

PRODUCT LIABILITY BITESIZE

QUARTERLY UPDATE

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Your quarterly update from HF's Product Liability team

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INTRODUCTION

It's been a busy time since the first edition of our regular product liability update.

The Queen's Speech heralded new laws for automated vehicles and e-scooters. Elsewhere, the Office for Product Safety & Standards (OPSS) has published a series of reports on topics ranging from domestic fires through to artificial intelligence. And the effects of Brexit continue to be felt, including through the introduction of the UKCA mark from next year and diverging standards on things like forever chemicals, artificial intelligence and medical devices.

In *Product Law*, we take a closer look at the Queen's Speech as well as changes to the introduction of the UKCA mark and all the recent updates from the OPSS.

In *Product focus*, we shine a torch on recent developments concerning button batteries and magnets, products which can cause electric shocks, forever chemicals, e-cigarettes, cosmetics and medical devices.

In *Automated Vehicles* and *Micromobility*, we consider the imminent arrival of ALKS, the changes to the Highway Code made to pave the way for ALKS, as well as recent consultations on automated driving and remote driving – before taking a look at the ongoing concerns with e-scooters.

In *Food for Thought*, we summarise recent updates from the Food Standards Agency and the government on food policy.

Finally, in *Case Watch*, we look at recent product liability judgments including a timely reminder of the importance of limitation periods in product liability cases, and why the right lawyers should be consulted.

We hope you find the information in this update useful. Please don't hesitate to get in touch if you have any queries arising from the topics discussed.



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PRODUCT LAW

THE QUEEN'S SPEECH

The announcements made in the 2022 Queen's Speech included a number of possible developments of interest to those dealing with product liability claims:

- The speech referred to the encouragement of agricultural and scientific innovation to “unlock the potential of new technologies to promote sustainable and efficient farming and food production”. This was a reference to the Genetic Technology (Precision Breeding) Bill, which will set out a regulatory regime for precision bred organisms (plants and animals which have been modified via biotechnology, e.g., gene editing).
- The Product Security and Telecommunications Infrastructure Bill will ensure that smart consumer products, like smart phones and TVs, are more secure against cyber-attacks and are updated regularly to protect against emerging threats.

- The Transport Bill will include new laws for automated vehicles and e-scooters (which we have discussed in more detail in Automated Vehicles and Micromobility, below).

UKCA MARKINGS

We already knew that post-Brexit and from 01.01.23, products which previously required a CE mark will be required to have a 'UKCA' mark when placed on the UK market.

The government now seeks to make it simpler for businesses to apply the new UKCA mark – although not for all products (with medical devices being excluded). The government will achieve this by (for example) reducing re-testing costs, removing the need to re-test imported stock, continuing to accept spare parts on the UK market and allowing UKCA markings to be added using a sticky label for an extended period.

UPDATES FROM THE OPSS

The OPSS has had a busy few months with the following notable developments:

- The introduction of a Code of Practice to support businesses in bringing products to market safely (PAS 7050:2022), as well as an update to the Code of Practice on supporting better product recalls (PAS 7100: 2022).

- The publication of a report into product safety and industry looking at supply-side issues and consumer views on product safety.
- The publication of its 'Study on the impact of artificial intelligence on product safety', which contains a number of insights including that AI is expected to transform several sectors including transport, healthcare and even service robots in the next few years. The report recognises the benefits of AI, including the potential for products to predict their own repair needs (so maintenance can be scheduled accordingly), but also recognises the somewhat theoretical possibility of AI to cause harm.

If (or when) AI does cause harm, determining liability will be complicated because AI products can change over time, can lack transparency in their decision making and can be used past their support point. The report considers whether a separate safety framework should be developed for AI products (as in the EU) but stops short of making any recommendations in this respect. Instead, the report suggests that “as products using AI proliferate, the demand for clearer liability rules will become stronger”.

- The publication of a study on the characteristics of modern domestic fires, which notes that domestic homes have changed in their design (and materials) and now contain modern products (such as e-cigarettes and products containing lithium-ion

batteries) which can all impact on the propensity for and characteristics of domestic fires. Some of the key findings will be of interest to those involved in product liability and property damage claims including as follows:

- The increased number of electrical products (and lithium-ion batteries) inside homes will of course increase the risk of domestic fires, particularly given the difficulties faced by consumers in identifying poor quality and counterfeit products (particularly when purchasing online) – and more could be done to help consumers, including better regulation of online marketplaces.
- Whilst some products (like TVs) are causing less fires, other products are causing more fires, including washing machines, tumble dryers, computers and battery chargers.
- Common problems with batteries, wiring, cabling, plugs and battery chargers include insufficient insulation and overheating.
- The report notes potential changes to lithium-ion battery designs that could mitigate fire risks, particularly associated with ‘thermal runaway’.

PRODUCT RISKS

UPDATE ON BUTTON BATTERIES AND MAGNETS

In the first of edition of our product liability update we noted recent concerns with the use of button cell batteries and high-powered magnets, particularly in toys. This trend has continued. As reported, the OPSS is leading a campaign to raise awareness about the potential hazards of children ingesting both batteries and magnets as well as other small toy parts and imitation food.

In one report the OPSS detailed enforcement action it had taken in respect of 28 magnetic toys with magnetic flux exceeding the maximum allowed and as recently as 22.07.22 the OPSS issued a report in respect of magnetic balls which had the potential to cause internal injuries if accidentally consumed. It is of course very possible claims could follow if injuries are caused by the inadvertent consumption of button batteries and magnets, particularly where (for example) a battery is easily accessible, or a magnet exceeds the maximum magnetic flux.

ELECTRIC SHOCKS

Keeping a close eye on OPSS product safety reports reveals a high number of products recently introduced to the market which present a serious risk of electric shock and burns.

Some examples include:

- A number of products with plug dimensions not meeting the requirements of BS1363, such as a foot massager, adaptor for ride on car and a lision wrench
- A smart lamp, with only basic insulation between metal parts and live parts
- A number of hair dryers, presenting a risk of shock and fire
- A number of products which had not been adequately earthed, such as a preheating plate, a bubble machine and a diamond core drill
- A number of battery chargers, presenting a risk of shock and fire

Of course, for claims handlers, if a product causes injury (such as burns) via electric shock or a fire then a claim may follow.

FOREVER CHEMICALS OR PFAS

PFAS stands for “Per-or poly-fluorinated alkyl substances”, more commonly referred to as forever chemicals, a group of over 4,700 chemicals used in everyday products, like food packaging, cosmetics and clothing, and which persist and do not break down in the environment. It’s alleged that some forever chemicals can be toxic and harmful to humans and animals.

In the US, forever chemicals have been the subject of class actions, and some states are introducing legislation which will phase out or ban them from use.

At the EU level, the use of forever chemicals is restricted (more so than in the UK) and some EU members have already taken steps towards an outright ban in Europe.

The safety level is lower in the UK, where the Environment Agency reports that forever chemicals are widely present in our surface water and ground water and the BBC recently found that forever chemicals in our water exceeds European safety levels but not the UK’s safety levels.

If reports of injury and harm to the environment increase, then of course this will have an impact on the risk profile of some producers. Elsewhere, there have been recent reports that it may be possible to destroy forever chemicals using sodium hydroxide.



VAPING AND E-CIGARETTES

Vaping and e-cigarettes have been hot topics for those involved in product liability for as long as they've been on the market.

However, there was a dearth of claims for a period, save for the odd exploding battery.

That has changed (at least in the US) in recent years with claims relating to marketing practices, mislabelling and defective designs starting to appear. And a recent report by Duke University School of Medicine reveals that some mint and menthol-flavoured e-cigarettes contain potentially dangerous levels of synthetic cooling agents.

E-cigarettes have long been considered an emerging risk and it's possible we will start to see more claims in the UK soon.

COSMETICS

The use of cosmetics can lead to product claims, particularly where they cause an adverse reaction. Two recent developments in the regulation of cosmetics seek to reduce the risks associated with their use:

- The government intends to revise the Cosmetic Products Regulations 2009 to reduce or prohibit specific chemicals including those classified as Carcinogenic, Mutagenic or Reprotoxic (CMR).
- The OPSS has called for data on the safety of cosmetic ingredients with suspected endocrine disrupting properties (i.e., those which can decrease or increase hormone levels).

MEDICAL DEVICES

In 2021 the MHRA (Medicines and Healthcare products Regulatory Agency) ran a consultation on the future of medical devices in the UK and has now published its response to the consultation.

Of interest to those dealing with product liability claims, particularly as wearable and connected medical devices become more prevalent, the MHRA confirms its intention to define and regulate 'Software as a Medical Device' (SaMD) broadly in line with the EU's approach – to cover issues such as cyber security and data protection.

Elsewhere, manufacturers will be required to have sufficient financial coverage to compensate those impacted by adverse incidents.



AUTONOMOUS VEHICLES

[CLICK HERE](#) OR HEAD TO OUR WEBSITE TO CHECK OUT THE AUTONOMOUS VEHICLES UPDATE WHICH INCLUDES:

- **IMMINENT ARRIVAL OF ALKS?**
- **CHANGES TO THE HIGHWAY CODE**
- **REMOTE DRIVING**
- **TRANSPORT COMMITTEE INQUIRY ON AUTOMATED VEHICLES**



MICROMOBILITY

AN UPDATE ON E-SCOOTERS

Since our roundtable event on 12.05.22, e-scooters continue to dominate the headlines. For instance, there have been reports of further [accidents and deaths](#), [staged accidents](#), [e-scooter fires](#), and couriers using e-scooters adapted to boost performance. AXA has also [reported](#) covering almost £½million on claims caused by lithium battery fires and has issued a fresh warning regarding the risks associated with e-scooters (and e-bikes).

The Transport Secretary announced in April that the government remains intent on legalising e-scooters. The subsequent Queen's Speech (and the government's 140-page briefing pack) was in fact silent on e-scooters; but a government spokesperson and insider sources told the press the Transport Bill will include measures relating to private e-scooters, to stipulate minimum standards concerning speed, power and lights (and possibly also with regard to the use of helmets and indicators) and that it'll be illegal to sell e-scooters which don't meet the regulatory standards.

In the meantime, it appears the e-scooter trials will be extended to the end of May 2024 and the government

has stated its intention to create a new vehicle category. The government says it will consult interested parties before any new arrangements come into force.

Elsewhere, the Association of Consumer Support Organisations (ACSO) published a report on the future of e-scooters on 22.07.22. The report includes recommendations for policy makers to consider expanding e-scooter hire schemes, build better infrastructure, educate road users, insure and register e-scooters and introduce a minimum age and speed limit as well as compulsory protective equipment.





FOOD FOR THOUGHT

UPDATES FROM THE FSA

There have been a couple of recent updates from the Food Standards Agency (FSA) which may be relevant to those dealing with food and drink claims:

- On 31.05.22 the FSA published its [International Objectives and Priorities](#) for the next 12-18 months. Of note, the FSA says it will take a more prominent role as a regulator following Brexit. And consumer protection remains key. The FSA says that its international work will “mitigate risks to the global food system”.
- On 05.07.22 the FSA also announced a [new £1.6m food safety network](#) intended to tackle food poisoning which it says costs the UK up to £9billion per year. The FSA says there are 2.4 million cases of food poisoning every year. To tackle this, the initiative (in partnership with the Biological Sciences Research Council) will assemble a community of food producers, policy makers and scientists, identify areas of research need, coordinate research activities and promote skill development

GOVERNMENT FOOD STRATEGY

The government published its [Food Strategy](#) paper on 13.06.22. The paper focuses on the delivery of a prosperous agri-food and seafood sector, a sustainable food system and export and import opportunities. Of note to those dealing with food and drink claims, it is suggested there may be further changes to mandatory food labelling (following those already introduced in relation to allergens).

CASE WATCH

01.

'Dieselgate' litigation

It was reported in May that Volkswagen had agreed to pay £193m to more than 90,000 drivers in settlement of the 'dieselgate' class action. As reported, the claim related to vehicles fitted with 'defeat devices' which were certified as conforming with EU pollution standards when they did not. It appears the loss sustained by users primarily related to the value of their vehicles.

02.

Hastings v Finsbury Orthopaedics Ltd [2022] UKSC 19

Recent product liability decisions concerning metal-on-metal hip replacements have clarified the meaning of "defect" under the Consumer Protection Act (CPA) by establishing that there is no entitlement to absolute product safety (see *Wilkes v DePuy* and *Gee v DePuy*). The Supreme Court endorsed those decisions in *Hastings*.

In *Hastings*, C received a metal-on-metal prosthetic hip which had a propensity to shed metal debris through use to which some patients could suffer an adverse reaction. C brought a claim under the Consumer Protection Act on the basis (he said) the product contained a defect in that the design created a risk of early failure. On this point, the Supreme Court endorsed the first instance judge's finding of fact that the lifespan of the hip was not out of line with benchmarks at the time.

03.

Coote v Ullstein [2022] EWHC 607 (QB)

The facts of *Coote* highlight the importance of limitation periods in product liability claims, which can be easy to miss or misconstrue.

C claimed a link between the MMR vaccine and her epilepsy. However, her claim was extinguished due to the expiry of the 10 year long-stop under the Consumer Protection Act. The 10 year long-stop bars claims relating to product defects after the expiry of 10 years from the date the product is first placed on the market; but C was incorrectly advised by her solicitors that the long-stop started to run from the date the vaccine was administered. C brought a professional negligence claim which was ultimately struck out because C would have had poor prospects of success in any event.

Despite the result, the above case is a timely reminder of why it's important that product liability claims are dealt with by the right lawyers.

CONTACT

If you would like to discuss any of the information contained within this document, please do not hesitate to get in touch.



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