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Product Liability Part III

A review of current issues from the Product Liability Sector Focus Team

This review, published in three parts, provides an update on a diverse range of topics relevant to those who practise, or have an interest in, product liability law.

We look at topics ranging from the practical (e.g., Brexit, S41 CPA) to the inspirational (genomics, vaccine compensation). We give thanks to guest authors from 39 Essex Chambers, Hawkins, and 1 Chancery Lane. Part I appeared in November and Part II in December.

To watch bitesize videos on each of these topics, please visit Forum of Insurance Lawyers - YouTube

7. Commercial Property Damage Claims under s.41 Consumer Protection Act 1987

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Traditionally, Part 1 of the CPA provides that anyone can potentially bring a claim provided they have suffered either personal injury or property damage, with the all-important exclusion of commercial claimants in Section 5(3). The position has been clear that Part 1 is not intended to benefit such businesses/companies or commercial claimants generally. However, recently, more commercial claimants are trying to rely on Section 41 CPA to bring a claim for commercial property damage.

Part 2 of the CPA deals with consumer safety. Section 11 provides that the Secretary of State has the power to make 'Safety Regulations' for the purpose of securing that goods are 'Safe'. This has resulted in a wide range of safety regulations by virtue of these powers, normally focusing on a specific type of product. Section 41 goes further and provides that *"An obligation imposed by safety regulations shall be a duty owed to any person who may be affected by a contravention of the obligation and…a contravention of any such obligation shall be actionable accordingly"*. We can see that Section 41 is purporting to allow a civil claim to be brought by any party that has been 'affected' as a result of another party breaching a safety regulation, regardless of the type of damage.

An example of where Section 41 has been pleaded in the High Court is in relation to breaches of the Electrical Equipment (Safety) Regulations 1994 resulting in commercial property damage[1]. Surprisingly, it appears to have been common ground between the parties that the claimant could bring such a claim, as the defendants did not raise this as an issue.

The Electrical Safety Regulations are an anomaly in facilitating commercial claimants to make a claim under the CPA. The CPA on its own does not provide this cause of action. Section 19 of the Act provides that the purpose of making safety regulations is to minimise death or personal injury; it does not mention property damage. Contrary to what has been empowered by the CPA, the Electrical Safety Regulations expands the definition of the term "Safe" (beyond what is stated in the CPA) to include a risk of damage to property. It is only because of this unique feature that there can be a claim for damage to property under Section 41 at all.

It is difficult to see any logical justification for this approach, and it would not be surprising if we start to see future defendants start to question claims pursued under Section 41 of the CPA.

1 Howmet Ltd [and] Economy Devices Ltd [2014] EWHC 3933 (TCC); Goodlife Foods Ltd [and] Hall Fire Protection Ltd [2017] EWHC 767 (TCC); Stoke-on-Trent College [and] Pelican Rouge Coffee Solutions Group Ltd [2017] EWHC 2829 (TCC)

8. Cladding claims post-Grenfell

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Cladding claims over the last four years since the Grenfell tragedy have revealed a number of patterns, despite the evolving landscape within which they operate. Below is an introduction into what these claims usually entail and what to look out for.

The parties

The potential claimants in cladding claims include housing associations, charities or commercial owners of buildings. Resident leaseholders can also bring group actions, and we may need to consider more of these since the government has not yet resolved the issue of freeholders dumping remedial and associated costs on leasehold residents. The potential defendants include principal design and build contractors, architects, sub-contractors, manufacturers, company guarantors and agents.

Basis for liability

There are questions over who is truly responsible for the design of cladding; however cladding claims generally include allegations that contractors have breached their duties under JCT contracts, and that architects have provided defective designs and breached statutory guidance and/or inspection duties. The usual arguments and bases for liability are grounded in contract or negligence, including *Hedley Byrne's* assumption of responsibility. One frequently employed argument is that negligence should be judged against the standards of other professionals at the time. However, where building regulations of that time have been ignored, this argument is unlikely to be persuasive.

Loss claimed

The loss claimed and the associated issue, causation of loss, is the strongest area for defendants. The question of whether the remedial works proposed really flow from the alleged breach of duty can be an obstacle for claimants, as there is often a degree of betterment involved. This is particularly the case where there is a requirement for remediation works to meet current building regulations that are inevitably more onerous and costly than those that were in place at the time of the build.

Potential issues

- Funding is potentially available to cover the costs associated with remedial works on buildings over 18m, however the government expects claimants to initially seek recovery from those originally at fault.

- Cases can change during own lifetime as a result of new expert opinion or updated government guidance. For example, the Building Safety Bill criticises the assessment of buildings to date.
- Lack of consistency with cases. Defendants and law firms tackle cases differently: some cooperate with clients to limit costs, whereas others fight to defend their clients' reputations and weed out unmeritorious claims. There is yet to be a leading judgement.

9. Collective redress - are we headed for US style class actions?

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Billions of dollars of damages are awarded in US class actions against companies in sectors such as life sciences, automotive and tobacco. There are compelling indications that the UK is heading towards increased and wider collective redress, and insurance lawyers and their clients should be mindful of this.

<u>European new deal for consumers</u>
The collective redress Directive that came into force on 24 December 2020 obliges every Member State to have at least one representative action scheme in place for redress and injunctions. The Directive reflects a trend of providing greater protection to consumers and extending collective redress rights.

This may bring the EU closer to US style actions because certain organisations and public bodies, termed "qualified entities", will be able to launch group actions on behalf of consumers. There are, however, restrictions on which organisations/public bodies can bring actions. Further, there is no obligation on Member States to have an "opt-out" system for any type of claim, whereby individuals are automatically included as claimants if they meet certain criteria, unless they expressly opt-out.

The UK already has group litigation orders, in which "opt-in" systems are routinely used. Recent high-profile examples include PIP breast implants, Volkswagen vehicles and hip implants. However, under increased pressure to promote consumer rights, the UK is moving in a similar direction to EU, with an increased use of opt-out actions.

<u>Lloyds v Google and Merricks v Mastercard</u>
In *Lloyd v Google*, the Court of Appeal permitted opt-out action in respect of a large-scale data breach. The Court stated that the use of an opt-out mechanism was unusual, but permissible.

In *Merricks v Mastercard*, Merricks alleged that inflated prices were paid by UK consumers using Mastercard. Approximately 46.2m consumers could fall within this class of claimants. This was considered in detail by the Supreme Court, who gave judgement on 3-2 basis. In summary, it permitted the possibility of an opt-out option and passed the matter back down to the competition court.

Both cases show an open-minded approach, and it is easy for insurance lawyers to envisage a wide scope for opt-out actions in the future, particularly in respect of claims for refunds or replacements of defective products, in which remedies are likely to be the same or similar across a group. Assuming the group is reasonably traceable, collective redress could include all purchasers.

Future behaviour of OPSS, Which and other champions of consumer rights

Public and private bodies intended to champion consumer rights would likely be interested in playing the role of class representative in an opt-out system, should the UK's collective redress laws be relaxed in line with the EU position. Although a government body such as the OPSS would be unlikely to have the expertise and funding to take on such a role, it is likely that another consumer body such as Which? or Which? Legal would step forward. The latter, possessing the legal expertise, credibility and potential funding, would be a prime candidate.