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The Claims Portal and Product Liability Claims

IN BRIEF

This article considers whether product liability claims fall within the scope of the Pre-Action Protocol for Employers' Liability & Public Liability Claims.

A recent post by Gordon Exall in *Civil Litigation Brief* (here) reported on a first instance decision concerning whether product liability claims fall within the scope of the Pre-Action Protocol for Low Value Personal Injury (Employers' Liability and Public Liability) Claims – commonly referred to as the 'Claims Portal'.

Insurers and defendant practitioners might be forgiven for having thought this matter was put to bed some time ago, with the consensus being that product liability claims fall within the scope of the Claims Portal, despite the frequent attempts by claimants to bring such claims outside of the regime.

According to the case report, as set out by *Civil Litigation Brief*, the claimant (who had bitten 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" (per 1.1(18) in the relevant Protocol), but instead are advanced via the Consumer Protection Act 1987 (CPA) and, as such, arise out of strict liability for defects in products. The County Court costs judge agreed and ruled that as a product liability matter, it was not appropriate for the claim to have been advanced in the Claims Portal.

The reason that many had thought this issue had already been resolved was because of another first instant decision, *X (a Minor) v MPL Home & Senza Group Ltd (2021)*, also reported in *Civil Litigation Brief* (here). But upon closer review, the decision in *X (a Minor)* is not necessarily inconsistent with the more recent decision set out above.

In *X (a Minor),* the claimant (who had been 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'. On this, the judge accepted that if, for example, a claim is advanced only in contract (an option in many product liability claims) then that would not necessarily constitute a public liability claim – but said that did not apply in the case because the claimant, as a minor, could not have brought a contractual claim. So, the judge decided that because the claim was at least capable of being advanced in negligence, it did in fact fall within the definition of a public liability claim. (A secondary argument that product liability claims are simply too complex for the Claims Portal was rejected.)

Thus, we are left in a position where the courts, at first instance, appear to have said on two separate occasions that if a product liability claim is advanced on a non-negligence basis (including for breach of contract or under the CPA) then it will fall outside of the scope of the Claims Portal. This is a position that makes little sense from a policy perspective, given whether or not a claimant advances a negligence claim in a product liability matter will often depend on which defendant they choose to pursue. Indeed, one potential criticism of the court's reasoning is that it is not clear whether it is a requirement for the claimant to bring a claim in negligence or only that there be scope to bring such a claim (whether the claimant chooses to or not). (In many product liability claims, there will usually be at least some scope for a negligence claim against at least one of the potential defendants – usually the manufacturer.)

Of course, neither of the above first instance decisions will be binding on any future courts, so the point is still at large. And one important point to note is that both cases appear to have been argued on a potentially false premise, i.e., that it is the definition of a 'public liability claim' at 1.1(18) which determines what does and does not fall within the scope of the Claims Portal. This is possibly incorrect because, in fact, the Protocol does not 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 – and regardless of whether a claim is pursued in negligence or not.

Until we have a decision by the higher courts, one way or the other, uncertainty will likely fuel further arguments between claimants and defendants. (Indeed, 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.)

This article was kindly provided by **Daniel West**, Partner at HF and head of the FOIL Product Liability SFT.