Product liability developments in 2011: what do they mean for your business?

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WE ROUND UP SOME OF THE MOST RELEVANT and interesting developments from 2011 that may affect your business.

2011 CASE HIGHLIGHTS

As ever, very few product liability cases made it to court, but of note this year are the following.

GREEK YOGHURT MANUFACTURER EXONERATED BY QUALITY CONTROL AND TRACEABILITY PROCESSES

In Greece, a claimant who suffered acute gastroenteritis after eating a mouldy yoghurt claimed damages against the yoghurt producer and the supermarket she bought it from.

Under the EPLD, a producer is liable for damage caused by defects, but may have a defence if it can be proved that the defect occurred after the product was placed on the market.

In this case, the yoghurt manufacturer was able to trace the production batch and found no defects in other yoghurts of the same age. The supermarket admitted that the yoghurt had left the producer in perfect condition and the amount of mould was consistent with it developing during the time the yoghurt was stocked by the supermarket. Consequently, the court held that the supermarket was liable to the claimant (Athens Court of Appeals Judgment 9079/2000).

What does this mean for your business?
This decision emphasises the merits of effective monitoring and quality control systems, which can be used to show that a product was not defective when it was placed on the market. Implementation of such quality control systems may be key in a successful defence to any product liability claim.

GERMAN MANUFACTURER LIABLE FOR UNDETECTABLE DEFECTS

In Germany, a manufacturer was found liable for damage caused by undetectable defects in a glass bottle (Munich Higher Regional Court – Case 5 U 3158/10). The bottle exploded in the hands of the claimant and a fragment of glass injured her eye.

Investigations revealed that the bottle exploded due to micro-fractures on its surface which were not detectable. The court held that the bottle was defective because consumers could reasonably expect a glass bottle to be free of damage which could cause it to explode.

Two defences raised by the producer failed. Firstly, they argued that the defect occurred after the producer had placed the bottle on the market. However, there was no evidence that the retailer or any intervening third party had caused the defect. While the producer operated a quality control system, the court held that this was no defence because it would not have detected the micro-fractures. Secondly, the producer was unable to rely on the German equivalent of the 'development risks' defence (ie that the state of scientific knowledge at the time of manufacture was such that the defect could not be discovered) because the risks of an exploding glass bottle were known and preventable by applying a protective coating.

What does this mean for your business?
If evidence shows that the defect was not caused by a third party after the product entered circulation and that the defect was present at manufacture, the producer may be found liable even if the defect cannot be detected by the producer's own quality control process.

REPLACEMENT OF FAULTY GOODS AND DISPROPORTIONATE COSTS

The European Directive on the Sale of Consumer Goods and Guarantees gives rights to consumers in the EU to have goods repaired or replaced, or to have their money back, if the goods supplied are faulty.

In 2011, the European Court of Justice (ECJ) ruled on two German cases that involved suppliers of faulty goods (Joined cases C65-09 and C87-09 *Weber v Wittmer*; *Putz v Medianess Electronics* [2011]).

In one case, a consumer purchased floor tiles from a supplier for €1,382 and, once laid, noticed imperfections which could not be cleaned or removed. The only remedy was for the supplier to replace them at an estimated cost of €5,830. In a second case, a consumer bought a dishwasher which was found to be faulty after installation.

In both cases, the supplier refused to meet the costs of removal and

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reinstallation, but the ECJ ruled that the supplier was obliged to remove and reinstall the goods, or pay for such work to be carried out. Furthermore, this obligation arose whether or not the seller was obliged to install the goods under the original sales contract.

In terms of costs, the ECJ considered that suppliers could not refuse to replace defective goods on the grounds that the costs were disproportionate – although costs could be limited to a proportionate amount.

What does this mean for your business?
Retailers should be aware of the potentially substantial extra costs of removing and reinstalling defective goods (even if there is no contractual obligation to do so). There is a possible argument that reinstallation costs are disproportionate, but the extent to which such an argument can be advanced has not been defined.

PRODUCT SABOTAGE

In August 2011, the producer of Nurofen Plus recalled all packets of the painkiller in the UK after several were found to contain powerful prescription-only anti-psychotic drugs, not produced by the manufacturer. Sabotage was suspected to be the cause.

What does this mean for your business?
The principal defence to any such potential sabotage claim would be that the products were not defective at the time that they were supplied. To this end, quality control procedures and tamper proof seals may protect manufacturers against possible liability. However, it is questionable whether such a defence would be available if products were contaminated or sabotaged within the confines of the producer's factory. Responding quickly and effectively to any suspected sabotage is also key. Delays can extend consumer mistrust in a product and lead to unnecessary long-term damage to the brand.

EUROPEAN PRODUCT LIABILITY DIRECTIVE REVIEW

In September 2011 the European Commission published its fourth review of the European Product Liability Directive (EPLD).

Consumer groups had lobbied to reverse the burden of proof to make it easier for consumers to bring claims against manufacturers by forcing the producer to prove that damage was not caused by the product's defect (presently consumers must prove defect). However, the Commission concluded that the EPLD achieves a good balance between protecting consumers and not unduly inhibiting producers, and does not need amending.

The minimum claim value threshold was maintained at €500. Producers had wanted to increase the threshold in line with inflation, while consumer groups wanted it removed to permit compensation for all material damage.

What does this mean for your business?
Maintaining the current position as to burden of proof means that the onus remains on consumers to prove that a product is defective, rather than manufacturers proving it is not. By maintaining the threshold for claims at €500 (£275 in the UK), manufacturers can be assured that they will not be faced with a surge of small, low-value claims.

PRODUCT SAFETY PACKAGE

In March 2011, the European Parliament adopted a resolution to revise the General Product Safety Directive (GPSD). This resolution focused on improving market surveillance, suggesting that member states should fine entities that deliberately introduce dangerous or non-compliant products into the EU, and improving RAPEX – the European Commission's rapid alert system for dangerous products.

What does this mean for your business?
The Parliament resolution demonstrates a general desire to revise the GPSD. However, there are unlikely to be any immediate changes in this area and businesses should await concrete proposals from the EU.

CHINA: JOINT PRODUCT SAFETY SURVEILLANCE INITIATIVES

China is the greatest source of notifications of dangerous products under RAPEX (58%). In 2011, the EU formed a joint product safety surveillance initiative with China to improve the traceability of Chinese products and to allow for better corrective measures to be taken.

A pilot scheme was launched between the Netherlands and China to focus on toy safety, as toys are commonly the most notified product category. The primary objective was to define common working methods and protocols with the Chinese authorities and to inform Chinese authorities about European requirements.

What does this mean for your business?
There is an ever-increasing focus on China by the regulatory authorities, at EU, national and international level. To the extent that UK businesses are now already taking steps to ensure the quality and safety of products (or indeed components) of Chinese origin, businesses would be well advised to ensure that adequate quality control and contractual provisions are in place to minimise the risks posed to potential customers and product reputation, and to ensure co-operation and indemnification.

INTERNATIONAL ALIGNMENT OF SAFETY STANDARDS

In February 2011, the European Commission introduced a pilot project with the US, Canada and Australia to attempt to align safety standards for three products that pose a risk to children; namely corded window coverings (such as blinds), chair-top booster seats and baby slings.

What does this mean for your business?
If the pilot project is successful, manufacturers can expect to see similar projects being developed for other products, in particular those that affect the most vulnerable groups of consumers, such as children and the elderly.

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Athens Court of Appeals Judgment 9079/2000

Joined cases C65-09 and C87-09 Weber v Wittmer; Putz v Medianess Electronics [2011]

Munich Higher Regional Court – Case 5 U 3158/10