Product liability update

April 2017

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Knowledge and the continued use of a defective product

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Consulting on the Product Liability Directive (85/374/EEC)

The Product Liability Directive 1985 was introduced with the purpose of creating a strict liability for defective products. Article 1 of the Directive simply states "The Producer shall be liable for damage caused by a defect in his product". The remainder of the Directive goes on to define the precise scope of this Article. more›

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Any comments or queries?

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Insuring driverless cars

The Government has proposed legislation which would extend compulsory motor insurance, as provided for under the Road Traffic Act 1988, to cover product liability for motorists using autonomous vehicles.

The legislation will mean that a single insurer will insure both the driver's use of the vehicle and the automated vehicle technology.

Transport Secretary Chris Grayling said: "Automated vehicles have the potential to transform our roads in the future and make them even safer and easier to use, as well as promising new mobility for those who cannot drive. But we must ensure the public is protected in the event of an incident."

There had been concern that confusion would arise if there was an incident involving an autonomous vehicle as to who to pursue, the driver or the manufacturer, which in turn would lead to a delay in innocent parties receiving compensation.

The Government is therefore introducing legislation "to ensure that motor vehicles continue to be properly insured, and innocent victims of collisions involving automated vehicles are compensated quickly."

When a crash is determined to have been caused by an automated vehicle the victim will have a direct right against the insurer. The insurer will in turn have a right of recovery against the responsible party, which could include the manufacturer of the vehicle.

This news came shortly before Ford announced that it is investing $1bn into AI development over the next five years.

Ford intends to have a fully autonomous, level 4-capable vehicle for the commercial market by 2021. This means its vehicles won't have a brake pedal, accelerator, or steering wheel and will be able to operate in a predetermined geographical area without human intervention. This, according to the Society of Automated Engineers (SAE), is one rank behind "fully autonomous", in which the AI is able to fully control every aspect of the driving and does not rely on the input of a human driver.

Ford CEO Mark Fields told Business Insider: "The term autonomous vehicle is just thrown about so liberally in this industry. I mean, there are five levels of autonomy... My only fear in the industry is somebody tries to come out with one of those [self-driving cars] before it's ready and then there's an event."

The Government's proposed legislation appears to be sensible in order to swiftly deal with such an "event" should one occur.

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Notification clauses – a timely reminder

In *Zurich Insurance plc v Maccaferri Limited* the Court of Appeal was asked to determine whether there had been a breach of a condition precedent in a combined public and products liability policy which stated that the insured must give notice "as soon as possible after the occurrence of any event likely to give rise to a claim."

The insured, Maccaferri, had supplied a "Spenax gun" to a builder's merchant who in turn hired it out to a construction company. On 22 September 2011, there was an accident involving the gun and an employee of the construction company lost sight in one eye.

Maccaferri became aware of the incident on 28 September 2011 but was not given details and did not know that there had been a serious personal injury. By 12 January 2012 it was aware there was an injury, but was not informed of allegations that the gun was faulty.

On 12 July 2013, Maccaferri received a Part 20 claim against it and notified Zurich that same day.

Zurich declined indemnity and advised Maccaferri that there had been a breach of the condition precedent.

Zurich's position was that Maccaferri should have given notice when it became aware of the event, and that it was likely to give rise to a claim, or when it ought to have become so aware.

The Court of Appeal disagreed and stated that the question asked by the clause was whether, when the event occurred, it was likely to give rise to a claim.

To find otherwise would have placed Maccaferri in the position of having to undertake a "rolling assessment" as to whether a past event was likely to give rise to a claim, which was not the wording used.

Lord Justice Christopher Clarke commented: "This is a condition introduced by Zurich into its policy which has the potential effect of completely excluding liability in respect of an otherwise valid claim for indemnity. If Zurich wished to exclude liability it was for it to ensure that clear wording was used to secure that result. It has not done so."

"There are clauses which have that effect, particularly in claims made policies insuring against professional liability, but they are not in this form. If that was what was intended, the insurers could be expected to have spelt it out."

The court confirmed that "an event likely to give rise to a claim" meant that a reasonable person would have thought it was at least 50% likely that a claim would be made.

In this instance: "It was a possibility, but not more, that the accident involved a fault in the gun. But there were other possibilities: a fault in the way in which the gun was used, or no fault at all....A possibility of a claim is not enough."

As the clause was constructed, the court found that there had been no breach.

This case therefore acts as an important reminder to insurers that, in light of the serious consequences for an insured, any clause which they might wish to rely upon to exclude liability must be properly drafted and unambiguous as to its meaning.

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Knowledge and the continued use of a defective product

In *Howmet Ltd v Economy Devices Ltd & Others* the Court of Appeal examined the effect of knowingly using a defective product and whether such knowledge amongst employees could be attributed to the employer company.

The claimant claimed damages as a result of a fire which destroyed their factory.

The claimant had been using the defendant's product, a "Therm-o-level", as a detection device. The Therm-o-levels were installed in heated industrial tanks to detect if liquid levels became too low, since low liquid levels created a fire hazard.

On two occasions there were device failures and small fires occurred which were extinguished by factory personnel. Engineering and facilities managers were made aware of the failures and decided to amend the company's processes. However, before the changes were implemented a further fire occurred, but this time there was nobody around to extinguish it and the factory was destroyed.

The Court of Appeal dismissed the claimant's claim against the defendant manufacturer.

The claimant's employees were aware that the use of the Therm-o-level was unacceptable as a safety device in light of the two previous fires. Whilst generally the manufacturer will be liable for damage arising from a defect in its product, the claimant in this case became aware of the defect but continued to use the product anyway, and as such the court held that they did so at their own risk.

Lady Justice Arden highlighted that whilst continued use of a knowingly defective product will usually relieve the manufacturer of any liability, this might not always be the case, referring to *Sir Donald Nicholls V-C in Targett v Torfaen Borough Council*:

"Knowledge of the existence of a danger does not always enable a person to avoid the danger... Whether it does so depends on all the circumstances. It will do so only when it is reasonable to expect the plaintiff to remove or avoid the danger and unreasonable for him to run the risk of being injured by the danger".

However, in this instance, the court found that the claimant's employees did not do enough to remove or avoid the danger posed by the defective Therm-o-level thus assuming the risk in its continued use.

The court also held that, in this case, the employees' knowledge of the defect was attributable to the claimant company, despite assertions that the more senior managers were unaware. The court said that steps should have been taken to report the full position to the senior manager in light of the high level of danger posed by the defect and that the claimant company could not rely upon the manager's ignorance.

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Consulting on the Product Liability Directive (85/374/EEC)

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It is this Directive that gave birth in the UK to The Consumer Protection Act 1987.

Article 21 of the Directive states that "Every five years the Commission shall present a report to the Council on the application of this Directive and, if necessary, shall submit appropriate proposals to it."

Regular reports have been produced since the Directive's implementation as to its application. However, there has been no formal performance review. That is until now.

In its last report of 2011, the Commission concluded that there was not sufficient evidence of problems in the application of the Directive to justify a proposal for amendments.

However, there have since been discussions on the adequacy of the Directive to face the challenges raised by new technological developments. As such, on 10 January 2017 the European Commission launched a public consultation on the evaluation of the Product Liability Directive.

The Commission states that the aim of this consultation is to collect stakeholders' feedback on the application and performance of the Directive on liability for defective products. In particular:

- whether and to what extent the Directive meets its objectives of guaranteeing at EU level the liability without fault of the producer for damage caused by a defective product
- whether it still corresponds to stakeholders' needs
- if the Directive is fit-for-purpose vis-à-vis new technological developments such as the Internet of Things and autonomous systems.

The consultation consists of three online questionnaires addressed to producers, consumers and public authorities respectively and runs until 26 April 2017. Contributions received, as well as a brief factual summary, will be published by the Commission once the consultation has ended.

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New advertising rules for HFSS

From July 2017 the advertisement of high fat, salt or sugar (HFSS) food or drink products whose target customers include a significant proportion of under-16s will be banned in all non-broadcast media.

The Committee of Advertising Practice (CAP) has introduced the new rules in response to social concerns about childhood obesity and the shifting media habits among young people, who are now spending more time online than watching TV.

The rules will apply across all non-broadcast media targeted at under-16s including print, cinema, online and social media. The rules will also mean adverts for HFSS products will no longer be allowed to appear around online TV-like content such as on video-sharing platforms if they are directed at or likely to appeal to children.

The rules include:

- adverts for HFSS products cannot appear in other media where children make up over 25% of the audience
- adverts for HFSS products will not be allowed to use promotions, licensed characters and celebrities popular with children; advertisers may now use those techniques to better promote healthier options
- the Department of Health nutrient profiling model will be used to classify which products are HFSS.

The changes bring non-broadcast media into line with television, where strict regulation prohibits the advertising of unhealthy food to children. Although campaigners argue that even more needs to be done as some TV shows which are hugely popular with children, such as the X-factor, are exempt from restrictions as they fall outside children's programming.

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