RPC

Product Law bulletin

February 2020

Product liability and regulation in a post-Brexit era: what will happen next?

With the exit of the UK from the EU upon us, how will this affect the product liability market and how might the body of law governing product liability and safety change? more›

Whirlpool: further consideration after the Government's follow-up report on Safety of Electrical Goods in the UK is published

Whirlpool has been subjected to criticism for its handling of recalls of various washing machines and tumble dryers. more›

Beko v Wilson: Considering the relationship between the limitation longstop and the Consumer Protection Act 1987

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Hastings v Finsbury Orthopaedics Ltd and Stryker UK Ltd: Scottish Court follows recent English decisions concerning "defect" under the Consumer Protection Act 1987

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FSA Consultation launched on technical guidance for allergen labelling

The Food Information (Amendment) (England) Regulations 2019 (SI 2019 No. 1218) will come into force on 1 October 2021 and will change the way in which food businesses in England provide allergen information of prepacked for direct sale (PPDS) food. more›

Any comments or queries?

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Product liability and regulation in a post-Brexit era: what will happen next?

With the exit of the UK from the EU upon us, how will this affect the product liability market and how might the body of law governing product liability and safety change?

Many of the current UK laws are underpinned by EU Directives, including the Product Liability Directive (85/374/EEC), the General Product Safety Directive (2001/95/EC) and sector-specific EU directives in respect of a range of products, such as food and drink, toys, precious metals, medicinal products, cosmetics and footwear.

The transition period set out in the Withdrawal Agreement means EU law will continue to apply in, and in relation to, the UK until 31st December 2020. Following this, prior EU regulations will only continue to apply in domestic law insofar as they are not modified or revoked by regulations under the European Union (Withdrawal) Act 2018.

It is expected that the various regulations will remain in force for the time being, albeit with a different constitutional basis; however, at a later stage they could be repealed, modified or withdrawn. It is not anticipated that there will be any major reforms, so as to avoid difficulties in the future trading relationship with the EU, but the position is unclear.

One of the main changes predicted following the implementation period is that the EU CE marking system will no longer apply. This will instead be replaced by the UK Conformity Assessed (UKCA) marking system. This new system will be used on goods which previously required a CE mark and will follow essentially the same principles as the current CE marking scheme but will be valid for the UK only.

The UKCA mark will not be recognised in the EU; therefore, any products which require CE marking, and are exported from the UK to the EU, will need to meet the EU standards and bear both a CE mark and a UKCA mark. This also means that businesses whose products currently rely on third-party conformity assessments carried out by UK bodies before sales in other EU countries will need to have these assessments performed by EU-based bodies to ensure compliance.

Back to contents>

Whirlpool: further consideration after the Government's follow-up report on Safety of Electrical Goods in the UK is published

Whirlpool has been subjected to criticism for its handling of recalls of various washing machines and tumble dryers.

The Government have published their follow-up report on Safety of Electrical Goods in the UK, again focusing on washing machines and tumble dryers manufactured by Whirlpool as a case study. The original report, published in January 2018, criticised Whirlpool's original decision not to recall defective machines, the speed of the modifications, the quality of the advice given by both Whirlpool and Peterborough Trading Standards, and the attitude of Whirlpool towards product safety. Consequent to this report, the Office for Product Safety (OPSS) was established.

The latest report continues to challenge Whirlpool's handling of the issues. In particular, it highlights concerns over:

- The number of defective products still being used and Whirlpool's inconsistency over this figure. It is anticipated that there may still be up to 800,000 defective products in use.
- The length of time it took for Whirlpool to publish a full list of defective products, as requested by safety organisations and MPs: whilst the modification programme started in November 2015, a full list was not published until July 2019; the report states that this meant it was difficult for consumers to assess whether their machines were affected.
- The length of time before Whirlpool took the decision to recall potentially dangerous tumble dryers: in the four months since the recall has been in place, 53,889 machines have been made safe or replaced, compared to the 45,000 machines made safe in the preceding 20 months. The report highlights that lessons must be learnt by Trading Standards and the OPSS in order to deal with future product safety issues more efficiently.
- Inaccuracies in reporting data: in addition to the inconsistencies regarding the number of defective products still in peoples' homes, the report highlights that much of the OPSS's data came direct from Whirlpool and not its consumers. Particularly contentious was the data provided in relation to the number of modified machines causing further fires, which has been contested by a number of bodies, including the London Fire Brigade. The report questions the credibility and transparency of both Whirlpool and the OPSS in this respect.
- The use of non-disclosure agreements (NDAs): the report is critical of the use of NDAs in a number of cases where customers had received compensation, The NDAs included an undertaking from the customer to keep confidential the fact that a payment had been made, and the circumstances that gave rise to it. Whirlpool maintained that the NDAs were not intended to prevent customers from sharing information with regulators and safety organisations.

Further updates are anticipated in due course. The report can be accessed here.

Back to contents>

Beko v Wilson[1]: Considering the relationship between the limitation longstop and the Consumer Protection Act 1987

In December 2019 the High Court ruled that consumers of products are not entitled to rely upon s41(1) of the Consumer Protection Act 1987 (the CPA) to circumvent the limitation longstop. The longstop prevents any claim for damages being brought under the CPA more than 10 years after the product was first put into circulation.

In this case, a fire broke out in the Claimants' house on 9 August 2016, with tragic consequences. The Claimants alleged that the fire was caused by a faulty fridge-freezer, manufactured by the Defendant. The fridge had been bought in 2005 and would have been supplied earlier than this, therefore it was apparent that under Part 1 of the CPA Act, the claim was statute-barred.

The Claimants argued that s41 of the CPA and the Electrical Equipment (Safety) Regulations 1994 produced a combined effect of imposing strict liability upon the Defendant and therefore that they could bring their claim despite the 10-year longstop. Under s 41(1) of the CPA Act, it is provided that '(1) an obligation imposed by Safety Regulations shall be a duty owed to any person who may be affected by a contravention of the obligation and, subject to any provision to the contrary in the Regulations and to the defences and other incidents applying to actions for breach of statutory duty, contravention of any such obligations should be actionable accordingly.

The Defendant argued against this: it contended that to use s41 in this way would be inconsistent with the Product Liability Directive and CJEU law.

The Court found in favour of the Defendant, holding that an action under s41 could not be used to circumvent the limitation longstop, stating, "S 41(1) operates by making a breach of the obligations imposed by safety regulations actionable. In my judgment, in order to conform with what I have held to be the correct interpretation of the Directive, breaches of obligation imposed by safety regulations made under Part II of the 1987 Act are not actionable under s41(1) if and to the extent the breach of duty in question would fall within Part I of the 1987 Act as relating to a defective product that caused actionable damage".

The case is an important one: the purpose of the limitation longstop is to provide certainty to manufacturers of products. Had the longstop been removed, the duty imposed on manufacturers would be onerous and open-ended, potentially lasting throughout the entire life of the product. Additionally, the removal of the longstop arguably could have led to numerous historic cases that had not be pursued on the basis that they were statute-barred.

Back to contents>

1. [2019] EWHC 3362 (QB).

Hastings v Finsbury Orthopaedics Ltd and Stryker UK Ltd[2]: Scottish Court follows recent English decisions concerning "defect" under the Consumer Protection Act 1987

The Court of Session in Scotland has recently considered the meaning of "defect" under the Consumer Protection Act 1987 (CPA). In this case, Mr Hastings (the pursuer) alleged that the metal-on-metal total hip replacements he had been implanted with were defective under the CPA.

The CPA imposes no-fault liability on producers (and importers) of a product, if personal injury is caused by a defective product. S 3(1) of the CPA Act states that a product is defective "...if the safety of the product is not such as persons generally are entitled to expect...". In this case, the Judge, Lord Tyre, found that the pursuer had established the presence of metal debris from the product, and the resulting damage, but had failed to show the product did not meet the required standard.

Lord Tyre's comments on recent English decisions in the favour of defendant manufacturers are of interest. He considered the two most recent English authorities on the meaning of "defect": *Wilkes v DePuy International Limited*[3] and *Gee and others v DePuy International Limited*[4]. Lord Tyre concluded that, on a balance of probabilities, the entitled expectation had been met and therefore it was not proven that there was a defect. In turn, this meant that the defenders had no liability and the pursuer's claim failed.

In considering the claim, Lord Tyre explicitly agreed with the decision in *Wilkes* that the test for what persons are generally entitled to expect is an objective one. He considered both parties' differing stances of what formulates an "entitled expectation". The pursuer submitted that the entitled expectation should be that the product was at least as good as the alternative non-metal-on-metal implant, whilst the defenders argued that the entitled expectation should be that the performance of the product would not be materially worse than the products that it was intended to replace. Lord Tyre rejected the defender's submission. Nevertheless, Lord Tyre concluded that the pursuer had not satisfied either test.

Whilst the judicial approach in this case largely follows that taken by the English Court in *Wilkes* and *Gee*, the Scottish Court differed from its English counterpart in two respects. Parties in either jurisdiction may choose to refer to these points in future disputes:

First, the Court in this case took the "date of supply" to be the date when the product was implanted into the pursuer. This differs from the approach in *Gee* in which the time when the product was supplied was earlier, namely the date on which the product was put into circulation. It is arguable that this will make little distinction in the majority of cases. However, it could be an issue regarding long-use products, the long-term risks of which remain relatively unknown.

Second, and likely to be of particular interest to manufacturers, was the apparent dismissal of any weight attached to Information for Users (IFUs) supplied with the product. In this case, the IFUs were published and intended to be read by the surgeons carrying out the operations. Despite this, Lord Tyre concluded that they would have "no significant effect" on the test as they added little to a surgeon's knowledge. This is again in contrast with previous law,

2. [2019] CSOH 96.
3. [2017] All ER 589.
4. [2018] EWHC 1208 (QB).

specifically the decision of Hickinbottom J in *Wilkes*, in which it was confirmed that IFUs were relevant when considering the test for defect. It is noted that the IFUs in *Hastings* were general and heavily qualified, therefore it is likely that the weight attached the IFUs in future disputes will turn on the facts of each case.

Back to contents>

FSA Consultation launched on technical guidance for allergen labelling

The Food Information (Amendment) (England) Regulations 2019 (SI 2019 No. 1218) will come into force on 1 October 2021 and will change the way in which food businesses in England provide allergen information of prepacked for direct sale (PPDS) food.

The current law requires food businesses to ensure that mandatory food allergen information relating to the 14 key allergens is accurate, available and accessible to a consumer. Distinction is made between prepacked foods and non-prepacked foods in how the allergen information is provided to consumers: any food that is prepacked must have an ingredients list with any allergens present emphasised in the list, whereas non-prepacked foods are not required to carry labels or information on allergens. At present, any food that does not fall within the definition of prepacked food is deemed to be a non-prepacked food, including PPDS food.

The new legislation requires PPDS food to include the legal name of the food, a list of ingredients and any relevant ingredient used in the manufacturing or preparation of a food and still present in the finished product. This information must be set out on the packaging or a label attached to it and must be clear, visible and in a minimum font size. Any derivatives must be followed by the allergen (eg "cheese (milk)".

The changes have raised considerable discussion regarding what constitutes PPDS food. There is currently no definition of PPDS in the underpinning law, the EU Regulation governing Food Information for Consumers (EU FIC). This issue is the subject of a Government Consultation.

The Consultation proposes that for a food to be considered PPDS, it must meet all the following criteria:

- the food is presented to a consumer in packaging
- it is packaged before the consumer selects or orders it, and
- it is packaged at the same place it is sold.

Whether a food falls within the definition of being "packaged" is proposed to be tested by considering whether the product is "a single item (the food and its packaging) presented to the consumer" and whether "the food is completely or partially enclosed and cannot be altered without opening or changing the packaging".

"Same place" is defined further as food a) packaged by the same food business on the same site from which it is sold; or b) sold from temporary or moveable premises (such as a food truck or market stall) by the same food business that packaged it. The Consultation also provides examples or what may or may not be considered PPDS.

The Consultation was published on 23 January 2020 with responses due by 6 March 2020 and a published summary of the response within a further 3 months.

A link to the Consultation document is here.

Back to contents>

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RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

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- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
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- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
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