious implications both for the business and management in civil and criminal liability.

#### **CIVIL LIABILITY**

##### **Contract**

Historically, in cases where a consumer was injured by a defective product they had purchased they could seek redress against the retailers from whom they had purchased the item in contract under common law. In more recent times a huge raft of consumer legislation has enhanced the ability of consumers to successfully bring actions for damages and remedies under the Sale of Goods legislation.

## Negligence

However in so far as injured third parties are concerned historically they were unable to recover damages for injuries sustained until the famous judgement in Donoghue v Stevenson 1932 recognised it was appropriate to develop a new cause of action for claimants under what was termed the 'neighbourhood principal' and developing the duty of care to those injured by a defect in a product. Accordingly most cases involving a claim for damages arising from defective products are now brought in negligence for breach of the duty of care owed to those persons who were injured as a consequence of the defect.

These claims are brought upon the basis that the manufacturer owed a duty of care to all those who can reasonably be expected to make use of its product. In the case of 'dangerous' products this duty may be owed to anybody who may reasonably be affected by a defect in the product. This means that a claim in negligence is not limited by privity of contract, whereby only a party to a contract can sue under it. So a claim may be brought by a consumer-purchaser of the product, a person who uses the product, or an innocent third party injured by the product.

The manufacturer's negligence might arise from:

- a failure to take care during the manufacturing process, resulting in a particular product being defective;
- a failure to take care during the design of the product, including a failure to carry out sufficiently careful research before launch;
- a failure to carry out effective tests;
- a failure to provide an effective warning of dangers;
- a failure to recall a product, or to issue appropriate warnings if a danger becomes apparent after the product has been put into circulation.

Note that liability in negligence is not limited to the manufacturer of the product as other parties who supplied components or rebranded and distributed the product may be held liable if they can be shown to have been negligent.

## EU Directive 85/374/EEC

The European Union passed this Directive in an effort to provide a unified system of strict liability in member states for defective products. This is known as the 'Product Liability Directive' and in the UK the enabling legislation that was passed was The Consumer Protection Act 1987

## Consumer Protection Act 1987 (“CPA”)

### Liability under Part I of the CPA

The CPA introduced statutory liability for defective products. Liability under the CPA exists alongside liability in negligence and contract.

The CPA applies to both products used by consumers, and products used in a place of work. It imposes strict liability on manufacturers of defective products for harm caused by those products. This means that people who are injured by defective products can sue for compensation without having to prove that the manufacturer was negligent. It is merely necessary to prove that the product was defective, and that any injury or damage was most likely caused by the product.

### Applicability

The Act applies to all consumer products and products used at a place of work. Inclusion of the phrase 'products used at a place of work' extends the scope of the law to include sales of products between businesses, and not just sales to consumers, if such products are used in a place of work.

Under the Act, a claim may be brought by any person who is injured by a 'defective product', regardless of whether that person purchased the product. A claim may be brought for death, personal injury or damage to private property in excess of £275.

### What is a 'defective product'?

A 'product' can include goods, electricity and the component parts of any product. Where a component or raw material incorporated into a finished product is defective, both the manufacturer of the component and the manufacturer of the finished product are potentially liable.

A product is defective for the purposes of the CPA if its safety, including not only the risk of personal injury but also the risk of damage to property, is "not such as persons generally are entitled to expect". A product will not generally be considered defective just because a safer version is later put on the market.

In assessing the safety of the product, the Court will take into account all of the circumstances, specifically including:

- all aspects of the marketing of the product;
- the use of any mark in relation to the product;
- instructions and warnings;

- what might reasonably be expected to be done with the product at the time the product was supplied.

Further, the Court will also take account of the 'state of the art' at the time of supply.

### Who is liable?

Under the CPA, the 'producer' of a product is liable for any defects. The term can be quite wide as it includes the manufacturer of the finished product or of a component of the finished product, or any person responsible for an industrial or other process to which any essential characteristic of the product is attributable.

Further, liability may also be imposed on any party who holds itself out to be the producer through the use of a name or trade mark (re-branding the product), and any person who imported the product into the European Community.

So there may be more than one party liable under the CPA in respect of the same damage. Liability is joint and several meaning that the injured party may sue any or all of these people. Liability cannot be excluded or limited.

### Defences to a claim under the CPA

Whilst liability under the CPA is strict, the producer still has a number of defences available if a claim is made. It is a defence to show:

- that the product is defective in order to comply with domestic or European law;
- the party the claim is being made against did not supply the product;
- that the product was not manufactured or supplied in the course of a business;
- that the defect did not exist at the time the product was put into circulation;
- if the party is being sued because it manufactured a component - that the defect is a defect within the finished product, and came about because of the way the finished product was designed or because of instructions given by the manufacturer of the finished product.

The CPA also includes a 'development risks' defence, which creates a defence if the "scientific and technical knowledge" at the time the product was manufactured was not such that the producer of a similar

product might have been expected to discover the defect. This could be particularly important in relation to innovative and high-tech products.

**Note:** Upon receipt of any claim, or knowledge of any circumstance which may give rise to a claim under an insurance policy, the retailer, manufacturer or producer must immediately notify insurers. Failure to notify within a reasonable period of time may affect the indemnity afforded under the terms of the policy. In addition to providing an indemnity in respect of civil liability for a claim and costs there may also be cover under the company's insurance policy that may extend to provide legal advice during criminal investigations. Check the policy and contact the broker.

## **CRIMINAL LIABILITY**

### **THE INVESTIGATING AUTHORITIES**

The main investigating authorities that businesses are likely to be concerned with are:

#### **HSE**

- HSE's product safety enforcement powers are similar to those given by the Health and Safety at Work etc Act 1974. Accordingly all warranted HSE staff may exercise these powers in accordance with the law and HSE's own procedures.
- HSE can investigate product safety issues, requiring co-operation and information from those who may be involved. HSE inspectors can require that a product is left undisturbed or take possession of dangerous products. They can direct often through formal Enforcement and Prohibition Notices that activities such as the supply of a product presenting serious risk of injury is stopped immediately, or that improvements are made by a specified date. Those who are served these Notices may appeal to the Employment Tribunal. HSE can apply to the courts to request the forfeiture of certain products, subject to the court's ruling following judicial consideration of the facts.
- In cases of serious breach or if Notices have not been complied with the HSE may instigate proceedings in the magistrates' court. Costs may be awarded by the court to HSE. Most offences under UK product safety law are triable either way (for hearing in either The Magistrates' or Crown court) and unlimited fines may be imposed on those found guilty (by Crown courts).

#### **Trading Standards**

The powers of the HSE are well known and documented but the work and powers of the Trading Standard officers are less well known.

- **Trading standards officers enforce consumer protection legislation in order to create a safe trading environment. They carry out inspections on business premises to establish whether Trading Standards legislation has been complied with.**
- **An inspection may take place as part of a routine inspection programme, or because the officer suspects that an offence has been committed.**

#### **Trading Standards Officers: powers include:**

- **Power to enter premises and inspect goods: an officer may at all reasonable times enter any business premises and inspect any goods**
- **Power to request or require books, documents or records: an officer can require the production of documents relating to the business and may make copies.**
- **Powers of seizure: if an officer has reasonable cause to believe an offence has been committed, he may seize and detain any goods in order to ascertain whether an offence has been committed.**

#### **Trading Standards Officers: if there is a breach of Trading Standards legislation**

- **If the Officer finds a contravention of safety legislation, he may issue a suspension notice prohibiting the movement of specified goods for a period of six months.**
- **If the Officer finds more serious contraventions of safety legislation, he may consider legal proceedings.**

#### **Local Authorities**

**Powers are given to local authorities to investigate criminal offences under the Local Government Act 1972 (LGA 1972). Local Authority Environmental Health officers can undertake investigations and have wide ranging powers. They can be involved in assessing evidential issues and can enter premises and conduct interviews.**

**The officers can be involved in determining how evidence is gathered, the taking and the format of witness statements, interviewing suspects, and interviewing representatives of companies, limited liability partnerships, partnerships unincorporated associations and sole traders.**

The decision to prosecute for an offence will be made by the prosecution division within the local authority.

### Police

In serious cases where there has been death, serious injury or large scale property damage the Police can become involved investigations into the cause. By way of example if a defective product is suspected by being implicated in a fatality where a number of other similar incidents have been reported the Police may be called upon by the Coroner to act as his agent and undertake enquiries of the retailers, distributors and/or manufacturers.

The line of enquiry may be to ascertain their knowledge of the safety risks and what steps were taken to understand the nature and extent of the risk and if serious to remedy it promptly.

The Police may undertake their investigations in conjunction with other authorities.

### Criminal Liability and Proceedings

Proceedings by a prosecuting authority may arise due to breaches of various health and safety laws including:

#### Health & Safety at Work Act 1974

##### Action against the company

- Section 3 of HSWA imposes a duty on an employer to ensure, so far as is reasonably practicable, the health safety and welfare of persons not in its employment (i.e. the public).
- A company is guilty of an offence if it fails to comply with the duty imposed by section 3.
- A company would be liable to an unlimited fine in the event of conviction.

##### Action against Individuals

- Section 37 of HSWA states that where an offence has been committed by a company (see section 3 HSWA above) is proved to have been committed with the consent, connivance or neglect of an individual director, manager, secretary or other similar officer who was purporting to act in such capacity he too shall be guilty of an offence.



- Therefore in order for a director or other similar officer to be guilty of this offence:
  - The company must be guilty of an offence
  - That director must have consented to that offence or wilfully ignored it or negligently allowed it to occur.
- A director guilty of such an offence faces up to 2 years in prison and an unlimited fine.

### General Product Safety Regulations 2005

#### GPSR 2005, Regulation 5: The General Safety Requirement

Under Regulation 5, there is a “general safety requirement” that producers will only place a product on the market if it is a “safe product”. A “safe product” is one which presents no risk, or the minimum risk compatible with its use and which provides a high level of protection for consumers. If an unsafe product is placed on the market the manufacturer must notify the relevant enforcement authority (see Regulation 9(3) on notification).

#### Action against a company or individual

- Regulation 20(1) of GPSR creates an offence for a person to place an unsafe product on the market. A company faces a maximum fine of £20,000. An individual prosecuted for this offence can be imprisoned for up to 12 months and a fine.
- Regulation 20(2) of GPSR creates an offence if a person fails to notify an enforcing authority that a product it has placed on the market is not safe. A company faces a maximum fine of £5,000. An individual prosecuted for this offence can be imprisoned for up to 3 months and a fine.
- Regulation 20(3) of GPSR creates an offence if a producer does not give notice to an enforcing authority that its product is unsafe and it is proved that the producer ought to have known that the product was unsafe. A company faces a maximum fine is £5,000. An individual prosecuted for this offence can be imprisoned for up to 3 months and a fine.
- Regulation 24 creates offences where a person obstructs an officer of an enforcing authority. A company or person faces a maximum fine is £5,000.



## When to consider a recall

### Issues concerning notification of a safety defect

Under GPSR 2005, Regulation 9: Obligations of producers and distributors.

Where a product does not comply with the general safety requirement, both the producer and the distributor have a duty to notify the relevant enforcement authority (as defined in regulation 10(1)) of

- i. information which will enable the product or batch in question to be identified;
- ii. the risks that the product poses to consumers;
- iii. details of action taken to prevent risk to the consumer.

This means that producers should monitor their products for potential risks. Such monitoring would give producers advance warning of product safety risks, so that they can take action before the authorities take the step of ordering a product recall. In addition, the GPSR 2005 require producers to keep a record of consumer complaints about the safety of their products (see regulation 7(4)(b)(ii)), and to notify the safety regulators if they find that the product is unsafe (see regulation 9 on notification).

So this obligation to notify the relevant enforcement authority creates two questions for producers:

### Next Steps

#### Issue 1: Whether to notify?

Producers must quickly assess the seriousness of the risk in order to decide whether the product is unsafe. The European Commission's "Guidelines for the notification of dangerous consumer products to the competent authorities of the Member states by producers and distributors in accordance with article 5(3) of Directive 2001/95/EC" states that producers and distributors should take into account the severity of the possible damage and the factors which affect the level of the risk, such as the type of user and obviousness of the hazard, in deciding whether a product is unsafe and should be notified.

#### Issue 2: When to notify?

If the product is unsafe, then the European Commission's Guidelines state that a company must inform the authorities: "without delay, as soon as the relevant information has become available, and in any case

within 10 days since it has reportable information, even while investigations are continuing, indicating the existence of a dangerous product. When there is a serious risk, companies are required to inform the authority and in no case later than 3 days after they have obtained notifiable information. In an emergency situation, such as when immediate action is taken by a company, the company should inform the authorities immediately and by the fastest means". The Company should also keep their product liability insurers advised.

Once notified, the regulator will decide whether to send the information onto the European Commission and the other member states through the RAPEX system (the rapid alert system for non-food consumer products).

### Duty to Recall.

- The GPSR 2005 places a positive duty on producers to recall products that are dangerous in certain circumstances.
  - i. Before the GPSR 2005 there was common law authority for a duty to recall unsafe products.
  - ii. Under GPSR 2005 producers now have a legal obligation to withdraw unsafe products from the distribution chain and/or recall them from consumers.
- The GPSR 2005 regulation 15 gives national authorities the power to issue product recall notices. The authority can order the producer or distributor to take steps to protect consumers, including ordering a product recall.
  - i. Under regulation 10(5), while voluntary action on the part of producers and distributors is to be encouraged, an enforcement authority has the power take action "urgently and without first encouraging and promoting voluntary action if a product poses a serious risk". The enforcement authorities must act proportionately to the seriousness of harm and take account of the precautionary principle. Acting on a precautionary basis means that regulators must take action even when they lack conclusive scientific evidence of the existence of the risk, as long as there is a likelihood of real harm.
  - ii. Under regulation 15(4), an enforcement authority may only issue an recall notice if:
    - other action which the authority may require would not suffice to prevent the risks

- the action being undertaken by the producer or distributor is unsatisfactory or insufficient; and
- the authority has given no less than seven days' notice of intention to serve the recall notice and, where the person served has required the authority to seek advice from a person appointed by the Chartered Institute of Arbitrators (CI Arb) to determine whether the product is dangerous or whether a recall notice is proportional to the seriousness of the risk, the authority has in fact sought and taken account of such advice.

Under regulation 15(5), the second and third requirements of regulation 15(4) do not apply for products which pose a serious risk and which require urgent action.

- iii. Note that there is a right of appeal against recall notices. Under regulation 19(2)(d), a recall notice will be set aside if the product is not dangerous, or if the enforcement authority has not used recall as a last resort and the other requirements of regulation 15(4) have not been met.

#### **Taking corrective action: when producers should make a recall**

See “Product Safety in Europe: A Guide to Corrective Action Including Recalls”.

- The Guide aims to give producers and distributors of consumer products general advice about what they should do if they have evidence that one of their products may be unsafe.
- Plan ahead: preparing your collective action strategy before you have a problem and:
  - i. Establish a policy and procedure for corrective action. Details of such policies may vary, but should include a statement by the company management of its aims and commitment to speedy corrective action to restore product safety, and to inform consumers fully of the corrective action being taken.
  - ii. Set up a corrective action team. The team should have knowledge of design, production, product safety/ risk management, quality assurance, distribution, public and corporate relations, legal, and accounts.
  - iii. Monitor information about the safety of your products. You need to have systems to collect and analyse information on

report of accidents involving your products, customer complaints, warranty claims, insurance claims, any evidence of consumer abuse or misuse of the product.

- iv. **Keep good records to help trace products and identify customers and end users.**
- v. **Assemble documents about the product's design and Safety and preferably create a spreadsheet for ease of reference.**
- **Decide whether to take action: assess the risk**
  - i. **Identify the hazard and its cause**
  - ii. **Estimate how many products are affected**
  - iii. **Identify who might be affected**
  - iv. **Consider what severity of injury could result**
  - v. **Assess the likelihood of such an injury**
  - vi. **Evaluate acceptability of overall risk**
- **Taking corrective action: deciding what action to take**
  - i. **Decide whether corrective action needs to involve:**
    - **Products in the supply chain and possibly**
    - **Products in the hands of consumers**
  - ii. **Decide what corrective action needs to be carried out**

**If the overall risk is judged to be serious, the producer should take immediate action to:**

- **Inform the market surveillance authorities**
- **Isolate affected products**
- **Set up a communications programme to contact consumers**

**If the overall level of risk is judged to be moderate, the corrective action may be limited to products in the distribution chain, and it may be enough to withdraw those and give the authorities details of what is begin done**

**If the overall level of risk is judged to be low, corrective action may be limited to consideration of changes affecting products in design and production.**

**iii. Possible corrective action:**

- **Changing the design of products**

- **Withdrawing products from distribution**
- **Modifying products at consumers' premises**
- **Return of products by consumers for modification**
- **Recalling products from consumers for replacement or refund**

**iv. Agree responsibilities and actions with distributors**

**v. Inform the market surveillance authorities**

### **SAFETY NOTICES TO ISSUE**

The Trading Standards Institute website provides useful guidance and provides that any trader wishing to display their recall / safety notice should email it to [publications@tsi.org.uk](mailto:publications@tsi.org.uk).

Also consider notification to “RAPEX” the European rapid alert system for dangerous consumer products. It allows information about dangerous products to be given to other national authorities and the European Commission, in order to prevent the sale of these products. All the EU countries participate in the system. Under Article 12 of the GPSD, national authorities have a duty to notify the Commission, via the RAPEX system, of action taken to prevent the marketing and use of dangerous consumer products. The European Commission published its revised Guidelines for the operation of “RAPEX” in January 2010.

Manufacturers of consumer products marketed in Europe should be aware of the importance of the RAPEX Guidelines, which give guidance on how the risk posed by consumer products should be assessed. This risk assessment process is relevant when a manufacturer has marketed an unsafe product. Regulators will follow this risk assessment process to decide whether the producer or distributor needs to notify regulators about the problem; what corrective action, up to and including recall, needs to be taken; and whether the issue will be communicated across Europe. The Guidelines and the risk assessment process have significantly changed the way in which national authorities handle product recalls, and therefore the producer needs to understand the process.

#### **Preparing Risk Assessments under the 2010 Guidelines:**

- i. Describe the product and its hazard.**
- ii. Identify the type of customer to be included in the injury scenario.**
- iii. Describe the injury scenario in which the hazard might affect the consumer.**
- iv. Determine the severity of the possible injury to the consumer.**
- v. Determine the probability of the injury arising.**

- vi. Determine the risk level.
- vii. Check whether the risk level is plausible.
- viii. Repeat in order to identify other injury scenarios and the risk posed by the product. Classify the risk as “low”, “medium”, “high” or “serious”.

Depending on the nature of the products in question notices may have to be issued to other authorities so for food hygiene issues notice will need to be given to THE FOOD STANDARDS AGENCY ('FSA').

For vehicle defects notice will need to be issued to THE VEHICLE and OPERATOR SERVICES AGENCY ('VOSA').

### **MEDIA STATEMENT**

Take professional advice from the outset – get it right from the outset because you could be under scrutiny not only from the media but investigating authorities and it will be wise to ensure a consistent message is issued on the situation and the steps being taken to remedy it. A nominated spokes person is likely to have to face the media spotlight and there could be invitations to attend interview by the investigating authorities under PACE. Therefore get the facts clear, state the issues and processes put in place and make it easy for the innocent consumers to safeguard their safety, their families and property.

### **Further considerations**

The GPSR regime means that producers must respond quickly to a product crisis so heed the Guidelines and get prepared. Producers should prepare a crisis plan in preparation for an unexpected event in order to manage a potential product crisis. Producers should decide on an internal recall team, external advisors to deal with the risk assessment process, and detail procedures for employees.

Ensure comprehensive records are kept relating to design, safety assessments, product accreditation, supplies received from component manufacturers, issue of serial numbers, batch testing and details of your suppliers/customers. Ensure that, where appropriate, your customers also keep records of the end users.

There are differences between how the General Product Safety regime has been implemented in different member states, and how each member state approaches risk management. Producers should be aware of these differences and address both national and international issues in their crisis management plans.

**Manufacturing and producers may consider extending their existing product liability insurance to include product recall insurance which will cover some of the costs of a product recall.**

**This note is only intended to provide a brief summary of some of the most important issues concerning product liability and is not to be considered as legal advice; for further information please contact:**

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