Product liability update

May 2018

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Any comments or queries?

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Since the Directive's implementation, almost 33 years ago, the European Commission has published 5 performance reports; the most recent being published on 7 May 2018. This is the first report to be accompanied by an evaluation of the continued relevance of the Directive. This evaluation was undertaken after growing concerns that the Directive has become outdated as technology has developed in a way unimagined back in 1985.

As a result, and somewhat unsurprisingly, the latest report recognises that there is a need to consider whether the Directive in its current form is sufficient to deal with issues posed by modern technology, including "digitisation, the Internet of Things, artificial intelligence and cybersecurity".

So, is the Directive still relevant? Despite these technological advances, the answer appears to be yes. The European Commission has concluded that the Directive continues to be adequate and fit for purpose. However, it does intend to publish comprehensive interpretative guidance in mid-2019 to clarify the extent to which the Directive applies to emerging technologies, and potentially suggest updated definitions of key terms, while safeguarding the principle of strict liability, so as to ensure legal certainty for consumers and producers.

In reaching its conclusion the Commission examined the analysis of the number and types of claims brought throughout the EU between 2000 and 2016. The evaluation shows that 46% of cases were settled out of court and 15% settled through alternative dispute resolution. Only 32% of cases were resolved in court. (The remaining 7% were resolved through other means such as the insurer of the responsible party).

The report also reveals that consumers have been largely effective in getting compensation through litigation. Of the cases that reached court, around 60% of the claims for defective products were successful between the years 2000 and 2016.

The evaluation was critical of the cost and length of court cases pursued in some Member States, most notably in cases involving pharmaceuticals. However, it found that the Directive does provide a "stable legal framework" so as to ensure consumer protection.

As a result the Commission is, for the time being, happy to maintain the status quo. The Commission is, however, now taking steps to ensure that the Directive will continue to be relevant in the future.

As with all current European matters, how UK law develops in the future will very much be governed by the eventual outcome of Brexit, though given the UK's need for continued trade with the EU it seems likely that the UK will implement any changes to provisions made by the EU in respect of the Product Liability Directive.

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Patients lose metal on metal hip replacement litigation

In *Gee and others v Depuy International Limited* [2018] EWHC 1208 (QB) Mrs Justice Andrews found that the Defendant manufacturers of metal on metal hip implants were not liable to the 312 patients who claimed to have been injured by them.

The Claimants alleged that the metal on metal hip implants were defective, failed prematurely and led to them requiring more surgery than necessary. They claimed that the "Pinnacle Ultamet" prosthesis, which was withdrawn from sale in the UK in 2013, released metal particles damaging the surrounding tissues and causing pain, difficulty walking, swelling and numbness or loss of sensation in the leg. As a result, they claimed that the product was defective and the Defendant manufacturers were liable to them for damages under the Consumer Protection Act 1987 ("the Act").

The Claimants' primary contention was that the implants were defective because they had a "tendency or propensity" to result in "ARMD"; an adverse reaction to metal wear debris, leading to the need for an early revision.

The Claimants' alternative case was that the "Pinnacle Ultamet" replacement had an abnormal potential for damage compared with existing non-metal prostheses.

s2 of the Act creates a strict liability for manufacturers of a product for damage caused wholly or partly by a "defect" in the product.

s3 of the Act states that there is a "defect" in a product if "the safety of the product is not such as persons generally are entitled to expect".

Mrs Justice Andrews held that since all artificial hip prostheses eventually wear out, if the patient survives long enough, a natural propensity for the implant to fail could not be defined as a defect for the purposes of the Act.

With regard to the release of metal particles resulting in ARMD, it was known in 2002, at the time that "Pinnacle Ultamet" was launched, that all hip prostheses would produce particulate debris, whatever material was used. It was also known that an adverse reaction to debris could cause a hip to fail and require revision. As a result Mrs Justice Andrews held that the public had no right to expect that the implants would not produce metal wear debris in the course of their normal use, which might result in the need for an early revision.

Mrs Justice Andrews therefore found the Claimants' primary case to be "untenable".

The Claimants' alternative case was that the implants carried an increased risk of early failure in comparison with other established hip prostheses because of ARMD. As a result the safety of the implants was not such that the public were entitled to expect. However, Mrs Justice Andrews held that based on the available research there was insufficient evidence to conclude that ARMD had, on the balance of probabilities, made revision rates materially worse than those other products available at the time.

As a result, since there could not be said to be a defect in the implants, the claims failed.

Whilst this is a first instance decision and therefore not binding, it is of significant importance because hundreds more metal on metal claims against a number of other manufacturers have been stayed pending the outcome of this trial. This decision will certainly affect how those matters are progressed.

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Which? investigation find companies giving "inadequate and incorrect advice" over faulty white goods

Consumer watchdog Which? has revealed that an undercover investigation found that Whirlpool and retailers AO.com, Argos, Co-Op Electricals, Currys PC World, John Lewis and Very/Littlewoods were giving "inadequate, inconsistent and potentially dangerous advice" when contacted in respect of faulty tumble dryer models.

Which? made 12 calls to each of the customer service departments of the six retailers to ask for advice about burning smells coming from either a Hotpoint or Indesit model. It said not one call resulted in what it would consider to be an acceptable response to a serious safety issue.

In 9 out of 10 inquiries, the caller was not asked for a model code, despite safety alerts relating to the fire risk of these models. In the same percentage of cases, the customer service member failed to give the correct safety instruction, which is to unplug the device.

Earlier this year, a parliamentary report found that up to 1 million defective dryers were potential fire hazards in British homes due to Whirlpool's "inadequate" response to the discovery of the defect.

Which? is calling on the Office for Product Safety and Standards to take action against Whirlpool, while demanding a full product recall of the affected tumble dryers, both modified and unmodified.

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Court of Appeal upholds decision that insurer liable for costs of defending uninsured claims

The Court of Appeal held in *Travelers Insurance Company Ltd v XYZ* [2018] EWCA 10 that the Defendant insurer was liable to meet a third party costs order for costs incurred during group litigation involving both insured and uninsured claims.

The group litigation involved action alleging that the Defendant, Transform, had supplied defective breast implants.

The Defendant's product liability Insurers, Travelers, advised that whilst the policy covered those claims brought as a result of the implants rupturing (197 claims) it did not cover the "worried well" being those Claimants who were concerned about their implants but whose implants had not ruptured (there were some 426 uninsured claims). The Court concluded that this was not conveyed to the Claimants on the advice of solicitors and Counsel.

The insured claims were settled and Travelers paid a proportionate amount of the common costs only attributable to the insured claims.

The Defendant then went into administration and the remaining Claimants went on to obtain a default judgment against them. There was no argument contesting that these claims were not insured. However, the Claimants sought and were granted a third party costs order against Travelers for the remaining costs pursuant to s51 Senior Courts Act. Travelers appealed this decision.

Even where a claim or part of it is not covered under an insured's liability policy, or if damages awarded exceed a policy indemnity limit, the court has a discretion under s51 Senior Courts Act 1981 to make a non-party costs order that an insurer pays a claimant's costs, in exceptional circumstances.

Finding against Travelers, Lord Justice Lewison said "It is, in my judgment, fanciful to suppose that when Travelers entered into the contract of insurance they expected that, if called upon to indemnify Transform against a claim for defective products, such a claim would be brought by a random mix of insured and uninsured claimants. The expectation must have been that, if called upon to indemnify Transform, Travelers would potentially be liable for all the costs of an unsuccessful defence. It is in that sense that I agree with the judge that to require Travelers to pay the costs of the uninsured claimants is no more than Travelers bargained for."

Lord Justice Lewison also noted the following, which he said contributed to the exceptional circumstances: "If Transform had succeeded on the preliminary issues then all claimants (whether insured or uninsured) would have been liable equally to contribute towards Transform's costs which, ultimately, would have been to Travelers' advantage. But failure on those very same issues has the result, if Travelers are correct, that it is ultimately liable for only approximately 32 per cent of the claimants' costs. In addition, as the judge also recognised, there is a large element of happenstance in Travelers' position. The costs of defending the preliminary issues, for both claimants and defendants, were the same whether there had been 197 claims or 623. Had there only been 197 claims (all insured) Travelers would have been liable

to indemnify Transform against all the claimants' costs of the preliminary issues. But because 426 uninsured claimants joined the register, if Travelers are right they have fortuitously escaped liability for approximately 68 per cent of those costs, even though the addition of those uninsured claimants had no effect on the costs at all."

The Court of Appeal accepted the first instance Judge's conclusion that if the uninsured Claimants had known that their claims were not covered, none of them would have pursued their claims.

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