PRODUCT LIABILITY BITESIZE

QUARTERLY UPDATE

DECEMBER 2022

Your quarterly update from HF's Product Liability team

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INTRODUCTION

When we first started producing these quarterly updates covering all things product liability (see **here** for our earlier editions), we wondered whether there would be enough news to fill the pages, from what is (after all) a relatively niche area. But the fact that this is our largest edition yet just goes to show the breadth of issues which product liability touches upon and the extent to which the area has been developing and maturing in the last year or so, particularly in its attempts to keep up with advancing technologies.

Perhaps the most significant development in the last few months is the European Commission's introduction of a revised Product Liability Directive, which proposes dramatic changes to product liability as we know it. We've summarised the key changes in our *Product Law* section below, as well as updating you on other matters such as the UKCA marking, medical devices and the 'internet of things'.

Then in *Product Focus*, we look at some emerging product risks, like solar panel-related fires, as well as updating you on toys containing button batteries and magnets and forever chemicals.

In our *Automated Vehicles* and *Micromobility* section, we do our best crystal ball gazing to try to predict (again) when we might see an automated vehicle on a UK road, as well as looking at the latest Tesla and e-scooter headlines.

In *Food for Thought*, we discuss the recent inquest into the tragic death of Celia Marsh; and we look at some recent food contamination cases.

Finally, in *Case Watch*, we look at some recent product liability judgments touching on "own branders", expert evidence and contractual terms and conditions.

We hope you find the information in this update useful. Please don't hesitate to get in touch if you have any queries arising from the topics discussed.

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PRODUCT LAW

THE EC'S REVISED PRODUCT LIABILITY DIRECTIVE (AND AI LIABILITY DIRECTIVE)

The big news in 2022 Q4 has been the introduction by the European Commission (EC) of a revised Product Liability Directive (**here**), coupled with the complementary AI Liability Directive.

The EC's proposals would provide sweeping and dramatic changes to product liability as we know it, with many of the changes intended to address the types of mischief caused by emerging technologies which we previously addressed **here**. For example, the revised directive would extend the definition of a 'product' to include software – which has previously been subject to debate, particularly in the UK.

Of course, post-Brexit, the new directive would have no direct application in the UK; but we know the Office for Public Safety and Standards (OPSS) has been undertaking its own review of the UK's product liability framework and has acknowledged the need for reform in the face of changing technologies. The OPSS says it is working with the government in this respect.

It's worth noting that before he resigned as Business Secretary, Jacob Rees-Mogg signed off on a three-page document responding to the EU's proposals (**here**). That response (whilst noting that the revised Product Liability Directive would apply in Northern Ireland) stated that "The UK will continue to make decisions that benefit the UK interest. These decisions will be made by the Government, in accordance with expert groups, to determine what is best for the UK".

Nevertheless, if changes are to be made, it's hard to imagine the OPSS would not be influenced by the EC's workings, which include key changes that can be summarised as follows:

- As above, the definition of a 'product' is expanded to include software (which includes artificial intelligence systems) and not just tangible products (Article 4).
- Similarly, the definition of damage is expanded to include "loss or corruption of data" (Article 4).
- The definition of defect is expanded to take into account modern concepts such as a product's 'interconnectedness' with other products, its self-learning functions (e.g., artificial intelligence) as well as the manufacturer's ability (or duty perhaps) to retain control of a product after it has been supplied (e.g., via over-the-air software updates) (Article 6).
- The types of defendants liable under the directive are expanded to include the following (under Article 7):
  - Fulfilment service providers.
  - Online marketplaces (like Amazon and eBay).
  - Any party that substantially modifies a product after it has been placed on the market (which appears to be targeted at the circular economy but could also apply to someone carrying out, e.g., a software upgrade).
- The revised directive includes (potentially) increased powers for claimants to seek disclosure, particularly by raising a presumption that a product is defective where a defendant fails to comply with an obligation to disclose relevant evidence (Articles 8 and 9).
- Moreover, the revised directive also provides a rebuttable presumption of defectiveness (and a causal link between defectiveness and damage) where, due to the technical or scientific complexity of the subject matter, the claimant would face excessive difficulty in proving their claim (Article 9).
- The existing defence to say the defect did not exist at the time the product was placed on the market is weakened in that it cannot be used where the product remains in the manufacturer's control and where the defect arises as a result of or lack of a software update (Article 10).
- The 10-year longstop is similarly weakened (under Article 14) as follows:
  - For persons suffering latent injuries preventing them from starting proceedings within 10 years, the time limit is extended to 15 years.
  - Substantial modifications will renew the limitation period, which would presumably include a substantial software update or upgrade.

Elsewhere, the EC's proposed 'AI Liability Directive' deals with tortious liability in respect of artificial intelligence (AI) with the aim of ensuring that persons injured by AIs are no less protected than those injured by traditional (tangible) products. Much like the revised Product Liability Directive, there would be a presumption of defectiveness where it would be excessively difficult for a claimant to prove his or her claim, e.g., due to the opacity of the AI rendering it too difficult to explain its functioning.

These proposals will combine to make it easier for consumers to bring product liability claims, particularly in respect of new technologies, including, e.g., software, artificial intelligence and automated vehicles, where that technology can be complex and opaque. Whilst that might create new risks for manufacturers and their insurers, it could also provide much-needed certainty on longstanding issues such as the status of software and the impact a software update will have on limitations. We can only wait and see what the UK does next.

UPDATE ON THE UKCA MARKING

We reported in our **last edition** that from 01.01.23 products that previously required a CE mark will be required to have a UKCA mark when placed on the UK market. That date has now been pushed back to the end of 2025. This is to ease the burden on businesses in the current economic climate.

So, until the end of 2024, the UK will continue to recognise the CE mark.

UPDATE ON MEDICAL DEVICES

Similarly, we also reported on medical devices in our **last edition** – and since our last report, the MHRA announced (in October) there will be a delay to the incoming changes to the UK's medical devices legislation until July 2024.

The MHRA also published a roadmap for the future regulation of software and AI as medical devices as part of its proposed reforms (**here**) – with some initial steps to follow (hopefully) by the end of the year.

A NOTE ON THE CLAIMS PORTAL AND PRODUCT LIABILITY CLAIMS

Civil Litigation Brief recently **reported** on a notable first instance decision concerning whether product liability claims fall within the scope of the Pre-Action Protocol for Low-Lalue Personal Injury (Employers' Liability and Public Liability) Claims – commonly referred to as the 'Claims Portal'.

According to the case report, the claimant (who had bit into a foreign object found in a cereal box) argued that product liability claims are not 'public liability claims' within the meaning provided by the Claims Portal as they do not arise "out of breach of a statutory or common law duty of care" (see 1.1(18) in the relevant Protocol). Rather product liability claims, particularly those advanced via the Consumer Protection Act 1987 (CPA), are not based on any duty of care but on strict liability arising from a defect in a product.

The County Court costs judge agreed and ruled that as a product liability claim, it was not appropriate for the Claims Portal.

This decision conflicts with another first instant decision from 2021 also **reported** in Civil Litigation Brief and which had been relied on by many product liability defendants since its report. In X (a Minor) v MPL Home & Senza Group Ltd, the claimant (who was burnt by a defective hairdryer) made the same argument as in the more recent case, namely that product liability claims fall outside the definition of public liability claims. The judge in the earlier claim appeared to accept that a claim advanced only in contract (an option in many product liability claims) would not constitute a product liability claim – but said that did not apply in the present claim. (The claimant, as a minor, could not have brought a contractual claim.) The claimant also argued that product liability claims are too complex for the Claims Portal, and this argument was also rejected. As such, the judge decided that this product liability claim (which was at least capable of being advanced in negligence) did fall within the definition of a public liability claim.

Of course, neither of the above first-instance decisions will be binding on any future courts, so the point is still at large. One thing to note (which does not appear to have been rehearsed in either of the above cases) is that whilst the Protocol defines a 'public liability claim' at 1.1(18), it does not then refer to public liability claims when setting out the 'Scope' of the Protocol at 4.1. Instead, 4.1 states that "This Protocol applies where … the claim arises from an accident occurring on or after

31 July 2013 … [and] the claim includes damages in respect of personal injury [and] the claimant values the claim at not more than £25,000 …". That would encompass all personal injury claims, whether arising from product liability or not.

Another point to note is that whilst many product liability claims can be brought on the basis of a breach of contract or breach of the CPA, there will usually be at least some scope for a negligence/duty of care claim, even if the claimant chooses not to pursue it.

Until we have a decision one way or the other, uncertainty will likely fuel further arguments between claimants and defendants. (It's notable that a similar debate is also being rehearsed in respect of the extension of the fixed costs regime to all fast-track cases with claimant firms arguing, again, that product liability claims are too complex – an argument the MOJ has so far rejected.)

AVIATION

In September this year, the Law Commission (LC) commenced a 2-year review of the law relating to highly automated systems in the aviation sector (**here**).

In contrast to motor vehicles, automation has been used in commercial aviation for decades – where the situations encountered are less varied and more structured. According to the LC, recent breakthroughs have introduced newer and more innovative automated systems, which will have substantial benefits for the industry but will require a review of the existing legislative and regulatory framework to ensure it is agile but robust enough to ensure both innovation and safety.

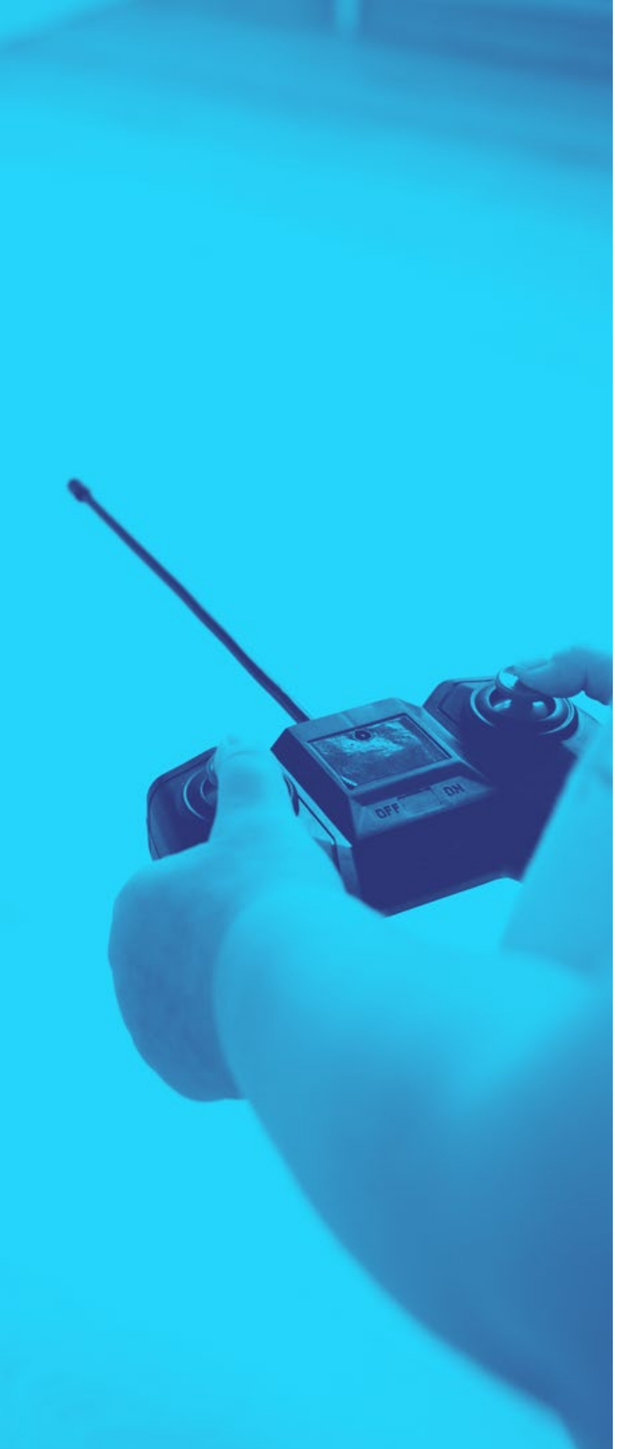
INTERNET OF THINGS

I spoke about the emergence of modern, connected devices (often referred to as the 'Internet of things' or 'IOT') and the law failing to keep up earlier this year (**here**). Against this backdrop, the FT **reported** in September (behind a paywall) on the EU's proposals to introduce mandatory minimum requirements for cybersecurity under the Cyber Resilience Act (**here**). The proposals include fines for IOT product makers, which don't do enough to minimise the risk of cyberattacks.

Closer to home, the UK government will seek to achieve similar aims via its Product Security and Telecommunications Infrastructure Bill. This bill will seek to make connected products more secure against cyberattacks.

The FT sets out some useful statistics. 23,000 companies are making IOT hardware. 370,000 companies are making IOT software. Only half of these companies correctly safeguard against cyberattacks.

Of course, insurers of IOT product makers will already be wary of potential claims of defect or breach of contract in the event a product fails to prevent a cyberattack. As with all emerging technologies, the law in this area (at least in the UK) is underdeveloped, which only increases risk and uncertainty for producers and their insurers.



PRODUCT FOCUS

RECENT PRODUCT RISKS

Insurers will be wary when products feature in the news for the wrong reasons. The risk of litigation will always increase when concerns are raised as to a product's safety. We've set out some recent reports which insurers may want to have on their radars below:

- The OPSS **reported** in November that it had intervened in respect of over 66,000 dangerous Glen Dimplex gas cookers (sold under its Belling, New World and Stove brands), which pose a risk of carbon monoxide poisoning. Glen Dimplex will visit every home containing an affected cooker to implement a modification programme.
- Product liability practitioners may raise an eyebrow at a recent report of dry shampoo products containing benzene, with a request made to the US FDA for the product's recall. The report, of course, brings to mind the classic (but controversial) product liability insurance indemnity case of Bacardi-Martini Beverages Ltd v Thomas Hardy Packaging Ltd – a case which involved benzene contamination and a question of whether the admixture of a contaminated ingredient with other ingredients would constitute damage. With the possibility of class actions relating to dry shampoo, insurers may well find themselves revisiting the Bacardi decision before too long.
- In November, the Insurance Times **reported** on an increasing number of solar panel-related fires in the UK, as had been noted by Zurich. An FOI request showed a rise to an average of 10 fires per month, with Zurich warning of poorly or incorrectly fitted solar panels increasing the risk of such fires and also noting that solar panels are becoming more common as homeowners and businesses seek to cut their energy bills.

UPDATE ON TOYS CONTAINING BUTTON BATTERIES AND MAGNETS

We reported on button batteries and magnets in the last two editions (**here** and **here**). Since then, reports of product recalls have not abated and may in fact have increased. For example, in October and November, the OPSS issued recalls in respect of light-up ghosts and pumpkins and LED strip lights, all of which posed a risk of choking due to the easy access of their button batteries. In the same months, the OPSS has issued recalls in respect of numerous magnetic products which present a danger via an excessively high magnetic flux level, such as fridge magnets and letters, construction sets, fidget toys, magnetic fishing toys and magnetic putty.

The uptick in reports has not gone unnoticed by some claimant firms, including Leigh Day.

UPDATE ON FOREVER CHEMICALS (PFAS)

We reported on forever chemicals (PFAS; chemicals which do not break down in the environment) in our last edition (**here**). Since then, these substances continue to feature in the US legal press, including as follows:

- In September, the Environmental Protection Agency (EPA) started the process of designating certain forever chemicals as "hazardous substances".
- A total of 9 states have now banned the sale of food packaging containing forever chemicals, with bans in New York and California to come into effect on 31.12.22 and 01.01.23 respectively.
- Similar bans on the sale of apparel, textiles and cosmetics containing forever chemicals will come into effect in California on 01.01.25.
- It's reported that in 2022 there have been at least 24 class actions targeted at forever chemicals in packaging goods.
- Elsewhere, a judge in the US District Court of South Carolina denied a motion for summary judgment brought by a manufacturer of firefighting foam in respect of 1,000s of lawsuits concerning the release of forever chemicals into the environment.
- Numerous states have enacted or are proposing to enact regulations regarding forever chemicals in firefighting foam.

In the UK, DEFRA has identified forever chemicals as something that must be managed as a priority. The risk of legal action in the UK remains.

AUTOMATED VEHICLES AND MICROMOBILITY

AN UPDATE ON AV TIMESCALES

In our last edition, we optimistically suggested automated vehicles (AVs) could be on UK roads by 2023. (The Department of Transport was still suggesting it could be 2022!) The government then announced in October that it would not bring forward the Transport Bill in the current parliamentary session (in order to make way for other priorities, like energy legislation) but hoped to produce "a narrow bill around future transport technologies …". Then in a later session, Steve Gooding of the RAC Foundation, suggested we might be able to own an AV by 2025 (which accords with the **government's recent policy paper**). (It's worth noting we've since had another regime change in government.)

The above has prompted some in the industry to call for the government to deliver AV regulation sooner rather than later; and, in response, a DfT spokesperson has said it remains committed to putting the UK at the forefront of AVs; but others say we will soon fall behind if regulation isn't in place by the end of 2023.

Whatever happens, it seems unlikely any of us will be in an AV on a UK road before 2024 at the earliest.

TESLA IN THE NEWS

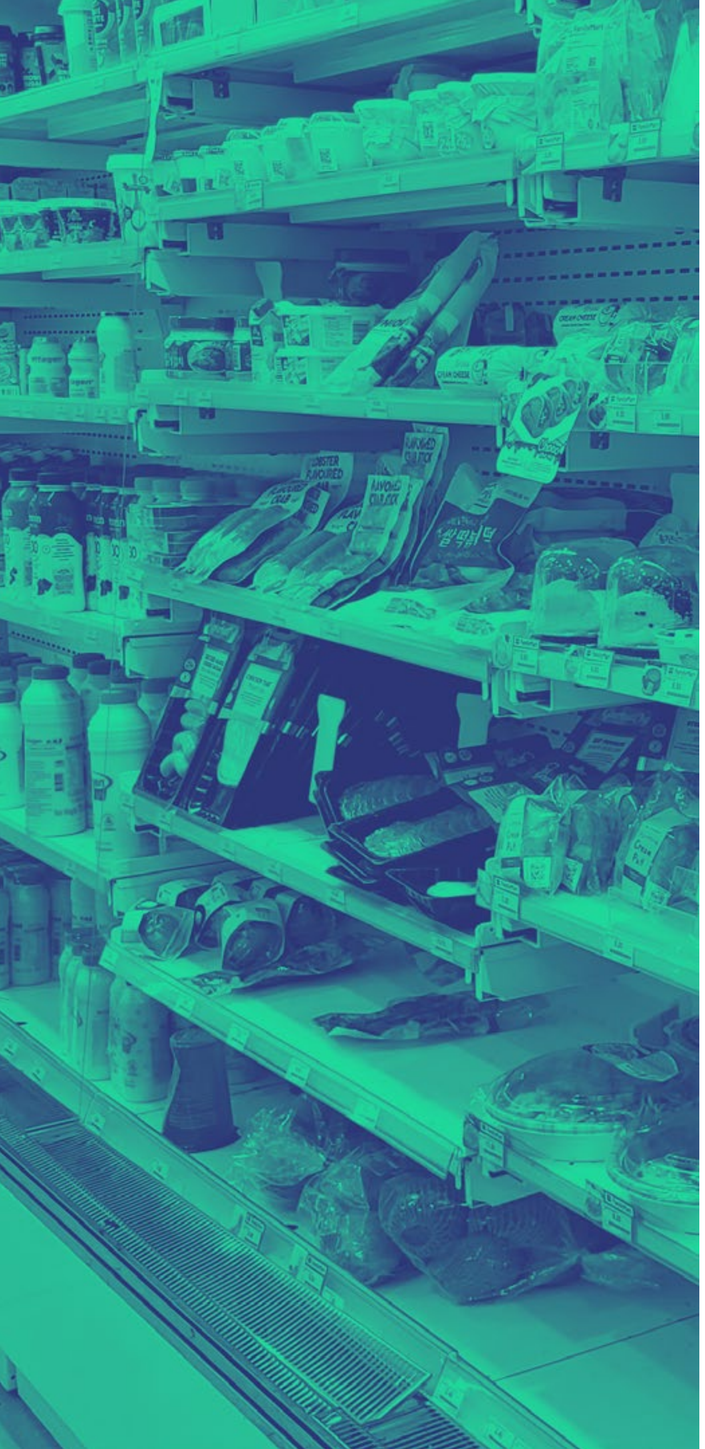
Tesla is, of course, at the forefront of introducing highly automated vehicle technologies to the world, and so we continue to keep a close eye on their progress, successful or otherwise. Recent updates include:

- In November, it was reported that Tesla had recalled just over 40,000 vehicles and had issued a software update in the US because their power-steering assist system could fail on rough roads.
- The trial of Kevin George Aziz Riad, who is charged with manslaughter after running a red light in a Tesla Model S and colliding with another vehicle but who says the autopilot feature was to blame, was scheduled to start in November but may have been delayed until next year due to two of the officers being on medical leave. The trial (when it happens) could offer a fascinating insight into the future of AV litigation.
- A similar trial is being heard in South Korea where Choi Woan-jong drove a Tesla Model X into a wall, killing another, and blames his Tesla.
- Elsewhere, Tesla has now disclosed 16 fatal crashes to US regulators since 2021 (when it first had to submit such data).

AN UPDATE ON E-SCOOTERS

E-scooters continue to make headlines. It remains illegal to ride one on UK public roads outside of the trial areas. Yet it is still very easy to purchase one (**as noted by the Guardian**). Against this background, we've noted the following developments in recent months:

- Many e-scooters trials have been extended until May 2024 (whilst others recently ended in November).
- As above, the future of the Transport Bill, which was set to legalise e-scooters in some form, is now uncertain following comments by the government that the bill would not be in the current parliamentary session and may be narrowed in scope.
- In October, the OPSS produced a **report** on a 'Solar' e-scooter product which it said was inherently unstable and capable of accelerating to 40mph.



FOOD FOR THOUGHT

THE INQUEST INTO THE DEATH OF CELIA MARSH

The inquest into the tragic death of Celia Marsh in 2017 concluded in September. Ms Marsh, who was allergic to dairy, had consumed a 'super veg rainbow flatbread' and purchased from Pret, which contained a coconut yoghurt dressing cross-contaminated with milk protein.

The coroner concluded that the coconut yoghurt (produced in the UK by Planet Coconut) should, of course, have been dairy free, having been marketed as such, but was not because it had been cross-contaminated at the manufacturing stage. The coroner ruled that "The manufacturer of the dairy-free yoghurt had in its possession documents which flagged this risk, but this risk was not passed on to its customers", including Pret.

Many will remember the inquest into the death of Natasha Ednan-Laperouse in 2018, which arose from similarly tragic circumstances, and raised similar issues, and ultimately resulted in changes to the law surrounding allergen labelling for food packed on-site. Elsewhere, the campaign for 'Owen's Law' (intended to compel restaurants to include allergen information on menus) continues. In a similar vein, Ms Marsh's husband has (understandably) called for more testing at every stage of the production process to be carried out to provide a safety net for those suffering from allergies.

Insurers will want to keep a close eye out for further changes to the rules concerning allergen labelling, which could impact the risk profile of some of their policyholders.

FOOD CONTAMINATION IN THE NEWS

These two recent recalls highlight the dangers of contaminants such as foreign bodies and undeclared ingredients in the food we eat:

- The FSA reported **here** that 'Happi Free From' is recalling its Oat M!lk chocolate bars because the products contain undeclared milk, an obvious health risk to anyone with a dairy or milk allergy.
- Krispy Kreme was fined £216,000 after receiving complaints of sharp pieces of metal having been found in their doughnuts, ultimately traced back to damaged equipment.

TITANIUM DIOXIDE

The safety of titanium dioxide (TiO2), used as a whitening ingredient but which was banned in the EU this year, has been in question for a number of years. The International Agency for Research on Cancer has classified TiO2 as a possible carcinogen when inhaled in dust form. In the EU and UK, TiO2 is similarly categorised as a carcinogenic substance. In the US, TiO2 is the subject of a US class action lawsuit relating to Skittles (manufactured by Mars) alleged to be unfit for human consumption.

But others assert the material (which can be used to enhance the whiteness of paints, plastics and paper) is inert and safe – and in November, the European Court of Justice decided the previous classification had been made in error. So unless there is an appeal, TiO2 should be declassified next year.

CASE WATCH

01.

Keskinäinen Vakuutusyhtiö Fennia v Koninklijke Philips NV EU case C-264/21

This interesting ECJ case considered the extent of what is an “own brander” under the Product Liability Directive (PLD; from which the UK’s Consumer Protection Act or CPA is derived).

The Finnish Supreme Court made a request to the ECJ concerning the interpretation of the PLD, which (as well as our CPA) imposes strict liability for product defects on producers as well as other defined parties, including “own branders”, i.e., those who present themselves as producers, e.g., by putting their trademark on the product.

The incident case concerned a coffee machine which caused a fire in a home. The product had been manufactured by Saeco, a subsidiary of Philips. The product and packaging featured a Philips logo, but otherwise, the packaging made clear (or at least suggested) there was a different producer, so the Finnish Court of Appeal found that Philips had not marketed the product as its own. Upon further appeal, the Finnish Supreme Court asked the ECJ whether something more than just a trademark was required to conclude that a party had held itself out as the producer.

In response, the ECJ clarified that the simple affixing of a trademark is enough to identify a party as strictly liable for the purposes of the PLD. Indeed, the whole point of the PLD (and thus, arguably, our CPA) is to “ease the burden of having to determine the actual producer of the defective product in question”.

Hence the case shows that a company can be ensnared by the provisions of the PLD (and potentially the CPA) by simply placing a logo in some way on a product or its packaging, even if it is otherwise made clear that the product was produced by another. Whilst the UK courts will not be bound by the ECJ’s decision (post-Brexit), it’s hard to imagine that if a similar issue came before a UK court, it would not at least consider (and potentially follow) the ECJ’s reasoning.

02.

Rashid & Ors v Direct Savings Ltd [2022] 8 WLUK 108

In product liability cases, a proposed defendant may become insolvent after supplying the product in question, thereby complicating any claim against it. In such cases, the claimant may look to the defendant’s insurer under the Third Parties (Right against Insurers) Act, either the 1930 or 2010 Act (depending on the date of the insolvency).

Under the 1930 Act, the relevant limitation period for the claim was suspended following the insolvency with the result that claimants potentially have much longer to bring a claim than would otherwise be the case.

However, the court has now confirmed the position is not the same under the 2010 Act. Rather limitation is not suspended by insolvency for the purposes of a claim under the 2010 Act – a decision that favours insurers in ensuring they do not have to face claims with no time limit.

03.

Kynaston-Mainwaring v GVE London Limited [2022] EWCA Civ 1339

For product liability claims pursued in breach of contract, the claimant will often need to establish that the product in question was not of satisfactory quality (in breach of terms implied into the contract by statute). In this claim (which was widely reported, including in the Daily Mail), the claimant had to show that his vehicle (purchased from the defendant) was not of satisfactory quality in circumstances where a blockage in the drainage channel had resulted in rainwater overflowing into the vehicle, and damaging the electrical components.

The defendant said the drainage channel ought to have been (but was not) cleared during the vehicle's most recent service. But the first instance judge found the drainage channel was probably cleared, so the car must not have been of satisfactory quality.

The defendant appealed, and whilst the Court of Appeal accepted the defendant's explanation may have been plausible (even preferable), the defendant had not shown that the first instance judge was 'plainly wrong' (the correct test), so the appeal failed. The Court of Appeal did say its decision did not have any wider application to the relevant vehicle model – which may, in fact, have been the defendant's overall concern.

04.

White & Ors v Secretary of State for Health and Social Care [2022] EWHC 3082 (KB)

Expert evidence is often crucial in most product liability cases. Ideally, both parties will rely on a joint expert or will each have their own expert, but in some cases, a party may not produce expert evidence, whether by choice or as a result of the court's case management decisions. In these circumstances, it's useful to know how the court will treat the uncontroverted expert evidence.

In 2021, the Court of Appeal in Griffiths v Tui UK Ltd (a food poisoning claim) considered this scenario, where the claimant had expert evidence, but the defendant did not. The court said that it did not have to accept the claimant's uncontroverted expert evidence at face value (just because it was the only evidence presented). It remained open to the defendant (who was without expert evidence) to argue simply that the claimant had not proven its claim (e.g., on the basis of deficiencies in the expert evidence presented). In Griffiths, the court said the claimant had not proven the claim because the expert had not provided any reasoning for his conclusions.

In White & Ors (an asbestos case), the claimant chose not to disclose any expert report, and the court had to decide how to treat the defendant's uncontroverted expert evidence. The court, whilst following the approach in Griffiths, found for the defendant. It was not bound to accept the uncontroverted evidence, but it could not depart from the expert's views without good reason, and there were none here. It had to evaluate and assess the evidence in the normal way, and it was also entitled to consider the claimant's decision not to serve any expert evidence and the likely reason for this.

05.

Recent decisions on contractual interpretation

In product liability claims, it's often necessary to consider the contractual position between different parties in the supply chain. Issues of incorporation, the 'battle of the forms' and reasonableness are common. In dealing with such matters, the following recent cases may be useful additions to have in the back pocket:

- Optimares SpA v Qatar Airways [2022] EWHC 2461 (Comm): This claim involved the supply of seats to an airline which was delayed due to covid-19, leading to the airline exercising its right to terminate. The decision serves as a reminder that the court will not re-write clear, unambiguous language to reflect what it thinks the parties ought to have agreed, particularly where the contracts had been negotiated by skilled professionals and even where it might be said that one party had the upper hand in the negotiations.
- Scotbeef Ltd v D&S Storage Ltd (in liquidation) [2022] EWHC 2434 (TCC): This claim concerned the alleged incorrect storage of the claimant's red meat by the defendant, which resulted in its spoiling. The defendant relied on a clause in the Food Storage & Distribution Federation T&Cs under which the claim would be time-barred. But the court found that the T&Cs had not been incorporated into the contract. Whilst the defendant's invoices had mentioned the T&Cs, no indication had been given as to what they were or where they could be found.
- Last Bus Ltd v Dawsongroup Bus and Coach Ltd [2022] EWHC 2971(Comm): In this claim, the defendant supplied coaches to the claimant, some of which were alleged to have been not of satisfactory quality. The defendant sought summary dismissal of the claim on the basis that its T&Cs excluded the implied term as to satisfactory quality. The court agreed that the contract excluded the implied term and then went on to consider whether this was reasonable under the Unfair Contract Terms Act 1977. It said it was, particularly given the parties had been of equal bargaining power – thereby reaffirming the recent trend of the courts to uphold contractual terms freely agreed between commercial parties.

CONTACT

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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