Product Law bulletin

June 2020

Whirlpool extends scope of appliance recall

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Tougher crash tests launched for 2020

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Product Law considerations arising from COVID-19

The impact of COVID-19 has been undeniably profound and widespread, seemingly affecting every area of life. Inevitably, one such area impacted has been product liability.

Coping with COVID-19: Considerations for diversification within the food industry

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Government powers to order provision of information from companies in the food supply chain

Sections 25 – 29 of the Coronavirus Act 2020 empower certain authorities (as detailed in s26) to order the provision of information from companies who form part of the food supply chain.

FSA issues guidance on cannabidiol (CBD) food products

Following concerns regarding unregulated and unregulated products on the market and the recent findings by the Committee on Toxicity (COT), the Food Standards Agency (FSA) have produced a statement to provide further guidance on the safe use of CBD products.

Product Liability and the rise of Artificial Intelligence

The main source of law on product liability is the Consumer Protection Act, dating back to 1987, and used to implement the strict liability regime introduced by EU Directive 85/347/EEC (the Product Liability Directive) introduced in 1985. Since the introduction of these laws, technology has progressed (and continues to progress) at a rapid rate. This, in conjunction with limited statutory updates, raises the question of whether the current law can adequately address modern issues, in particular AI technology.

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Whirlpool extends scope of appliance recall

Whirlpool has extended the scope of their recall of certain types of washing machines to cover a further 21 models, amounting to an additional 55,000 washing machines being added to the recall list.

This extension comes five months after the original recall of almost 520,000 appliances, about 20% of which were sold between October 2014 and February 2018, which are said to represent a fire risk due to a door lock flaw which could result in overheating.

Whirlpool revealed in April that they had located 210,000 of the affected machines from their original recall list, with more than 3.1 million people contacting them to check if their washing machines formed part of the recall. However, owners of some machines who may have previously been led to believe that their machine is safe may now have to check again.

Whirlpool has sought to reassure owners of potentially faulty machines that they can still have them repaired or replaced for free.

Jeff Noel, Vice-President of Whirlpool, said: “With people spending more time at home under the current social-distancing measures, it’s more important than ever that this safety issue is tackled swiftly”. “We are deeply sorry to our customers for the concern and inconvenience this recall may cause but we continue to take action because people’s safety is our top priority.”

Seventy-nine fires are thought to have been caused by an overheating door locking system, a fault that develops over time, according to Whirlpool.

All owners affected by the recall are entitled to a replacement washing machine or a repair to their existing appliance, without charge, but there is no offer from the company of a refund.

Whirlpool has put in place additional measures to ensure that any repairs or replacements can take place safely during the COVID-19 pandemic with engineers and delivery teams being equipped with PPE including face masks, gloves and hand sanitiser, and practising social distancing at all times during their work. Customers also do not need to sign any paperwork physically, and are called in advance of their scheduled delivery or repair appointment to make specific arrangements.

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Safety organisation Euro NCAP (European New Car Assessment Programme) have announced their toughest ever car crash tests, with cars to be crashed into a moving barrier for the first time and assessment to be made of ease of evacuation after a crash. Additionally, a new sophisticated crash-test dummy – dubbed THOR (Test device for Human Occupant Restraint) – will be introduced, with the new dummy more closely mimicking the behaviour of humans in collisions.

Euro NCAP crash test cars into a range of different barriers in order to assess their safety. Aside from the new moving barrier test (which replaces the offset-deformable barrier test used by Euro NCAP for the last 23 years), the group has also increased the speed and force of the side impact barrier test, which hits near-side to the driver. This means even stronger driver protection is needed for cars to score well.

Matthew Avery, director of research at Thatcham Research and Euro NCAP board member, said: “These are the biggest changes to Euro NCAP’s impact testing protocols in a decade. The THOR dummy makes the new test especially challenging for carmakers, as the dummy more closely represents a human. “The previous dummy we used was designed for impact scenarios that are less common today, while the THOR dummy is far more complex and sensitive and can record abdominal injuries”.

Small cars have historically faired worse when it comes to ‘real-world’ collisions with big cars. As such changes are being introduced with tough new assessments that will mark bigger cars with a lower rating if they are judged likely to damage smaller cars disproportionately. Matthew Avery stated further that “the objective is to encourage makers of larger vehicles to share some of the burden of the impact with smaller vehicles.”

Post-crash safety also plays a vital role in crash survival. In partnership with CTIF, the International Association of Fire & Rescue Services, Euro NCAP has also developed new rating rules to promote better post-crash safety. Manufacturers will be rewarded when rescue information is accurate and easily available. Euro NCAP also checks ease of extrication, electric door handles etc. and endorses advanced eCall functions (automatic systems activated in the event of a serious accident).

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Product Law considerations arising from COVID-19

The impact of COVID-19 has been undeniably profound and widespread, seemingly affecting every area of life. Inevitably, one such area impacted has been product liability.

The pressing need for both personal protective equipment (PPE) and ventilators has been well-reported. In order to cope with demand, there has been a sharp increase in manufacturers and other businesses diversifying to help produce the needed products. This has ranged from large scale businesses, such as car manufacturers, to smaller operations in local schools.

One such product has been ventilators, used to treat those who are unable to breathe sufficiently on their own. On 30th March 2020, a conglomerate of UK industrial, technological and engineering businesses announced they had joined forces to produce ventilators, following a call from the Government to support the production and supply of ventilators on 16th March 2020.

The group, titled the Ventilator Challenge UK Consortium, has been heavily involved in the design and manufacture of new ventilators, as well as producing ventilators according to an existing design, known as “Rapidly Manufactured Ventilator Systems” (RMVSs).

Whilst the need for rapid supply of a large-scale number of products, atypical of companies’ normal products, was widely acknowledged, concerns arose regarding the potential liability that could attach to manufacturers. In April 2020, Cabinet Office minister, Michael Gove, decided to indemnify new manufacturers of ventilators from potential liability claims.

In addition, the requirement for rigorous testing under the Medical Device Regulations has been removed, although the Medicines and Healthcare Products Regulatory Agency (MHRA) has been quick to stress that the essential safety standards must still be in place and have published guidance on what is a “minimally acceptable” performance required for RMVSs.

Additionally, the normally extensive pre-launch procedures for new products have been relaxed, both by EU and UK authorities. The EU Commission has published a recommendation detailing how PPE or medical devices can be placed on the market without the usually mandatory CE marking. The MHRA has also acknowledged that new ventilators will not bear the CE marking and will be approved using the “exceptional use” channel.

Whilst the indemnity put in place by the Government does not absolve all liability, for example, the Courts may still give consideration to the MHRA’s guidance when considering if a product is defective in accordance with the Consumer Protection Act 1987, such measures are intended to ease concerns of manufacturers, encouraging them to produce ventilators and in turn alleviate the shortage.

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Similar provisions are in place for manufacturing of other products, such as the HSE providing a short-term removal for product authorisations under the Biocidal Products Regulation for hand sanitisers and the MHRA loosening the requirements concerning surgical face masks and surgical gloves.

It seems likely that these provisions will remain in place whilst the demand remains high, but it remains to be seen whether any further indemnities or provisions will be added, for example as work continues to develop a vaccine.

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Coping with COVID-19: Considerations for diversification within the food industry

On 23 March 2020, the Government announced that all cafés, restaurants and pubs had to close immediately as part of the UK's COVID-19 lockdown. As a result, many of the businesses have endeavoured to diversify by introducing takeaway and delivery services where they have not done so before. This has created challenges.

In addition to continuing to practice good hygiene, such as hand washing and ensuring the premises are frequently cleaned and disinfected, several other practical considerations arise:

Temperature control: hot food must reach the consumer at a minimum temperature of 63 degrees Celsius and cold food at 8 degrees Celsius or below. Food businesses should consider whether they have appropriate packaging or whether (especially where the food is high risk, such as rice or cooked meat) more specialist equipment is needed. In order to comply with the regulations regarding temperature, delivery destinations are recommended not to be over 30 minutes away

- **Vehicles**: those used to deliver food must allow for separation of foods and must be subject to regular cleaning
- **Contact-free delivery**: to adhere to social distancing rules, delivery drivers should knock and leave the food at the consumer's door, rather than handing the food directly to the consumer. Consideration should again be given to how to ensure the temperature of the food is maintained after a delivery has been made and before the consumer collects it from the doorstep
- **Takeaway services**: where a business offers a click-and-collect service for food, it should ensure that there is a designated area for "handover". This area should have as few staff as possible
- **Payment**: cash payments should be avoided where possible and contactless payments encouraged. If cash payments are unavoidable, thorough handwashing should commence and any potentially contaminated areas should be cleaned and disinfected
- **Staffing**: consideration should be given to who will undertake the deliveries, for example, the business's own staff members or a third-party courier service. If using their own staff, businesses should ensure that the staff are aware of the health and safety policies and procedures in place for deliveries and provide additional training if necessary. If using a third-party, due diligence should be carried out to ensure that person meets the requisite standards
- **Allergens**: businesses selling takeaways, either online or over the telephone, allergen information should be provided at two separate stages:
    1. Before purchase: either by way of writing on the business's website or menu, or orally (for example, if the order is being taken over the phone); and
    2. When food is delivered: again, either in writing (e.g. a sticker, copy of the menu, label, etc.) or orally.

  If there have been changes to the menu, businesses should also ensure that the consumers are made aware of this.

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Government powers to order provision of information from companies in the food supply chain

Sections 25 – 29 of the Coronavirus Act 2020 empower certain authorities (as detailed in s26) to order the provision of information from companies who form part of the food supply chain.

The power is enshrined in s25(1) subject to caveats in s25(4) and (5). Information can be ordered to be provided for the purpose of establishing whether there is a risk of the food supply chain being disrupted (in whole or in part) and/or the nature of the disruption, subject to this information having previously been requested and not provided or false information having been provided. A requirement to comply with such a request cannot be imposed on an individual (s25(6)) and must be made in writing and include specified information (s25(7)).

The meaning of "food supply chain" is given a broad interpretation under s29. Food supply chain is defined under s29(2) as "a supply chain for providing individuals with items of food or drink for personal consumption, where the items consist of or include, or have been produced to any extent using – a) anything grown or otherwise produced in carrying on agriculture, or b) anything taken, grown or produced in carrying on fishing or agriculture". Further guidance is given on who constitutes a person "in" a food supply chain, who is a person "closely connected" and what is "agriculture". The wide definition includes persons supplying seeds, stock, feed, pesticides, etc.

S28 of the Act provides for financial penalties to be imposed on any person who fails to cooperate without reasonable excuse. The maximum amount of the financial penalty that can be imposed is 1% of the qualifying turnover of the person.

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FSA issues guidance on cannabidiol (CBD) food products

Following concerns regarding unregulated and unregulated products on the market and the recent findings by the Committee on Toxicity (COT), the Food Standards Agency (FSA) have produced a statement to provide further guidance on the safe use of CBD products.

The FSA advise that those who are pregnant, breastfeeding or taking any medication should not consume any CBD products. They also warn that healthy adults should give careful consideration before taking CBD and ingest no more than 70mg (the equivalent to 28 drops of 5% CBD) per day, unless directed to by a medical professional.

In addition, the FSA have issued a clear deadline for compliance with novel food regulations. The FSA had previously issued guidance in early 2019, following the European Food Safety Authority's classification of CBD products as "novel foods". A novel food is defined as food not widely consumed by people in the UK or the EU prior to May 1997. Regulation (EU) 2015/2283 dictates the need for novel foods to have a pre-market safety assessment and authorisation before they can be legally marketed.

The decision to classify CBD products as novel foods was controversial and therefore many companies chose to ignore the FSA's previous guidance. Resultantly, a deadline of 31 March 2021 for compliance has now been issued. The FSA have been unequivocal in their advice, stating that, "Businesses need to submit, and have fully validated, novel food authorisation applications by 31 March 2021. After this date, only products for which the FSA has a valid application will be allowed to remain on the market.".

In order to comply, businesses must submit a fully validated dossier for each of their products by the deadline. Subject to approval, it is these products only that can be remain on the market. No new products can be sold until they have received the necessary authorisation.

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Under the Directive, products are defined as moveable objects (even when incorporated into another moveable or immovable object) and include electricity. In its recent paper (found here) the European Commission details several challenges that they believe will arise as a result of modern technology:

Firstly, they identify that in AI systems, products and services consistently and permanently interact, making it impracticable to draw a distinction between the two. In addition, they question whether software is covered by the legal definition of a product – in particular, whether this differs dependent on whether the software is embedded or non-embedded.

They also note that defectiveness is potentially difficult to identify in sophisticated systems and, even where a defect could be identified, it would be hard for a lay person to identify and prove the defect alongside proving causation leading to potential for justice to be restricted.

The Commission identify that the regime was designed with traditional tangible products in mind, in circumstances where a product is sold and the manufacturer has no control over it thereafter. The current Directive focuses on when the product was put into circulation, with this forming the "cut off" point for any claims. This does not adequately cover more modern situations, for example, when a manufacturer retains some degree of control over the product's further development, for example, by way of additions or updates after it has been circulated. The Commission recognises that where this is the case, an argument could be made that the manufacturer's control is non-exclusive and diluted where the product's operation requires data provided by third parties, the user or the user's environment.

Similarly, a defence to potential claims adopted by most Member States is the colloquially-known development risk defence. This provides a defence if the knowledge at the time when the product was circulated was not enough to allow the defect to be discovered. If updates, additions and the like are adjudged to fall within the definition of a product, it is likely that this defence will be become much more important.

It seems likely that this is an area of law that will continue to develop, both by way of case law and statute. It appears that countries are already trying to address some of the issues in their own independent statutes, for example, the UK's Automated and Electric Vehicles Act 2018.