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PRODUCT LIABILITY POST-BREXIT – WHERE ARE WE NOW?

CLIENT UPDATE

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Product Liability team & 12 King's Bench Walk

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Alexander House
94 Talbot Road
Manchester

03300 240 711

www.h-f.co.uk

INTRODUCTION

We're now nearly two years from when the transition period under the EU-UK Withdrawal Agreement came to an end, but there remains a great deal of uncertainty regarding its impact, including with respect to product liability and product regulation.

At the domestic level, whilst much of the European Union (Withdrawal) Act 2018 (the Withdrawal Act) was concerned with preserving law, a key change was made to the Consumer Protection Act 1987, which radically redefines the legal status of some UK businesses. At the international level, the certainty previously afforded by the Brussels I (Recast) regulation on jurisdiction (a frequent issue in product liability claims) has now been lost. And at the regulatory level, UK businesses continue to adapt to changing product safety rules. Further, as we move forwards, the UK and the EU are separately considering reforms to the product liability and regulatory regimes, meaning further divergence is perhaps inevitable.

In this product liability update, Dan West, Head of Product Liability at HF, together with Michael Rawlinson KC and Max Archer of 12 King's Bench Walk, consider the ongoing impact of Brexit on product liability and product regulation.

DANIEL WEST
Partner & Head of Product Liability

0161 413 1890
daniel.west@h-f.co.uk

KEY CHANGE TO THE CONSUMER PROTECTION ACT 1987 (CPA)

The Consumer Protection Act 1987 (CPA; based on the EU Product Liability Directive) essentially guarantees that any person injured by a defect in a product will be able to seek damages from at least one defendant. The CPA achieves this by imposing strict liability on several classes of defendants. Previously this included the party which imported the product into an EU Member state (from outside the Member states) so that if the producer was located outside the EU, the injured party could pursue his or her claim closer to home. Post-Brexit, the position has been changed to narrow the geographical proximity of potential defendants even further – so that rather than looking to the party which imported the product into the EU, the injured party can sue "any person who has imported the product into the United Kingdom in order, in the course of any business of his, to supply it to another" [1].

At first glance, this seems like a relatively straightforward change. Its impact may be significant (particularly for some UK businesses, i.e., those which import products from the EU, who previously did not fall within the remit of the CPA but now do), but the new rules at least seem easy enough to follow.

That is, it's easy enough to follow for a product imported into the UK after 31 December 2020. But what is the position if a UK business imported a product prior to or on 31 December 2020 but where it causes damage and/or a claim is pursued after 31 December 2020? Will that business be subject to the CPA as it was drafted on the date of import, or will it be subject to the new rules?

The point is an important one since the limitation provisions associated with the CPA will mean there are products on the market dating back to 2012 that could still trigger a claim under the CPA, and there were products supplied prior to 31 December 2020 that could trigger claims up until the end of the decade.

The Act itself is silent on the point, making no reference (for example) to the date of import or claim. Similarly, the regulations which made the amendment are also silent. And neither the Withdrawal Agreement nor the Withdrawal Act adds anything.

One argument that might be put forward (presumably by UK importers) is that there is a presumption against the retroactive operation of legislation unless such a retroactive effect is stated clearly in the terms of the Act. As above, there isn't such a clear indication here. On this basis, it is arguable that where the CPA (as amended) imposes liability on a party which has imported a product into the UK, this can only apply to a party which did so from 31 December 2020 onwards. To say otherwise would be to impose liability on some UK importers who would not have known at the time (and had no way of knowing) that they were taking on potential liabilities under the CPA. Similarly, their insurers would also not have known the potential liabilities their policyholders were taking on and may not have offered insurance on such terms.

On the other hand, claimants may argue that the purpose of the CPA is not to assign liability at a particular point in time but simply to provide claimants with recourse against a particular defendant in circumstances where a product has caused them injury. As it stands, the CPA identifies the UK importer, and it should make no difference when the product was imported. To say otherwise would be to potentially leave consumers without a sufficient remedy, i.e., where they would have to pursue an EU producer or importer but without the benefit of the Recast Brussels Regulation (see below).

This is an issue that may need to be determined by the court at some stage in the near future.

1 See Regulation 6 and Schedule 3 of The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.

INTERNATIONAL CLAIMS JURISDICTION AND CHOICE OF LAW

The UK's departure from the EU wrought profound changes to the jurisdiction regime applicable to claims involving EU domiciled defendants. Where other EU regulations were copied and pasted into domestic law, the Brussels I (Recast) regulation was specifically excluded from this process by the Withdrawal Act. Thus this regime ceased to have effect from Exit Day onwards (save that it will continue to be applied in relation to claims issued prior to this date). The removal of the Brussels regime from the domestic rules of jurisdiction was widely expected (or perhaps vainly hoped) to be followed by the ascension of the UK to a multi-lateral treaty with the EU on the jurisdiction that would herald a Brussels-like jurisdiction regime as a replacement for what was removed by the Withdrawal Act (the Lugano Convention was mooted as an example). This was not to be: the politics of Brexit appear to have spiked any appetite for this solution on both sides of the channel, though this is not to say that ascension to such a regime is impossible in the future.

The Brussels Regime has not been replaced by a new system of jurisdiction, instead, the common law rules of jurisdiction and the service-out regime in CPR Part 6 have filled this gap. This is not a new regime; it has been running in parallel to the Brussels regime (which did not apply to non-EU defendants). The case law and the rules themselves have, therefore, not been in stasis since Brussels was introduced. In fact, its limits have been tested in the Supreme Court on several occasions in recent years (see Vedanta [2019] UKSC 20 et al). The basics of the regime are as follows:

> The Court's permission is required to serve a claim out of the jurisdiction, and to obtain permission it must be shown that:
>
> (i) there is a serious issue to be tried;
>
> (ii) that there is a good arguable case that the claim fits through one of the 'jurisdictional gateways' set out in CPR Part 6;
>
> and (iii) that England and Wales is the proper and appropriate forum for the dispute to be heard.

For product liability claims, the relevant gateways are likely to be:

- The Contract Gateway, which is engaged if the contract was made in England & Wales.
- The Tort Gateway; which is engaged if a claimant sustained damage in the jurisdiction (see Brownlie v Four Seasons Holdings [2021] UKSC 45).

– The Necessary and Proper Party Gateway, where the Court is already seized of the jurisdiction in relation to a defendant to which the claim against the contemplated defendant is a necessary and proper party.

As to forum non-conveniens, this doctrine allows the Court to stay the action if it considers another jurisdiction a more suitable and appropriate forum in the interests of justice. Forum conveniens did not feature in the Brussels regime ostensibly, this will be an attractive tool in the hands of defendants.

As will be obvious, the common law rules of jurisdiction are more complex and risk-laden than the Brussels Regime. The latter did away with forum non-conveniens: the return of a discretion-based test creates uncertainty and increased costs that will likely deter some from bringing claims. The need for permission to be sought and the increased costs of the process will no doubt cut down on lower-value claims. On the other hand, forum non-conveniens isn't always the potent weapon in the defendant's hands that is sometimes thought. Recent cases have emphasised that multi-national corporations whose business is truly global might struggle to show that one forum is distinctly more appropriate for the dispute than England & Wales. Producers with global supply chains whose business straddles the globe may find this difficult, albeit it is of course entirely case-specific. Another point of interest is the direct right of action against insurers. The Brussels Regime and its accompanying case law allowed a direct right of action against an insurer where permitted by the proper law of the dispute. This allowed a claimant to bypass the need for the tort to have been committed in the jurisdiction and/or avoid the potential difficulty of pursuing a tortfeasor directly. This right allowed an easy means of establishing jurisdiction in personal injury claims that took place in the EU, particularly in motor claims, due to the 6th Motor Insurance Directive and its requirement that all Member States establish a direct right of action in such claims. This right has been taken away, and it remains to be seen whether or not the permissive approach to the tort gateway enshrined in Brownlie will prove more advantageous than the direct right of action. Either way, the future is interesting, if uncertain.

Happily, the position in relation to proper law is straightforward. Rome I and Rome II were transposed into national law and continue to operate as before. This at least allows certainty in predicting the proper law of a dispute. Thankfully the common law rules of 'double actionability' will not be returning any time soon.

REGULATORY CHANGES IMPACTING PRODUCTS

At the end of the transition period, the Withdrawal Act converted most existing EU law (which applied to the UK) into domestic UK law and preserved laws made in the UK to implement EU directives. So, to a large extent, the UK's post-Brexit regulatory position largely mirrors its pre-Brexit regulatory regime and will continue to do so unless and until either the UK or EU makes changes to their respective regimes. Indeed, such changes may come sooner rather than later, given the government's intention to capitalise on Brexit. Indeed, we are already starting to see diverging standards on things like forever chemicals, artificial intelligence and medical devices.

Of course, some amendments had to be made[2] primarily to make the new regime workable. For example, references to EU bodies, EU law and Member states had to be removed, and references to retained EU law had to be inserted.

For UK product manufacturers, importers and suppliers, the key changes are listed below.

CHANGES IN STATUS UNDER THE GENERAL PRODUCT SAFETY REGULATIONS 2005

The General Product Safety Regulations 2005 (GPSR) provide a catch-all baseline level of safety for consumer products not otherwise dealt with under product-specific regulations. The regulations impose obligations on 'producers', which was previously defined to include EU manufacturers and businesses which import products into a Member state from outside the Member states, but post-Brexit changes made to the GPSR[3] redefined 'producers' to include UK manufacturers and businesses which import products into the UK.

This is a significant change for UK importers, which were previously treated as 'EU distributors', but now must comply with new duties. For example, a producer must not place products on the market which are unsafe, must provide consumers with information to enable them to assess the risks of a product and must comply with labelling requirements by including its name and address and product reference or batch on the product. The UK importer may also have to conduct sample testing and keep a register of complaints.

UKCA MARK

Beyond the GPSR, any products which previously required a CE mark (under product-specific regulations) to be placed on the EU market will now require a 'UKCA' mark when placed on the UK market (except for in Northern Ireland) – subject to a transition period, whereby CE marked products can still be placed on the UK market until 1 January 2023.

For the time being, the safety and compliance required for a UKCA mark are no different from that which was required for a CE mark. And the circumstances in which a product can be self-certified have not changed. But, as above, UK businesses which import products into the UK will now be classed as "importers" (not EU distributors) for all product-specific regulations, meaning they will have responsibility for ensuring the manufacturer has done everything required to place the product on the market including any conformity assessment requirements, drawing up technical documentation and affixing the UKCA marking.

It is also worth noting that for UK exporters wishing to export goods to the EU, this will still require a CE mark as the UKCA mark will not be recognised in the EU. Further, if conformity assessment is required, then this will need to be carried out by an EU-based notified body since UK-based notified bodies are no longer established in the EU. The UK exporter may also need to appoint an authorised representative in the EU.

Recently, the government sought to make it simpler for businesses to apply the new UKCA mark – although not for all products (with medical devices being excluded). The government will achieve this by (for example) reducing re-testing costs, removing the need to re-test imported stock, continuing to accept spare parts on the UK market and allowing UKCA markings to be added using a sticky label for an extended period.

2 Including within The Product Safety and Metrology etc. (Amendment etc.) (EU Exit) Regulations 2019.

3 Ibid, per Regulation 12 and Schedule 9.

FUTURE CHANGES TO PRODUCT LIABILITY LAW AND SCOPE FOR FURTHER DIVERGENCE FROM EU LAW

Moving forwards, the ongoing reviews of product liability law (and associated issues) at both the domestic and EU level will, perhaps inevitably, lead to further significant divergence between the two regimes.

At the domestic level, the government created the OPSS in 2018 with the stated purpose of delivering and improving consumer protection in the UK. In March 2021, the OPSS issued a call for evidence (see here) intending to reform the product safety framework so that it is fit for the future, including respect for, e.g., automated vehicles, artificial intelligence and modern connected devices. The response (here) was published in November 2021 when the OPSS confirmed it was working with the government to consider reforms to product liability laws, including, e.g., "to understand the impact of AI on product safety and liability".

Separately, at the EU level, the European Commission (EC) published a review of the Product Liability Directive (PLD; upon which the domestic Consumer Protection Act is based) in 2018 and concluded that it remained an "adequate tool" but had criticisms regarding its applicability to interconnected, digital, autonomous and intelligent products – particularly where products can be changed or adapted throughout their lifecycle. As a result, the EC plans to revise the PLD and recently closed a public consultation in this respect. The amendments being considered include extending the PLD to cover software and digital content and defects resulting from changes made to a product after it has been put into circulation. Separately, the EU is developing a framework for artificial intelligence.

It will be interesting to see the extent to which the proposed reforms of both product liability and artificial intelligence laws in each regime either mirror or depart from one another.

CONTACT

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

DANIEL WEST

Partner & Head of Product Liability

0161 413 1890
daniel.west@h-f.co.uk

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