

## Playing safe: liability and products for children

LIFE FOR THOSE WHO LOOK AFTER CHILDREN can feel like one long risk assessment. When purchasing products designed specifically for children, parents expect the highest safety standards. Sarah Croft, of Shook, Hardy & Bacon International, assesses product liability issues and the regulatory environment for children's products in Europe and the UK.

### PRODUCTS FOR CHILDREN

As Prince William so ably demonstrated when taking Prince George home for the first time, parents and guardians are obliged by law to use child car seats within the European Union for children up to the heights of 1.35m. All car seats must display an ECE R44/04 certification label to indicate they comply with standard safety requirements.

Parents are responsible for ensuring that seats are used correctly and that an appropriate seat is used taking into account a child's age and size. The consequences of a parent's failure to do so was illustrated in the UK by a case in the High Court in 2013, where a mother was found to be partially responsible for the injuries to her child incurred in a road traffic accident. While there was no dispute that the driver of the other vehicle was entirely responsible for the collision, the court accepted his insurer's argument that if the child had been using a child car seat rather than a booster seat, the child's injuries would have been much less severe. Consequently, damages were reduced by 25%.

There have been frequent reports of problems and recalls involving car seats, relating to issues such as latches, which either open too easily or not easily enough, and flammability. In 2013, in the UK there have already been two separate recalls of car seats with defective restraint buckles. In the US and Canada, the car seat manufacturer Graco is defending class actions filed in the last year relating to

allegedly faulty buckles and arm rests on its products.

Many will remember the press coverage of the UK incident in which a child lost the tip of its finger when a McClaren pushchair was folded down by an adult. The media interest in 2009 was fuelled by a perception that a 'recall' of the pushchairs had been undertaken in the US but not in the UK. Of course, the impression that a company has treated some consumers differently from others can be extremely damaging to a brand. There had been twelve alleged incidents in the US. The US 'recall' involved the release of an additional safety mechanism to cover the hinge in question. This kit was subsequently offered to the UK owners. The company stressed throughout that the pushchair was in compliance with all relevant safety standards. It also placed additional warning labels on the pushchairs and in the manual emphasising that children should be kept clear when folding the pushchair.

A notable trend in the last decade has been the increase in use of electronic products by children and the production of items such as computer tablets designed specifically for them. Electronic products come with their own hazards of course. These risks extend to gadgets which can be employed in the home as part of childcare. It was reported in August 2013 that, in the US, a hacker was able to exploit vulnerability in a webcam, advertised as an ideal baby monitor, allowing the hacker to access the device via the internet and shout abuse at a sleeping two year old.

### TOYS

In comparison with the toys from years gone by, the toys of today are far more sophisticated (although not necessarily more fun). They may contain more small and intricate components and be made of more complex materials. Consequently, any dangers can be much more difficult to



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detect or predict, with perhaps significant unintended consequences.

For example, in 2007, over four million craft kits were recalled worldwide because the glue used in the product contained chemicals that turned into the drug gamma-hydroxybutyric acid (GHB) when metabolised. GHB is a drug most notoriously associated with 'date rape'.

Improvements in technology have made tiny, powerful, magnets available to toy manufacturers at a low cost. Millions of toys using these magnets have had to be recalled as they may come loose and be swallowed by small children. If two or more magnets are swallowed, there is a risk that they may become attracted to each other through intestinal walls, causing serious injury or infections.

A few years ago, a day did not seem to go by without a recall of a toy – often manufactured abroad, usually in China. While the picture has improved somewhat in recent years due to greater awareness, vigilance and regulation, the impact of these episodes should not be underestimated by manufacturers.

In 2007, for example, the US toy manufacturer Mattel, and its subsidiary Fisher-Price, was forced to recall many millions of toys worldwide due to the amount of lead in the paint used by a subcontracted company in China during manufacture. In 2009, Mattel settled a product liability class action lawsuit brought in the US in relation to these toys at a reported cost to the company of around \$50m. The recall included replica vehicles from the Pixar film *Cars* and characters from *Sesame Street* and so the additional value of lost sales would also have been substantial. Similarly, in 2008, the US toy company RC2 Corporation settled a class action in relation to lead-contaminated *Thomas the Tank Engine* toys.

#### REGULATION IN THE EU AND THE UK

Toy manufacturers, importers and suppliers in the EU must ensure their products

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comply with the provisions of the Toy Safety Directive (Directive 2009/48/EC), which came into force in 2011. There were several new requirements introduced under the new legislation, including those relating to risks from chemicals, warning requirements and regulations regarding toys sold with food. The 2009 Directive was incorporated into UK law by the Toys (Safety) Regulations 2011.

The regulations define toys as 'products designed or intended, whether or not exclusively, for use in play by children under 14 years of age'. Toys need to meet the essential safety requirements of the directive, which are concerned with labelling to provide traceability to the manufacturer, safety warnings, the construction of the toys to avoid hazards such as sharp edges, hot parts, risks of entrapment etc, and the avoidance of toxic substances, harmful chemicals and allergenic fragrances.

While the directive does not give specific requirements for individual products, a number of harmonised standards have been published which give requirements and test methods for assessing specific potential risks. A toy is considered safe if all of the potential dangers associated with the product are addressed using the harmonised standards. In this case, the CE mark is placed on the product and it can be sold within the EU without further controls. The CE mark is a declaration by the manufacturer that the toy is safe.

Manufacturers should be mindful that more than one directive may apply to a particular product – for example, in the case of an electronic product for children, the product

would need to comply with those applicable to electronic products as well as the Toy Safety Directive.

In addition to the specific regulations for toys, the European Product Safety Directive (2001/95/EC), implemented in the UK by the General Product Safety Regulations 2005, imposes a duty on producers to place only safe products on the market, and additionally to notify the authorities where an unsafe product has been marketed. In order to establish a product defect the claimant must show that the product is not as safe as persons generally are entitled to expect. The European Product Liability Directive allows for 'strict liability' for defective products – ie a manufacturer can be found liable even without proof of any fault on their part. Under this regime, if an injury is caused due to a defect in the product, the manufacturer would be exposed to the risk of claims under strict liability imposed by statute and possibly in negligence too.

#### CONCLUSION

Naturally, parents take the safety of their children extremely seriously and are likely to pursue claims vigorously against any company they perceive to be responsible for injuring or endangering their child. Compliance with necessary regulation is vital for manufacturers and regular risk assessment is essential at every stage of the path from design through to manufacture and marketing. This is particularly challenging in this rapidly evolving sector.

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