Product liability update

November 2019

Non-party costs – Supreme Court judgment in *Travelers Insurance Company Ltd v XYZ*

The Supreme Court's recently handed down judgment in *Travelers Insurance Co Ltd v XYZ* provides guidance on insurers' potential costs liability in relation to wholly or partly uninsured claims. This will have particular relevance to group actions including a mixture of insured and uninsured claims. more›

800,000 defective Whirlpool tumble dryers potentially still in use within the UK

A parliamentary committee has warned that up to 800,000 defective tumble dryers may still be in use, at least four years after they were alleged to be a fire risk. more›

Pret A Manger to face trial in Bath

Pret A Manger and vegan-food supplier Planet Coconut are set to appear at Bristol Crown Court in December, following the death of a customer who suffered a fatal dairy-related allergy. more›

Court of Appeal endorses a risk/benefit approach to assessing defective products

In our May 2019 issue, we reported on the case of *Sandra Bailey & Ors v GlaxoSmithKline UK Ltd*. The trial started in 29 April 2019, and involved an action for damages by Claimants alleging that Seroxat (an anti-depressant) is defective under s3 Consumer Protection Act 1987. A recent ancillary Court of Appeal judgment in the case has important general ramifications for product liability claims. more›

Brexit

Uncertainty reigns in relation to the United Kingdom's proposed departure from the European Union. There is no definitive indication of what Brexit will hold for manufacturers, suppliers and insurers of products, but the government continues to issue guidance. more›

Any comments or queries?

Gavin Reese
+44 20 3060 6895
gavin.reese@rpc.co.uk

Nick McMahon
+44 20 3060 6896
nick.mcmahon@rpc.co.uk

Peter Rudd-Clarke
+44 20 3060 6535
peter.rudd-clarke@rpc.co.uk

Robert John
+44 20 3060 6944
robert.john@rpc.co.uk

Amber Oldershaw
+44 20 3060 6647
amber.oldershaw@rpc.co.uk

Non-party costs – Supreme Court judgment in *Travelers Insurance Company Ltd v XYZ*[1]

The Supreme Court's recently handed down judgment in *Travelers Insurance Co Ltd v XYZ* provides guidance on insurers' potential costs liability in relation to wholly or partly uninsured claims. This will have particular relevance to group actions including a mixture of insured and uninsured claims.

The Claimants in this group litigation action alleged that they had been supplied with defective breast implants. They brought claims against several defendants, including Transform Medical Group (CS) Limited ("Transform") in relation to implants which had ruptured and those at risk of rupturing. Of the 623 claims brought against Transform, 426 were uninsured claims as either no bodily injury had occurred or it occurred outside the policy period.

Transform's liability insurers ("Travelers") declined cover for those claims concerning un-ruptured implants, as the policy did not extend to claims presented by claimants who had not sustained bodily injury, the so-called "worried well". Travelers agreed nevertheless to fund Transform's defence in relation to both uninsured and insured claims.

The uninsured Claimants obtained a default judgment against Transform, the company having entered insolvent administration. As Transform's insurance did not cover the claims, those Claimants recovered no costs or damages. Their lawyers applied for a non-party costs order against Travelers under section 51 Senior Courts Act 1981. That section provides the Court with full power to determine by whom and to what extent the costs of proceedings are to be paid. This can include ordering a non-party to pay costs in certain circumstances.

At first instance, the judge focussed on whether the case was "exceptional" and whether the making of an order accorded with the principles of fairness and justice. She concluded that Travelers had not had a legitimate interest in the uninsured claims, and accordingly granted the application. Travelers appealed to the Court of Appeal, arguing that a non-party costs order could not be made unless the insurer had controlled litigation in its own interest. The Court of Appeal upheld the first instance High Court decision, making reference to the Court's broad discretion under section 51 Senior Courts Act 1981. It held that section 51 would be applied in "exceptional circumstances" and a "lack of reciprocity" on costs risks was a key factor in this case.

On appeal to the Supreme Court, Travelers argued that it had been exposed to "unexpected and unforeseeable liability" by the Court of Appeal, as its conduct could not be deemed "exceptional".

The Supreme Court identified two bases on which a non-party costs order against liability insurers may be made: intermeddling, and becoming the "real defendant" to proceedings.

After careful consideration, the Supreme Court held that the High Court had been wrong to impose a non-party costs order on Travelers. Liability insurers face a difficult decision in determining whether to fund all or part of an insured's defence in situations where cases are only partly insured. In addition, there is no obligation on insurers to disclose policy information including limits of cover, so failing to do so will be insufficient in itself to justify a non-party costs order. The Supreme Court's decision demonstrated the court's flexibility in exercising discretion under section 51. A section 51 order is not an automatic consequence and the court must consider whether an insurer has engaged in "unjustified meddling". Intermeddling is likely to be rare where an insurer has acted in good faith, as it had in this case.

Back to contents>

1. [2019] UKSC 48.

800,000 defective Whirlpool tumble dryers potentially still in use within the UK

A parliamentary committee has warned that up to 800,000 defective tumble dryers may still be in use, at least four years after they were alleged to be a fire risk.

A fault in Whirlpool dryers, caused by potential fluff build up within the appliance, has been recognised since at least 2015. It affects a variety of vented and condenser tumble dryer models sold between April 2004 and September 2015. The company first launched a modification scheme to fix at-risk machines, which involved free-of-charge Whirlpool engineers undertaking safety upgrades. In May 2019, the Office for Product Safety and Standards agreed the modification was "effective" and that modified machines could be used safely.

However, Whirlpool issued a recall of the tumble dryers in July this year as a result of governmental pressure. As part of the recall, customers with unmodified machines were entitled to receive replacements.

Further research, however, has indicated that some modified machines continue to show signs of fault, with certain "fixed" appliances producing smoke or the smell of burning.

The Business, Energy and Industrial Strategy (BEIS) Committee report published on 1 November calls on the government to conduct a new review of the safety of Whirlpool's modification and investigate other possible fire sources.

Back to contents>

Pret A Manger to face trial in Bath

Pret A Manger and vegan-food supplier Planet Coconut are set to appear at Bristol Crown Court in December, following the death of a customer who suffered a fatal dairy-related allergy.

The customer fell ill in 2017 and died in hospital, after eating a "super-veg rainbow flatbread" bought from a branch of Pret in Bath. The wrap was labelled as containing dairy-free yoghurt, but was later found to be contaminated with traces of milk protein.

Following an investigation by the Food Standards Agency (FSA), a national recall took place and dairy-free CoYo yoghurts were withdrawn from supermarkets across England. The FSA warned the product presented "a possible health risk for anyone with an allergy or intolerance to milk or milk constituents".

Planet Coconut is facing a total of eight charges, including four charges of selling food with a false label and four charges of failing to comply with EU provisions on food safety and hygiene. The supplier has pleaded not guilty to one charge of failing to comply with EU provisions between 1 November 2017 and 27 December 2017. They have also pleaded not guilty to one charge of selling food with a false label during the same period.

Meanwhile, Pret A Manger is facing seven charges. Three of these regard selling or displaying food offered, exposed or possessed with a label likely to mislead as to the nature, substance or quality of that food. They are also facing another charge of selling food not of the nature, substance or quality demanded by the consumer. The three further charges relate to a failure to comply with EU provisions regarding food safety and hygiene.

The trial is due to start on 6 December 2019.

Back to contents>

Court of Appeal endorses a risk/benefit approach to assessing defective products

In our May 2019 issue, we reported on the case of *Sandra Bailey & Ors v GlaxoSmithKline UK Ltd*[2]. The trial started in 29 April 2019, and involved an action for damages by Claimants alleging that Seroxat (an anti-depressant) is defective under s3 Consumer Protection Act 1987. A recent ancillary Court of Appeal judgment in the case has important general ramifications for product liability claims.

Following opening submissions, the trial judge had ruled that the Claimant's case should be limited to the "worst in class" case (comparing the risks of Seroxat relative to comparator drugs). It could not be extended to the "risk/benefit case", which would consider relative risk and benefits more generally as between Seroxat and its comparators.

The Claimants unsuccessfully appealed this decision. The Court of Appeal upheld the decision of the trial judge to determine only the "worst in class" issues within the Seroxat case. The significance of the judgment for manufacturers more generally is that the Court of Appeal went on to endorse the risk/benefit analysis when determining if products are defective under the Consumer Protection Act.

This Court of Appeal judgment followed the approach in the first instance decisions of *Wilkes v DePuy*[3] and *Gee v DePuy*[4], demonstrating the need for Courts to take a flexible "risk/benefit" approach in assessing product liability. This will likely be referred to by other litigants keen to adopt this approach over the more limited analysis supported by *A v National Blood Authority*[5], also a first instance decision.

This judgment has also highlighted a crucial procedural point in product liability claims. For actions brought under the Consumer Protection Act, there must be complete clarity in relation to the alleged defect. Claimants should clearly identify the issues to be determined at the outset, as seeking to introduce fresh issues at a later stage will risk serious cost and liability consequences and will require very compelling justification.

Back to contents>

2. (2019).
3. [2016].
4. [2018].
5. [2001].

Brexit

Uncertainty reigns in relation to the United Kingdom's proposed departure from the European Union. There is no definitive indication of what Brexit will hold for manufacturers, suppliers and insurers of products, but the government continues to issue guidance, some examples of which are here:

UK Product Safety and Metrology Guidance in a "no deal" Brexit – see here

The Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019 – see here

Placing manufactured goods on the UK market after Brexit – see here

Placing manufactured goods on the EU market after Brexit – see here

Back to contents>

About RPC

RPC is a modern, progressive and commercially focused City law firm. We have 78 partners and over 600 employees based in London, Hong Kong, Singapore and Bristol. We put our clients and our people at the heart of what we do.

"... the client-centred modern City legal services business."

We have won and been shortlisted for a number of industry awards, including:

- Best Legal Adviser every year since 2009 – Legal Week
- Best Legal Employer every year since 2009 – Legal Week
- Shortlisted – Banking Litigation Team of the Year – Legal Week Awards 2019
- Shortlisted – Commercial Litigation Team of the Year – Legal Business Awards 2019
- Shortlisted – Best Copyright Team – Managing IP Awards 2019
- Shortlisted – Insurance Team of the Year – Legal Business Awards 2018
- Winner – Best Employer – Bristol Pride Gala Awards 2018
- Winner – Client Service Innovation Award – The Lawyer Awards 2017
- Shortlisted – Corporate Team of the Year – The Lawyer Awards 2017
- Winner – Adviser of the Year – Insurance Day (London Market Awards) 2017
- Winner – Best Tax Team in a Law Firm – Taxation Awards 2017
- Winner – Claims Legal Services Provider of the Year – Claims Club Asia Awards 2016

Areas of experience

- Advertising & Marketing
- Alternative Dispute Resolution
- Commercial Contracts
- Commercial Litigation
- Competition
- Corporate Crime & Investigations
- Corporate
- Data & Technology
- Employment & Pensions
- Financial Markets Litigation
- Health, Safety & Environmental
- Insurance & Reinsurance
- Intellectual Property
- International Arbitration
- Private Equity & Finance
- Product Liability & Regulation
- Real Estate
- Regulatory
- Restructuring & Insolvency
- Tax
- Trusts, Wealth & Private Client

19566

Tower Bridge House
St Katharine's Way
London E1W 1AA
T +44 20 3060 6000

Temple Circus
Temple Way
Bristol BS1 6LW
T +44 20 3060 6000

38/F One Taikoo Place
979 King's Road
Quarry Bay, Hong Kong
T +852 2216 7000

12 Marina Boulevard
38/F MBFC Tower 3
Singapore 018982
T +65 6422 3000

RPC