

Risks following a product recall, part 2: criminal offences for the company and directors

IN ADDITION TO CIVIL PRODUCT LIABILITY claims, a company and its directors could also face criminal charges following the recall of an unsafe product.

In part 2 of this two-part series considering post-recall risks, Alison Newstead, partner with Shook Hardy & Bacon International, outlines the potential offences and penalties under the General Product Safety Regulations 2005 and the Corporate Manslaughter and Corporate Homicide Act 2007.

Part 1 of this series examined the issue of confidential and sensitive information reaching external parties by way of disclosure or as a result of requests under the Freedom of Information Act. To read part 1, see *The In-House Lawyer* 203, September issue.

GENERAL PRODUCT SAFETY REGULATIONS 2005

Under the General Product Safety Regulations (GPSR) 2005 there are several offences that may be committed as a result of a defective product. These offences may attach to the company or to an individual.

CORPORATE OFFENCES UNDER GPSR

The GPSR 2005 make it an offence for a producer to:

- place a product on the market that is unsafe;
- fail to give adequate warnings about the product; and
- fail to make an appropriate notification to the authorities with the relevant time limits.

The fine for placing an unsafe product on the market can be up to £20,000 per offence. It is worth noting that an offence is committed each time that an unsafe product is placed on the market. In theory, if 10,000 unsafe products were placed on the market, 10,000 separate offences will have

been committed and could be penalised accordingly. In practice, the prosecuting authority will limit the prosecution to a number of sample offences.

The timing of notification to the relevant authority is an area of significant risk. Understandably, there is often some tension among departments about how soon a notification to the regulatory authorities should be made.

Under the General Product Safety Directive (from which the UK GPSR 2005 derives), the requirement is that notification be made 'immediately'. The GPSR 2005 in the UK requires notification 'forthwith'. EU guidance states that notification should be made:

'...as soon as information on the dangerous product becomes available and in the case of a serious risk, within three days, and in other cases within ten days in any event'.

Despite the differing wording, one principle is clear: notification to the regulatory authority should not be delayed. It may be that a decision to recall cannot be taken until after risk assessments have been carried out. However, it is better to let the regulatory authorities know that there may be a potential problem and that a risk assessment is underway than to risk a potential prosecution due to non-compliance with the notification requirements.

INDIVIDUAL OFFENCES UNDER GPSR

Individuals may be prosecuted and face penalties under the GPSR 2005 if an offence of a body corporate is committed with the consent, connivance or attributable to any neglect on the part of a 'director, manager, secretary or other similar officer of the body corporate'.

Personal liability does not attach merely to a person's job title, but it will focus on their authority and responsibility within the



'Under the General Product Safety Regulations 2005 there are several offences that may be committed as a result of a defective product.'

Alison Newstead, partner, Shook, Hardy & Bacon
E-mail: anewstead@shb.com

business. In reality, liability is likely to attach to decision makers, ie those who have a say in how activities are managed and organised. If any individual has the power to decide corporate policy and strategy it is likely that they will fall into this category.

In considering which actions fall within the arena of 'consent, connivance and neglect', there are no definitions in the GPSR 2005, however:

- 'Consent' is likely to mean that the individual sanctioned the particular action, or inaction.
- 'Connivance' is more of a wilful shutting of the eyes; where a person knew what was going on, but did not take any steps. In essence, agreement to the course of action was tacit. Case law suggests that the individual 'was not actually encouraging [the course of action], but did nothing about it'.
- 'Neglect' covers situations in which an individual failed to take steps that it was their duty to take.

In terms of individual penalties under the GPSR 2005, depending on the exact offence, an individual could face a fine of up to £20,000 or imprisonment of up to 12 months.

CORPORATE OR INDIVIDUAL MANSLAUGHTER

Perhaps the most concerning outcome of a product safety recall is the risk of a corporate manslaughter prosecution for the company, or an individual gross negligence manslaughter conviction for the individual.

CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT 2007

Following accidents such as Potters Bar and Hatfield rail crashes and the Zeebrugge ferry tragedy, the Corporate Manslaughter and Corporate Homicide Act 2007 was designed to make it easier to prosecute organisations where their gross negligence leads to death.

Although traditionally considered in the arena of health and safety prosecutions, the corporate manslaughter legislation could equally cover a situation when someone is killed as a result of an unsafe

'Perhaps the most concerning outcome of a product safety recall is the risk of a corporate manslaughter prosecution for the company or an individual gross negligence manslaughter conviction for the individual.'

product where corrective action, such as a product recall, had not been taken by a business in respect of a dangerous product leading to a person's death.

Under the Act, an organisation will be guilty of an offence if the way in which its activities are managed or organised:

- causes a person's death; and
- this amounts to gross breach of a relevant duty of care owed by the organisation to the deceased. It will be for a jury to decide whether a gross breach has been committed; such a breach has to be wilful, it cannot just be a mistake.

In such situations, the way in which the activities are managed or organised by 'senior management' is key to securing a conviction. 'Senior management' are those who play a significant role in making decisions about the organisation or management of the business, whether as whole or in respect of a substantial part or, indeed, the actual managing or organising of the business.

This definition may also catch a wide class of lower management, particularly as a recall situation requires a range of individuals from across the business to be involved.

It is possible to envisage several situations during a product safety crisis when a company could be held responsible for a death as a result of senior management actions. For example:

- if there was knowledge of crucial information regarding product defect trends from the monitoring systems but management failed to act upon it;
- if there was knowledge of similar safety problems in other countries, but

management failed to investigate if a similar problem could occur within the UK; or

- where a positive instruction was given that corrective action (such as a recall) should not be taken.

The penalties for offences under the Corporate Manslaughter Act are wide ranging.

Businesses could face an unlimited fine in the Crown Court, and/or a remedial order that requires the company to take steps to remedy any management which led to a death, or a publicity order that requires a company to publicise that it has been convicted of the offence, giving the details, the amount of any fine imposed and the terms of any remedial order made. Most damaging perhaps, would be the reputational damage suffered by the company, with the company being branded as a 'corporate killer'.

INDIVIDUAL GROSS NEGLIGENCE MANSLAUGHTER

It should not be forgotten that there is also the possibility of a prosecution for individual gross negligence manslaughter, which carries a maximum penalty of life imprisonment.

While there have been many such individual prosecutions in respect of health and safety offences, so far no such prosecutions have been based on badly managed product recalls or indeed failure to instigate such recall. However, the legal framework is in place and the possibility of such a prosecution remains.

*By Alison Newstead, partner,
Shook, Hardy & Bacon.
E-mail: anewstead@shb.com.*