PRODUCT LIABILITY UPDATE

Product focus

Ongoing concerns with Lithium-ion batteries

Recent reports of e-scooter fires in India and this year's OPSS product safety reports show the risks associated with lithium-ion (Li-ion) batteries persist. For instance, recent OPSS reports have flagged the following product recalls resulting from battery faults:

- Fitbit 'Ionic' smartwatches containing a Li-ion battery which could overheat causing burn injuries.
- Similarly, a 'Kiprun' sports watch which could also overheat.
- A portable Li-ion battery pack for an e-bike which presented a fire risk following a "consumer incident".

Li-ion batteries are popular in the market because they store a large amount of power in comparison to their size and weight. But they are also susceptible to failure, particularly if they sustain damage, if they are not charged correctly or if they are not disposed of correctly (i.e., at landfills and waste treatment facilities). Further, the fires produced by Li-ion batteries can be more dangerous than ordinary fires because they essentially produce their own (toxic) fuel, can become very hot very quickly (via thermal runaway), can burn for days and can be almost impossible to extinguish (and will often reignite even when extinguished).

Li-ion batteries have also been known to ignite in e-bikes, e-cigarettes, smartphones, headphones and hoverboards.

Of particular concern is the increasing use of batteries in electric vehicles (EVs) where fires can arise when (for example) a battery is damaged in a crash or as a result of a contaminated cell introduced at the manufacturing stage. Whilst it has been reported that EVs have a relatively low chance of catching fire (25 per 100,000 vehicles) that proportion must be applied to the 7 million EVs on the road today; and to the predicted 100 to 200 million EVs by 2030.

Li-ion batteries in e-scooters raise similar issues. In 2020 e-scooter manufacturer Lime recalled 2,000 e-scooters due to a risk the batteries could catch fire, particularly where the battery had been damaged as a result of the e-scooter colliding with something. In November 2021, passengers had to abandon Parsons Green tube station after an e-scooter caught fire (following which TfL banned privately owned e-scooters on the London transport network). Then on 1 January 2022, a Voi Scooters warehouse containing hundreds of e-scooters caught fire as a result of battery overcharging. It's suggested there were at least 95 e-scooter fires in 2021 (up from 33 in 2020) and that London firefighters have been called out to over 130 e-bike and e-scooter blazes in the last year (see Over 130 e-bike and e-scooter battery fires in just over a year | Evening Standard).

In the event of a fire arising from a Li-ion battery, the liability position may be complex and will depend on the cause.

- If it's found the battery contained a defect, which caused damage, then the producer of the battery will almost certainly be strictly liable under the Consumer Protection Act (CPA). Similarly, if (for example) an EV manufacturer installs a defective battery in its EV then it could also be strictly liable as the producer of the EV even if it sourced the battery from elsewhere.
- But if it's found that the battery was damaged after it was supplied, then the manufacturer may escape liability; but not necessarily if it's found the misuse which caused the damage was foreseeable. For example, if a manufacturer of e-scooters is aware that its

products are being ridden in ways that could damage the battery then it may have a duty to address that risk, say by providing a special warning.

- Similarly, if in fact the battery failed because it was overcharged or overheated then (again) much may depend on the instructions provided and any warnings given, particularly regarding the risk of fire.

Button batteries

Recent OPSS product safety reports have also highlighted the ever-present danger of button cell batteries being swallowed by children. Button cell batteries are used in many everyday items, particularly children's toys. If swallowed by a child, they can react with saliva to produce caustic soda (normally used to unblock drains) which can cause tissue damage to the child's oesophagus and stomach.

The OPSS has recently flagged the following toys which were found to contain loose or easily accessible button cell batteries:

- A writing table doodle board.
- LED keyrings.
- A princess light up tutu.
- A slapband watch.
- Fancy dress hat with LED lights.

The OPSS launched a safety campaign relating to raise awareness among parents and carers (see Hidden danger in your home: button batteries and powerful magnets - GOV.UK). And Duracell recently introduced a range of button cell batteries coated in a non-toxic bitter substance to discourage babies and toddlers from swallowing them.

The liability position relating to the risk of injury from swallowing is not straight forward. At one end of the scale, if (for example) a toy contains a battery which is easily accessible (for example, if there is no battery compartment screw) then it would almost certainly not meet the requirements of the Toys (Safety) Regulations 2011 and, similarly, would almost certainly contain a defect for the purposes of a CPA claim. At the other end of the scale, parents and guardians must take some responsibility for keeping button batteries (particularly those purchased separately) away from children. For the time being, it seems unlikely manufacturers will be required to introduce a bitter coating (as used by Duracell) – but that may change in time if the practice became more common and consumers expect it.

High powered magnets

Interestingly, the OPSS has also identified similar risks associated with small high powered magnetic products, particularly ball magnets, following reports of serious injuries having been caused following ingestion by children. The risk is that if 2 or more magnets are swallowed, they can be drawn to each other in the digestive system (causing blockages). Toy safety standard EN 71 sets an acceptable maximum level of magnetic flux for toys. The OPSS has recommended the same maximum level is applied to all products where there is a risk the product might be ingested by a child – which might include fridge magnets, desk toys, etc. In recent product safety reports, the OPSS has highlighted several sets of magnetic construction toys which were over twice the maximum limit.

Microplastics

In a recent study, scientists found microplastics (fragments of plastic less than 5mm in length which enter natural ecosystems from cosmetics, clothing, packaging, etc.) in the blood of almost 80% of people tested (see Researchers find microplastics deep in the lungs of living people : NPR). The impact on health is not known yet but the particles could potentially lodge in organs and cause damage to human cells. It is difficult to predict whether an injury caused by microplastics could result in a product liability claim (not least because of the difficulty of tracing such materials back to a source) but it certainly can't be ruled out either.

Autonomous vehicles and micromobility

Law Commission recommendations and scope for product liability claims

Following 3 consultations, the Law Commission has now published a report making recommendations on the proposed legal framework to be adopted when a vehicle can drive itself (see Automated Vehicles | Law Commission). The report largely focuses on the regulatory side, suggesting a legal definition of autonomous driving, an authorisation scheme (to decide which features are self-driving) and a system of legal accountability which makes the 'authorised self-driving entity' (e.g., the manufacturer) responsible for a wide range of offences committed whilst an automated driving system is engaged.

The report discusses civil liability at Chapter 13 and concludes that the Automated and Electric Vehicles Act 2018 (the AEVA; which provides for claims against insurers and for recovery claims against manufacturers) is "good enough for now" and also that "product liability law is likely to play only a limited role in the regulation of self-driving". It says this because apparently "often both sides would be able to resolve matters without recourse to the law". HF considers this view is naïve and has discussed this further here: Automated Vehicles: The Law Commission Recommendations for the Way Ahead | Horwich Farrelly.

Mercedes announces it will accept legal responsibility for accidents caused by its self-driving cars

Elsewhere, Mercedes has confirmed it will accept legal responsibility for accidents involving its Level 3 automated lane keeping system (ALKS) if the accident is caused by a fault with its technology, but not if the driver fails to comply with their duty of care, i.e., if he or she refuses to take back control of the vehicle following a transition demand (see Mercedes to accept liability for accidents when Automated Driving System engaged - Thatcham).

As above, the AEVA imposes liability on insurers where damage has been caused by an autonomous vehicle driving itself and provides that an insurer can pursue a recovery from "any other person liable to the injured party in respect of the accident". So, for the purposes of claims in the UK, Mercedes has not said much that is not already in the AEVA – but its comments may help insurers to avoid multi-party product liability claims, involving, e.g., dealerships and other suppliers.

HFTV e-scooter event

We mentioned the prevalence of e-scooter fires above. On 12 May 2022 HF will be airing an e-scooter roundtable looking at various issues associated with these products including the potential for product liability claims. Please get in touch if you would like to join this roundtable.

Food for thought

FSA launches its 5-year strategy

On 18 March 2022 the FSA launched its strategy for improving food over the next five years, particularly to reflect the FSA's greater responsibility post-Brexit as well as climate change (see Food you can trust - FSA strategy 2022-2027 | Food Standards Agency). From a product liability perspective, the strategy touches on the following:

- Pathogens and foodborne illnesses: the strategy outlines how rising temperatures mean food is at greater risk from pathogens and toxins. The FSA says it has developed a Foodborne Disease Framework to draw together data on the most detrimental pathogens and that it will use DNA-sequencing to technology to track pathogens through the agri-food system.
- Food allergies: the strategy highlights that 2 million people are living with a diagnosed food allergy and that 600,000 people have Coeliac Disease. It highlights the importance of a strong food safety culture in order to protect those with food hypersensitivity. Elsewhere the FSA recently completed a 4 month trial of an allergy and intolerance reaction reporting tool (see Report a food allergy or intolerance reaction | Food Standards Agency).

FSA consultation on precautionary allergen labelling closes

The FSA's consultation on precautionary allergen labelling closed on 14 March 2022. The law regarding the labelling requirements for the 14 main allergens was recently changed via Natasha's Law. However, the law is less clear in circumstances where there is a risk of unintentional allergen cross-contamination. It has become standard practice for food businesses to provide warnings stating that a food item 'may contain' a certain allergen or that the absence of an allergen cannot be guaranteed. However, there has always been a risk that excessive use of precautionary allergen labels (perhaps thought to protect food businesses) can limit consumer choice and devalue genuine warnings. The FSA is seeking to set out an approach which provides better information to consumers whilst remaining proportionate for food businesses. We await the FSA's findings.

FSA issues call for evidence on safety of plastics recovered from the open environment

On 21 March 2022 the FSA called on retailers, manufacturers and suppliers to provide evidence on the safety of using recycled plastic, recovered from the open environment, as food contact material. The FSA has taken this step as a result of findings by the Joint Expert Group on Food Contact Materials that it was not possible to guarantee the use of such material was without risk.

FSA draws up list of CBD products

The FSA has drawn up a list of over 3,500 novel food application containing CBD (cannabidiol; a chemical in cannabis). Products marked as validated or awaiting evidence should stay on the market but any products which are either not on the list or are marked as removed should be withdrawn. This is a further step in making sure CBD products are safe; but it does not mean the CBD products are authorised. That is not likely to happen until 2023.

New calorie labelling regulations come into force

The Calorie Labelling (Out Of Home Sector) (England) Regulations 2021 come into force in April 2022 and will require qualifying food businesses to display calorie information on menus and food labels for non-prepacked food intended for immediate consumption.

Case watch

Ayannuga and others v One Shot Products Ltd [2022] EWHC 590 (QB)

The decision in the above case demonstrates that proving there is a defect in a product under the Consumer Protection Act 1987 (CPA) will often be inextricably linked with causation.

The claimant family lived in a flat. A friend of the family helped them to unblock a sink and used a bottle of 'One Shot Instant Drain Cleaner'. The claimants alleged the product produced hydrogen sulphide which killed the family friend and catastrophically injured the father. The claimants sued the defendant as the manufacturer of the product, which they said contained a defect, under the CPA. The parties put forward competing theories as to what had caused the release of hydrogen sulphide, both of which (at first glance) seemed improbable. However, the court ultimately preferred the defendant's theory (that sewer gas had escaped when a pipe was removed) to the claimants' theory (that the product had reacted with lime sulpher). Whilst the conditions suggested by the defendant were incredibly unlucky, there was simply no evidence to support the claimant's theory. It seemed the use of the drain cleaner had been coincidental. It had not caused the claimants' injuries. The claim was dismissed.

Wilson and others v Bayer Pharma AG and others [2022] EWHC 670 (QB)

This product liability decision is notable both for its historical interest (pre-dating the Consumer Protection Act) and for its reminder that claims can sometimes re-emerge where the state of scientific knowledge changes over time.

A hormone-based pregnancy test was introduced in 1959 and was withdrawn nearly 20 years later following concerns it was causing miscarriages and other issues. A cohort of claimants first proceeded against the defendants in 1977 but they ultimately discontinued with leave to apply to bring further actions if there was a scientific revolution. Then in 2019 and 2021, 231 claimants subsequently brought further claims, presumably based on new scientific evidence. But the solicitors representing the claimants have now terminated their retainers with 183 claimants (so they can continue their claims on their own) whilst the remaining claimants discontinued their claims. The above decision concerns the solicitors' successful application to come off the record in respect of the 183 claimants who wish to continue.

Soteria Insurance Ltd v IBM United Kingdom Ltd [2022] EWCA Civ 440

It is common to encounter exclusion clauses in product liability claims. Such clauses often refer to indirect or consequential loss, meaning losses arising from unusual circumstances rather than flowing from a breach. The difference between direct and indirect losses is often case specific and not easy to predict. The above decision highlights this uncertainty.

The respondent (R) had supplied an IT solution to the appellant (A). The contract included an exclusion providing that neither party would be liable for indirect and consequential losses. A refused to pay R's invoice because of serious delays in the delivery of the product. A sought damages for its wasted expenditure. At first instance, the judge said that claim was excluded. A appealed; and the Court of Appeal agreed the wasted expenditure was not excluded because it was not indirect or consequential loss and was not otherwise mentioned in the exclusion.

Baker and others v Volkswagen Aktiengesellschaft and others [2022] EWHC 810 (QB)

The VW NOx Emissions Group Litigation (established by a GLO in 2018 and consisting of 91,000 claimants) continues. In the above judgment a cohort of 49 claimants, whose claims had been struck out in 2019 because they had not joined the group register prior to the cut off date, applied for relief from sanctions and for a declaration they were deemed included in the group register; but their application was dismissed. To do otherwise would have rendered the cut-off date meaningless.

If you would like to discuss any of the information contained within this document, please do not hesitate to get in touch.

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