Products Update

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Any comments or queries

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News

Child’s play - defective toys
The safety and quality of the toys we buy for our children should be taken as read. These are fundamental requirements, given a child’s propensity to put anything and everything into his/her mouth, and generally pull things apart into smaller pieces. As a consequence there is a strict regulatory regime in place aimed at ensuring the safety of toys. This article will look at the current statutory framework to which all those involved in the toy supply chain must adhere, and will also examine the fallout when things go wrong.

Statutory framework
The Toy Safety Directive 2009/48/EC applies to all toys sold in the EU as of 19 August 2011 (and 20 July 2013 for that part of the Directive which relates to chemicals within toys). The Directive will bite at all stages in the toy supply chain, and thus applies to manufacturers, importers and retailers alike. The Directive was incorporated into UK law by the Toy (Safety) Regulations 2011 (the Regulations).

A toy is defined as a product designed or intended, whether or not exclusively, for use in play by children under 14 years of age.

The Regulations set out the key safety requirements which must be complied with, to include those relating to physical/mechanical properties, flammability, electrical properties, chemical properties, safety warnings, to name but a few. The list of requirements is extensive.

The Regulations also stipulate that toys must be marked to ensure traceability, bear the CE mark and be accompanied by instructions for use and warnings where necessary.

Manufacturers need to be aware that there are also a number of more product-specific regulations, for example relating to magnetic parts, the use of chemicals such as six phthalates and electronic toys. Manufacturers need to ensure compliance with all safety requirements relevant to a particular toy.

Manufacturers must place a CE mark on their toy, which is essentially a declaration that the product satisfies all relevant safety requirements. For products which are manufactured fully in accordance with the requirements of the Regulations, manufacturers may self-certify without obtaining independent verification as to conformity. The CE mark is an enforcement mark, not a sign of quality or safety for consumers. It indicates to enforcement authorities that the toy is intended for sale in the European Economic Area (EEA).
In addition to the aforementioned Regulations which apply specifically to toys, the more
generic European Product Safety Directive 2001/95/EC, which was incorporated into UK law by
the General Product Safety Regulations 2005, must also be complied with by toy manufacturers.
These provide that only safe products will be placed on the market.

When things go wrong
Failure to comply with the increasingly stringent safety regulations can have a significant impact
on those involved in the supply chain at many levels.

If a toy is found to be defective in any way it is likely to be the subject of a product recall. Given
the potential safety risk to children, such recalls often attract a lot of negative publicity which
can cause devastating reputational damage. Recalls are also expensive business, in terms of
lost revenue, business interruption and damage to the brand. A case in point is the recall by
Mattel/Fisher-Price of millions of toys worldwide due to lead being found in the paint used on
the toys. A product liability class action was pursued in the US in respect of these toys, at an
alleged cost to Mattel in the order of $50m.

The injury to or death of a child arising out of a defective toy will have a devastating impact on
those companies involved in the supply chain. Not only will a hostile, high profile and vigorously
fought claim follow, but the reputational damage is likely to be significant. The future viability of
the business could be placed at serious risk.

Then there is the risk of a high profile prosecution, which could result in a large fine and/or
imprisonment of any Directors/Officers implicated. Again the knock-on effect of a high profile
prosecution is likely to be very damaging to a company’s reputation.

Conclusion
The fallout from failing to comply with all requisite safety requirements can lead to devastating
consequences as highlighted above. This does perhaps beg the question, why bother? The
fact is we are living in an increasingly materialistic society where children expect, and generally
receive, all they desire. The toy industry is therefore a highly lucrative one, and provided the
regulatory minefield is carefully navigated, and every step within the supply chain is closely risk
assessed, there are significant profits to be made.
Things that go bang in the night

Everyone loves the dazzling show created by fireworks. The attraction of fireworks to celebrate all kinds of events is ever popular and fireworks are bigger and better than ever. As with any product sold in the UK, those products must be fit for purpose (Sale of Goods Act 1979) and ‘as safe as people are generally entitled to expect’ (Consumer Protection Act 1987). Also, under the General Product Safety Regulations 2005, “No producer shall place a product on the market unless the product is a safe product.” However, things do go wrong, issues do occur during the manufacturing or supply process and without knowing it, you may have produced or be selling a firework which is defective.

There is no doubt a defective firework can do a lot of harm – for example at a California fireworks show in 2013, a defective shell exploded early, sending rockets and shrapnel into the crowd, injuring 39 people. The injuries can be horrific. Therefore where do you stand legally if you manufacture, supply or sell direct a defective firework? This article seeks to set out briefly the relevant statutory provisions and key requirements for those involved in the supply chain of fireworks.

Legal requirements

All fireworks sold in the UK must comply with the Pyrotechnic Articles (Safety) Regulations 2010 (the Regulations) which came into force on 4 July 2010 (there are limited exceptions where this date is 4 July 2013). This requires all fireworks (defined as “a pyrotechnic article intended for entertainment purposes”) supplied to the UK for sale to the general public, no matter where they were manufactured, to meet the safety standards of BS EN 14035 (which supercedes BS7114: 1988). To confirm that this requirement is met, all such fireworks must be marked “CE” to show that they meet EU requirements (Directive 2007/23/EC). These Regulations replace the Fireworks (Safety) Regulations 1997 (as amended by the Fireworks (Safety)(Amendment) Regulations 2004) and fireworks which were produced in compliance with the earlier Regulations can continue to be sold until July 2017 – these will bear the BS7114 mark.

The key changes brought about by the Regulations are:

- A much wider scope including non-firework pyrotechnic articles (eg car air-bag detonators)
- The introduction of independent third party conformity assessment
- Free movement
- CE marking and new labelling rules
- The Regulations apply to the whole of the UK, not just Great Britain
- New enforcement provisions

The Regulations maintain the categorisation of fireworks contained in BS7114. Briefly, these are based on gunpowder content, weight, size and how far the firework ejects debris. In brief, these are as follows:

1. Category 1 – pose a minimal hazard and usually applies to indoor fireworks
2. Category 2 – garden fireworks
3. Category 3 – display fireworks
4. Category 4 – fireworks sold for professional use only (including theatrical pyrotechnics) and can include aerial shells and other items banned from sale to the public because they are extremely dangerous to the untrained

Who do the Regulations apply to and how?
Part 2 of the Regulations apply to all those in the supply chain for category 1, 2 and 3 fireworks. This includes manufacturers (paragraph 6), importers (paragraph 7) and distributors (paragraph 8). Similar provisions are contained in Part 3 in respect of category 4 fireworks. For the purposes of this article we will address only those on sale to the general public.

Manufacturer
The onus of ensuring the firework is made in accordance with the Regulations is on the manufacturer who is required to ensure compliance with the safety requirements as set out in Schedule 2, namely that the firework has been submitted to a notified body or is otherwise subject to a conformity assessment, has passed the conformity assessment procedure and has the CE mark affixed. This includes ensuring the firework is categorised in accordance with paragraph 4 of the Regulations.

A manufacturer is defined as “a person who designs or manufactures a pyrotechnic article, or who causes such an article to be designed and manufactured with a view to first making it available on the EU market and its distribution and use, distribution or use, whether for payment or free of charge, under the name or trademark of that person.”

Importer
Where a manufacturer is not established within the EU the importer of the firework must ensure compliance with the Regulations as if the manufacturer were based in the EU. The importer will be liable for any contravention of the Regulations and any contravention caused by an act, omission or default of the manufacturer.

Distributor
The distributor is required to act with due care in relation to category 1, 2 or 3 fireworks. This, in particular, includes the requirement to check that the category 1, 2 or 3 firework bears the CE marking and is accompanied by any separate safety warnings or instructions provided by the manufacturer or importer.

Enforcement
The local weights and measures authority (usually the trading standards departments of most local authorities) is responsible for enforcement of the Regulations (the Secretary of State has a default power to enforce) and their powers derive mainly from the Consumer Protection Act 1987.
Under the Regulations, where the enforcing authority becomes aware of a category 1, 2 or 3 firework used in accordance with its intended purpose, which is liable to endanger health and safety, the following notices may be served against the manufacturer, importer or distributor as appropriate:

- A prohibition notice
- A notice to warn
- A suspension notice
- A withdrawal notice

However, it should be noted that the enforcement powers under the Regulations are not restricted to those measures set out above and, by reference to the General Product Safety Regulations 2005 and/or pursuant to the Consumer Protection Act 1987, the enforcing authority (the local authority or county council under the 2005 Regulations) has the power to prosecute. If found guilty of an offence under either statute sanctions can include imprisonment and/or a fine.

**Conclusion**

Whether you are an importer, manufacturer or distributor of fireworks, it is imperative that you are fully aware of the provisions of the Regulations and you comply with these. Accidents involving defective fireworks do occur, sometimes with devastating consequences. If this does happen, not only is there the possibility of an investigation by the enforcement authorities but also a civil claim by the injured persons.

### Jurisdiction and applicable law in product liability cases – an overview

In an increasingly global market, cross-border and jurisdictional issues arise in product liability cases on a frequent basis. Two recent decisions have added some welcome clarity as to jurisdiction and applicable law in cases with an international element.

#### Jurisdiction

The Brussels Regulation (EC) 44/2001 provides that generally jurisdiction is granted to the court in the place where the defendant is domiciled.

However, Article 5 (3) provides that a person domiciled in a member state may be sued in another member state in tort, delict or quasi-delict (which includes the product liability directive referred to below) in the courts where “... the harmful event occurred or may occur”. In the case of *Bier v Mines de Potasse d’Alsace*, the European Court of Justice (ECJ) ruled that the expression “place where the harmful event occurred or may occur” can encompass both “the place where the damage occurred and the place of the event giving rise to it”.

1. C21/76.
The ECJ recently considered the interpretation of Article 5 (3) of the Brussels Regulation in the context of a product liability case, Kainz v Pantherwerke AG. This case concerned an Austrian resident, Mr Kainz, who purchased a bicycle from a retailer in Austria. The bike had been manufactured by the defendant in Germany. The claimant sustained his injuries during a bike ride in Germany.

The claimant commenced proceedings in Austria under Council Directive 85/374/EEC (the Product Liability Directive) which concerns liability for defective products (this directive has been implemented in the UK by the Consumer Protection Act 1987). He argued that the place of the event giving rise to the damage was Austria on the basis that the bicycle was brought into circulation in Austria, ie he as an end user bought the bicycle from a distributor in Austria.

The Austrian Court referred the matter to the ECJ, seeking clarification of Article 5 (3) of the Brussels Regulation (EC) 44/2001, and specifically the meaning of “the place where the damage occurred and the place of the event giving rise to it”.

The ECJ found that Article 5 (3) must refer to the place where the manufacturer is established, and not where the damage was later suffered. After all, the place of manufacture is the place where the event occurred which damaged the product itself. The ECJ made it clear that the courts where the product was manufactured would be best placed to determine whether the product was defective. Germany was therefore deemed to be the correct forum.

Applicable Law

Even if a Court is found to have jurisdiction to hear a case, it does not automatically follow that the law of that country will equally apply.

The date of the event giving rise to the damage is relevant for the purposes of determining jurisdiction. Where the event occurred before 11 January 2009, the issue of applicable law will be determined in accordance with the Private International Law (Miscellaneous Provisions) Act 1995 (PILA). Post 11 January 2009, the provisions of Rome II apply.

The recent case of Allen & Others v Depuy International Ltd considered the issue of applicable law.

This case concerned a number of non-European Union residents who alleged that they had suffered injury as a result of defective metal-on-metal hip prostheses manufactured by the defendant in England. None of the claimants were domiciled in England and none had their operation or suffered their alleged injury in England. The majority of the claimants had received their prostheses in New Zealand, Australia and South Africa, but they chose to issue proceedings in England, being the Defendant’s country of domicile.

2. [2014] All ER (D) 13 (Feb).
3. [2014] EWHC 753 (Q8).
In terms of the relevant date giving rise to the damage, the Judge held that this should be either the manufacture or distribution of the defective prostheses, or otherwise the date of the original implant operation. All of these dates occurred before 11 January 2009 and therefore PILA applied.

Section 11 of PILA provides that the applicable law is that of the country where the injury was sustained. However, Section 12 (2) allows for this general rule to be displaced in exceptional circumstances. The claimants sought to argue that the general rule should be displaced in this instance so that the applicable law should be that of England and Wales.

The Judge considered a number of factors when determining the issue of applicable law, including where the implant operations took place (which was not necessarily the place of the injury), where the injury subsequently arose and where any revision surgery was undertaken. All of these factors occurred outside of England and Wales. The court also held it relevant that at the time of implantation, it was in the objective expectation of all parties that local law would apply. The Judge therefore held that the law of the country where the place of injury occurred should apply. Therefore, different foreign laws applied to the various claimants.

The Judge went on to provide helpful clarification as to whether the Consumer Protection Act 1987 would have applied in the event that English and Welsh law had been deemed to be the applicable law. The Judge held that both the Consumer Protection Act and the Product Liability Directive do not apply to cases where the injury/damage occurred outside the UK/EU/EEA. The Judge held that the Consumer Protection Act applied to injuries or damage suffered by consumers when in the UK, and the Product Liability Directive for consumers in the EEA. The Consumer Protection Act did not therefore cover claims for injury/damage occurring outside the EEA. The claims which were before the Court in Depuy therefore fell outside the territorial scope of the Consumer Protection Act.

Good news for product liability insurers joined to medical negligence claims?

Product liability insurers will now be familiar with the qualified one-way costs shifting regime (QOCS) that has applied to personal injury cases since April 2013. The effect of QOCS is that a defendant that successfully defends a personal injury claim will not recover its costs, unless the claimant has been awarded damages. The rule is subject to various exceptions (such as statutory rights or where proceedings have been brought dishonestly) but the basic principle means that liability insurers will generally not recover costs, even if their insured successfully defeats a claim. Now, a recent Court of Appeal case has highlighted the ability for some parties to personal injury cases to recover costs, notwithstanding QOCS.

In a judgment handed down on 31 July 2014 in Wagenaar v Weekend Travel Ltd t/a Ski Weekend, important guidance was issued. In that case, the claimant brought a claim for damages against the defendant tour operator for personal injuries sustained in a skiing
accident. The tour operator joined the ski instructor into the action as a third party. The claim was dismissed and neither the tour operator nor the ski instructor were found liable. On costs, the judge ruled that QOCS applied to both the tour operator’s and the ski instructor’s costs. The ski instructor appealed.

The Court of Appeal allowed the ski instructor’s appeal. In doing so, the Court of Appeal noted that “if QOCS is intended to apply to all parties to any proceedings in which any claim for personal injuries is made, it will have far-reaching economic repercussions in many fields – medical negligence claims, road traffic claims and industrial accident claims to name but a few.”

The Court of Appeal ruled that QOCS does not apply to all litigation arising from a personal injury claim in which commercial parties dispute responsibility for the payment of personal injury damages. To illustrate the point, Lord Justice Vos stated: “in medical negligence claims, a claimant may sue a doctor, a health authority and the manufacturer of some piece of medical equipment. It would be strange if there could be no costs orders enforced between the defendants.”

The effect of this judgment is that defendants must consider the risks of joining third parties to claims in which the claimant has QOCS protection. Whilst the defendant will not be able to recover its costs, if it is successful, it can still be liable for third parties’ costs.

This is positive news for insurers of medical device manufacturers who may deal with cases where the defendant, such as a hospital or surgeon, joins their insured to a personal injury claim. The Court of Appeal’s decision clarifies that the manufacturer that successfully defends such a claim will be able to recover its costs, despite QOCS. However, in the event that a manufacturer is sued by a patient, it may want to consider carefully whether to join a hospital or surgeon to the proceedings because even if it defeats the patient’s claim, it could be liable for the doctor or hospital’s costs.

The information and opinions provided in these articles should not be relied upon, or be used, as a substitute for legal advice on how to act in a particular case.
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