



Product liability update

August 2018

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Code of Practice – supporting better product recalls

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BEIS continues its focus improving product safety with new strategy implemented by the Office for Product Safety and Standards

In our alert published on 1 February this year, we reported on the creation of a new national oversight body created to identify and manage consumer product risks and recall, the Office for Product Safety and Standards (OPSS). [more>](#)

Any comments or queries?

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Potential impact of US litigation in the UK

There have been two recent significant product liability cases in the US which have involved products which are common place in the UK market.

The first involves talcum powder manufactured by Johnson & Johnson. In July, a jury in Missouri awarded a group of 22 Claimants \$4.7bn (£3.6bn) in compensation and punitive damages following a claim that use of the talcum powder caused them to develop ovarian cancer, as the products contained asbestos.

The second involves a jury decision in San Francisco where Dewayne Johnson was awarded \$298m (£233m) after the jury found that regular use of the commonly used weed killer, Roundup, caused him to contract non-Hodgkin lymphoma, leaving him with only months to live. In his role as a groundskeeper and pest manager at a school in Benicia, he sometimes had to spray the herbicide on school grounds for several hours a day. Both Johnson & Johnson and the manufacturers of Roundup, Monsanto (now owned by Bayer) intend to appeal the respective decisions.

The Court system in the US allows a jury to reach first instance decisions on both liability and damages. This is markedly different to how civil cases are determined in the United Kingdom, namely by a Judge sitting without a jury. Whilst a Judge is not necessarily unsympathetic to the stories that Claimants outline in Court, they are expected to weigh up the evidence impartially and in a dispassionate manner. In comparison, the jury system in the US can lead to awards being significantly affected by the highly emotional nature of Claimants' predicaments.

In the absence of clear scientific evidence to establish a causal link between the products and the injuries alleged, it is highly doubtful that either case would succeed in the UK. As matters stand, it appears that there is insufficient scientific evidence for both.

However, the impact of such court decisions in the US can be felt reputationally on the marketing of those products in the UK. Following the Roundup case, despite Monsanto's assurances and the fact an appeal is to follow, at least one major UK retailer has reviewed their sales of the product. B&Q have confirmed that they are reviewing all of their garden products and that they already offer alternatives to weed killers which contain glyphosates, the chemical alleged to have caused Mr Johnson's cancer.

In the UK, claims of this sort would be determined under the strict liability regime set out by the Consumer Protection Act 1987 (CPA) or in tort for negligence. A claim under the CPA would need to establish that the product in question was defective in failing to meet the level of safety consumers are generally entitled to expect, and that any such defect caused injury. Causation would also be an essential part of a negligence claim. In the absence of scientific evidence to establish a causal link between the use of talcum powder products or glyphosates and the development of cancer when used in accordance with any instructions/recommendations that apply to the product, it is difficult to see how either case could proceed successfully.

The cases do, however, highlight the importance of vigilance. Where scientific studies reveal new concerns over a product, manufacturers should review whether any remedial or protective action is required and/or whether warnings or guidance accompanying their products should be updated.

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Appeal decision upholds retailer's partial responsibility for injuries arising from caustic soda

The Court of Appeal has recently upheld a High Court decision in which Mr Younis t/a Safa Superstores was found one third liable for an incident which caused severe injuries to a toddler.

In 2013, Ayman Faisal was in his pushchair when his mother turned her back for a few seconds. In that time, Ayman picked up, opened and drank from a bottle of drain cleaner which contained caustic soda. He immediately suffered severe injuries as did his mother who sustained burns after trying to take the product out of his mouth. After a month in intensive care, Ayman has been left unable to speak and is fed through a tube into his stomach.

The manufacturers of the product, Active Brands Concept Limited, accepted liability on the basis the child proof cap was defective and this had allowed Ayman to drink from the bottle. However, they brought a contribution claim against the retailer on the basis they had not followed the warning on the product to ensure it was kept out of the reach of children. They alleged that by placing the product on the lower shelves, Safa Superstores should share liability for the claim.

In the High Court, the Judge found Active Brands Concept Limited and Safa Superstores were jointly and severally liable for the injury and held that Safa Superstores was responsible for one third of the liability for the claim. The decision was appealed by Safa Superstores, but was upheld by the Court of Appeal. Whilst the Appeal Court judges accepted that Mr Younis was someone who was "sympathetic" and "tried to do what was right", the fact he had been unaware that he needed a licence to sell the toxic product was not a defence, and furthermore the product should not have been stored on the bottom shelf.

The decision emphasises that liability for the consequences of a defective product can reach beyond the producer, and can extend to the retailer in circumstances where they do not take adequate steps to ensure safety in the way the product is sold.

The amount of Ayman's claim has not yet been settled, pending confirmation of his long term prognosis. However, funding that has been secured from the Defendants will enable him to seek specialist treatment.

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Code of Practice – supporting better product recalls

In March 2018, the Department for Business, Energy and Industrial Strategy published a Code of Practice on consumer product safety related recalls and other corrective actions (PAS 7100:2018).

The Publicly Available Specification (PAS) was developed following consideration by the Working Group on Product Recalls and Safety and was facilitated by the British Standards Institution. The stated purpose of a PAS is to “respond to emerging needs within a sector, through a collaborative and robust process of knowledge sharing”. Whilst it does not have the status of a British Standard, and will be withdrawn once the content is incorporated into a British Standard, it is likely to be considered for development as a British Standard or to constitute UK input into the development of a European or International Standard.

The PAS sets out a Code of Practice for:

- **businesses** – to assist manufacturers, importers and distributors of non-food consumer products prepare to deal with product safety issues
- **market surveillance authorities** – to set out for local authorities and other regulators the guidance and advice that should be made available to businesses in order for them to meet their legal responsibilities and act in the public interest.

The PAS is aimed at all businesses, irrespective of size or type.

It places significant emphasis on the importance of advance planning, and provides practical guidance on preparation of a suitable Product Safety Incident Plan (PSIP).

A PSIP should include the following elements, setting out where possible who in an organisation has responsibilities for which action and when:

- product and customer traceability
- product safety monitoring
- market surveillance authority notification
- risk assessment
- corrective action planning
- communications
- PSIP training/testing/review plans

The PAS provides explanatory commentary under each of these headings.

It also sets out helpful summaries of the relevant regulatory requirements, together with model examples of risk assessment and notification documents.

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BEIS continues its focus improving product safety with new strategy implemented by the Office for Product Safety and Standards

In our alert published on 1 February this year, we reported on the creation of a new national oversight body created to identify and manage consumer product risks and recall, the Office for Product Safety and Standards (OPSS), click [here](#).

The OPSS formed part of the Government's response to recommendations made by the Working Group on Product Recalls and Safety in 2017. It is based in the Department of Business, Energy and Industrial Strategy.

Earlier this month, the OPSS unveiled a Strategy Plan for Strengthening the National Capacity for Product Safety. The strategy has four key aims:

- **analyse:** make the best use of scientific evidence, incident data, risk and intelligence in decision making
- **inform:** help consumers make informed choices and give businesses the information they need to comply
- **enforce:** use the full range of tools and powers to maintain protection, fairness and confidence
- **build:** put in place robust systems and infrastructure to equip the UK for future challenges.

The strategy is intended to support manufacturers, retailers and importers in complying with their legal responsibilities and taking rapid action in the event of any safety issues related to their products. The OPSS's objective is to develop a number of specialist services to support consistent national enforcement, to include aspects of product testing and technical expertise.

In addition to publication of the PAS on consumer product safety related recalls and other corrective actions, the Actions to Date completed by the OPSS include:

- training 250 Trading Standards Officers on the Code of Practice in relation to Product Recalls
- reviewing compliance systems at white goods manufacturers and suppliers
- giving Trading Standards Officers free access to all technical British Standards to equip them to identify issues and support compliance.

The Plans are intended to set out the strategy for the next two years to 2020. The link to the relevant page of the Government website which provides access to the documents relevant to the Strategy can be found [here](#).

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