PRODUCT LIABILITY: LEGAL REVIEW

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5 September 2001

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The purpose of this lecture is to consider those elements of the law that are particularly relevant to product liability claims. Whilst it is not possible in the time allowed to undertake an exhaustive examination of this topic I have, nonetheless, tried to isolate areas of particular interest. In this respect I am hoping to concentrate on certain "tools of the trade".

During this talk I will refer to the following areas of product liability law:

1 . Consumer Protection Act 1987 - relating in particular to the definition of a "defect" and other aspects of the Act that arise on a regular basis with particular emphasis placed on practical examples.

2. Causation - the requirement to prove causation in all product liability claims including claims under the Consumer Protection Act 1987 together with some of the defences available to manufacturers in relation to the causation argument. I also touch on product recall.

3. Terms and- Conditions - their importance in restricting or excluding claims. Difficulties either party may have in proving that the relevant terms and conditions were "incorporated" in the contract including reference to the "battle of the forms". I will also briefly consider the question of "reasonableness" in the context of the Unfair Contract Terms Act 1977 and how the Courts interpret this.

4. Contributory Negligence - the extent to which a defendant is entitled to rely upon the Claimant's contributory negligence in reducing the value of claims as well as its relevance to the Consumer Protection Act 1987.

5. Product Recall - Brief reference to Insurers position regarding product recall.

6. EU Directive on Unfair Terms in Consumer Contracts - Brief notes setting out broadly the impact of these regulations and their importance to Insurers in relation to Product Liability claims.

1. CONSUMER PROTECTION ACT 1987

Background

As you are all aware the Consumer Protection Act 1987 was brought into force in compliance with the EC Directive 85/374 enacted on 25 July 1985. It may be worth noting that at present there is a dispute as to whether or not the Consumer Protection Act properly reflects the terms of the Directive. There is an academic argument as to whether the "state of the art" defence incorporated in the Act is wider than that set out in the Directive itself.

Part 1 of the Act came into force on 1 March 1988 and it is this part of the Act that will be of particular relevance when dealing with personal injury and product liability claims.

Basically the Act renders a "Producer" strictly liable for personal injury, death or damage to a consumer's property caused by defective products.

Under the Act it is still necessary for the plaintiff to prove:

1. That there was an injury or damage to "consumer" property

2. That the damage was caused by the product (we will discuss the question of causation later)

3. That the product was itself defective as defined by the Act.

On the matters mentioned above I will concentrate in particular on the question of how the Act defines a product as "defective" and some of the matters that will be taken into consideration by the Court.

The question of what is a defect is set out in the Act in section 3(1) which states:

"Subject to the following conditions of this Section, there is a defect in a product for the purposes *of* this Part *if* the safety *of* the product is not such as persons generally are entitled to expect; and for those purposes "safety", in relation to a product shall include safety with respect to products comprised in that product, and safety in the context of risks of damage to property, as well as in the context of risk of death or personal injury."

Section 2U2 of the Consumer Protection Act further assists by setting out further matters which are relevant as follows:

"(a) The manner in which, and purposes of which, the product has been marketed, its get-up, the use of any market in relation to the product and any instructions for, or warnings with respect to, doing or refraining from doing anything with or in relation to the product;

(b) What might reasonably be expected to be done with or in relation to the product; and

(c) **The time when a product was supplied by its producer to another;**

and nothing in this section shall require a defect to be inferred for the fact alone that the safety of a product which is supplied after that time is greater than the safety of the product in question".

From the above it should be noted that Courts have a very wide discretion. The above list of relevant matters is not exhaustive. The Courts will therefore take into account other factors including the value of the products supplied, the availability of alternative products, the choice of features between competing products and relative prices. For example the Court might be entitled to infer that a more expensive and therefore more heavily researched or tested product would have undergone more extensive safely testing than a cheaper less sophisticated product. With regard to long established and well known products, the Court might well expect there to be a considerable degree of safety which the public is entitled to expect.

Criteria for Assessing "Defective" Products

We will now look at some the various criteria and their relevance.

1 The presentation of the product "its get up"/marketing/warnings

The Courts will take into consideration the marketing of products as well as their description and the information and warnings supplied with the products themselves.

Expectations in relation to safety might well be limited to the extent that labelling or public information is made available. A lot of attention has been given to the question of cigarette smoking. Packaging of cigarettes have, for a number of years contained fairly extensive warnings regarding the health risks. The Courts will take into account the clarity of these warnings, and the extent to which they comply with Government Health regulations. The Courts will also take into account warnings contained on packets produced by other manufacturers including warnings contained on packets manufactured by the same companies in other countries. As has always been the case when looking at the question of warnings, the Courts will consider the extent to which the seriousness of the risk is effectively brought to the consumer's attention.

Soft metal bristle toothbrush

If, for example, a new type of a toothbrush were invented with soft metal bristles but there was a very small risk of this causing a life threatening gum infection then the Courts would take into account the following matters:

(a) The way in which the product was advertised and marketed and the extent to which the public might assume from marketing or advertising that the product was entirely safe.

(b) The effectiveness of any warnings in relation to this risk. This will include consideration of the extent (if the risk (it is very very rare) the gravity of the risk (it could be life threatening) and the way in which the risk is presented. If, for example reference to the risk is only made in the package inserts the Court may be less willing to assume that this was sufficiently brought to the public's attention. If however there is specific reference to the risk incorporated on the packet in bold print then the Court might well feel that the risk had been sufficiently brought to the consumer's attention.

(c) The extent to which alternative products could have been used. If therefore ordinary bristle brushes produce very similar results without any risk the Court might find that the product is unsafe without any additional benefit being accorded by its use.

II The anticipated use of the product

Any use that could reasonably be expected will be taken into account in determining whether or not a product is defective. For example a bottle manufacturer may find that in order to try to remove the top to their carbonated drink a consumer had used either a pair of pliers or their teeth. Whilst this may be an obvious misuse of the bottle and/or lid the Court may nevertheless find that the Producer ought to have ensured that the bottle lid came away freely. Indeed it might be argued that the manufacturer ought to anticipate that the lid might be damaged as a result of efforts to remove it.

III The time when the product was supplied

Consideration will always have to be given to the circumstances at the date when the product was supplied. This will relate to any warnings, indications or other information given in respect of the product itself. To use our soft metal bristle toothbrush as a further example the Court will consider the state of technical knowledge and the market place at the date of supply. If the product were subsequently improved "made safer" the Court would not take this into account. Safety is seen as a "relative" rather than an "absolute" concept.

The product may not be defective if' it becomes dangerous only after extensive use or after its reasonable or stated life. In some circumstances a product which is liable to become less safe with time may be defective at the time it is put into circulation unless it is supplied with an adequate time warning or "shelf life". The Producer will not therefore necessarily be liable if the consumer uses the product after the expiry date which is clearly marked on the product.

IV Causation

I will deal with the question of causation as a separate topic later since clearly it is not only relevant to claims and Consumer Protection Act but also to general liability claims.

V What defences are available under the Consumer Protection Act?

The Claimant does of course have to prove that he has suffered damage, that the product was defect and that damage was caused by the defect. Apart from the general defences available in respect of all these allegations specific defences include the following:

(a) The **product was supplied prior to 1 March 1988** when this section came into force.

(b) The **damage suffered by the plaintiff is purely economic** and therefore did not arise as a consequence of damage to property or personal injury caused by a defective product.

(c) **The state of scientific and technical knowledge at the relevant time was not such that a Producer of products of the same description as the product in question might be expected to have discovered the defect if it had existed in his products whilst they were under his control.**

This last defence requires some further explanation since it is likely to arise regularly on large claims. This is generally known as the "the development risks" defence. It is particularly relevant to companies involved in more sophisticated products requiring detailed background research and development. The defence was established in order to research and development. The defence was established in order to ensure that products which might contain unknown hazards which were not ascertained at the relevant time are not subsequently found to have been defective as a result.

It will be apparent that the pharmaceutical industry is developing new products on a regular basis. The purpose of this wording was to ensure that they could provide new products, if on the balance of reasonable research the product was safe despite the fact that in due course it might be discovered subsequently that some side effect occurred. It was thought that the development risks defence was necessary if innovative research and product development were to be encouraged.

It is worth mentioning that this defence applies equally for packaging and labelling. It is therefore relevant to take into account the state of scientific and technical knowledge at the relevant date when considering what information is contained in package inserts or on the packages themselves in relation to warnings, directions or sell-by dates. Back to our toothbrush; one would have to consider whether or not the rare gum disease was known or ought to have been discovered at the time when the product was supplied. If other Producers had discovered the gum disease and it was not discovered by the manufacturer for whom loss adjusters act, it might be difficult for them to suggest that their product was safe if the other manufacturers had mentioned this risk on their labelling and the Insured had not. It is worth suggesting to Insured to occasionally gather packaging of competitors in order to compare their own labelling with other suppliers.

Conclusion - Consumer Protection Act

To conclude it is important that this Act is borne in mind whenever a consumer brings a claim in respect of products. The particular matters referred to above will require consideration when assessing the risk in respect of the product.

2. CAUSATION

There is an absolute requirement in English law to prove causation in respect of all liability claims. This is reflected in Article 4 of the EC Directive which states "The injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage."

No specific reference is made to causation in the Consumer Protection Act. It is unnecessary since it is already an established principle of English Law that the plaintiff has to prove causation in order to succeed with his claim.

By way of background it is worth noting that in order to prove a claim, the plaintiff has to establish that the product was capable of causing the damage (general causation), the plaintiff's damage was in fact caused by the use of the defendant's product (individual causation) and that had the defect not existed, the plaintiff would not have suffered damage (proximate causation) often assessed on the "but for" test).

Indeed in the leading case of McGhee v. **National Coal Board** [197213 All ER 1008 which involved employers who had negligently failed to provide showers in circumstances where workmen were likely to contract dermatitis from brickdust if showers were not taken, Lord Simon stated:

"..... **where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require ... the plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on the balance of probabilities that the**

breach or breaches of duty contributed substantially to causing the injury". The most important words there are "contributed substantially to causing the injury".

The principle of causation was subsequently further defined in the leading case of **Wilsher v. Essex Area Health Authority [1988] 1 All ER 871.** In this case a baby was born prematurely suffering from an incurable condition of the retina. Evidence was placed before the Court to the effect that the negligent administration of excess oxygen to the baby may have caused its condition. The Court however heard that there were five other common causes of' the condition. The effect of the House of Lord's decision was to restate that "the plaintiff must prove that the negligent action of the defendant was more likely than not the cause of or a material contributing factor to his injury".

With regard to our soft metal bristle toothbrush one might discover that some people suffer from the very rare gum disease when they smoke more than 40 cigarettes a day over a very long period of time. In our example case the Claimant had smoked one or two cigarettes a day for twenty years. The Court would have to consider whether the use of the toothbrush was more likely than not the cause of, or a material contributing factor to the cause of' the gum disease despite evidence that earlier smoking may have had some effect as well.

Background Causes of Injury

It is therefore essential in all cases where causation is investigated to consider other possible background causes of an injury and the extent to which they may have been the principal or exclusive cause of injury. If this can be established it may prove difficult for the plaintiff to convince a court that the defective product was, on the balance of probabilities, either the cause or contributed substantially to causing the injury.

If, for example, the Claimant's personal representatives were to allege that the Claimant had died of lung cancer due to the effects of smoking, and a Court were to accept that inadequate warnings had been given, the Claimant's personal representatives would still have to prove that smoking either caused or contributed substantially to causing the Claimant to develop cancer. In order to establish this the Claimant's personal representatives would either obtain independent medical evidence to confirm that on the balance of' probabilities that is the case or alternatively they would rely upon epidemiological studies to show that the Claimant was placed at two or three times the normal risk as a result of smoking and that on the balance of probabilities this was the cause. The Courts are however fairly sceptical of statistical studies although they will accept their introduction by experts as evidence in support of their views.

Duty to Warn - Proving Causation

In cases where it is alleged that a Producer has not brought a serious risk of using a product to a consumer's attention the Claimant may be at risk if he cannot prove the effect which a different warning would have had on his own conduct. In cases where drugs or medical products were dispensed by either a pharmacist or doctor (an intelligent user) it will be necessary for the plaintiff to show that a different warning or information would have caused the actual doctor or pharmacist either to have brought the risk to the attention of the patient or alternatively to have prescribed or dispensed an alternative drug which would not have caused the same side effects.

It will be difficult for a plaintiff to establish that a different warning would have led to the injury being avoided. In the case of our innovative toothbrush it would be for the Claimant to prove that a more straightforward warning on the packet referring to this very rare but possibly fatal illness would have caused him to have used a more traditional toothbrush. Whilst a Claimant might state that he would have chosen an alternative or given up if' he had known of the full risk it will nevertheless be necessary for him to prove this to the Court's satisfaction. (In circumstances where cigarette manufacturers have introduced increasingly straightforward warnings over a period of time it might be difficult for a Claimant to argue that had these more extensive warnings been contained on packets, say, 15 years ago they would have stopped smoking if, in fact, they had continued to smoke despite more extensive warnings now being printed on the packets.) To some extent a Producer may be able to rely upon market information relating to the limited extent to which consumers have moved away from their product despite the introduction of more elaborate warnings.

Volenti Non Fit Injuria

It has long been established by the Courts that a plaintiff's claim will fail if the defendant can establish that the plaintiff has assumed the risk. The full translation *of volenti non fit injuria* is "to the person willing to take the risk no injury is done".

In order to establish this defence the Producer will have to prove that on the balance of probabilities the Claimant "voluntarily and freely with full knowledge of the nature of the risk he ran impliedly agreed to incur it." It may be very difficult for a Producer to rely upon this particular defence. It will not always be easy for him to show that the plaintiff freely and with full knowledge agreed to accept the consequences of the risk. With hindsight it will often be the case that the full consequences of the risk were not made known to the Claimant or that he could not have fully understood the extent and true nature of the risk itself.

3. TERMS AND CONDITIONS

It will often be the case that supplier or purchaser will seek to rely upon Terms and Conditions in order to limit or exclude liability in respect of claims. This is a very wide topic and I do not intend in this short lecture to consider this topic in great depth. It is however worth noting the current situation regarding the question of "incorporation" of relevant Terms and Conditions and furthermore the extent to which these might be questioned by the Court in terms of "reasonableness" within the meaning of the Unfair Contract Terms Act 1977. These are recurring themes that have to be considered when dealing with product liability claims.

A. Unfair Contract Terms Act 1977

At present the Courts are very reluctant to impose their will when the parties have set out in Terms and Conditions their relationship with each other. The Courts will however consider whether the Term or Clause falls foul of the Unfair Contract Terms Act 1977 after it has been established that the Term or Clause forms part of' the contract. It should be noted that the 1977 Act does not automatically subject every exemption clause to the requirement of reasonableness; it renders some clauses automatically ineffective without their "reasonableness" coming into question. Other clauses will only be effective if' they satisfy the requirement of reasonableness.

I should add that certain types of contract are specifically excluded from the operation of the Act. one of these types of contract is a contract of insurance.

If we assume that the exemption clause in the Insured's Terms and Conditions is subject to the test of reasonableness, (and the situation where a party deals on the other party's written standard terms of business is specifically included in the 1977 Act) then what does the 1977 Act require for the clause to be valid?

The following principal matters will be relevant:

1. Timing: Was it reasonable to include such an exclusion clause given the circumstances which were known, or should have been known, or in the contemplation of the parties when the contract was made;

2. The strength of the bargaining positions of the parties, taking into consideration whether the customer's requirements could have been met by other means;

3. Whether there was an inducement to agree to the term or whether the consumer, in accepting the Term could have contracted with someone else without such a Term;

4. Where the extent of the customer's knowledge in relation to the existence and extent of the Term;

5. Where the Term excludes or restricts liability if some condition is not complied with, whether it was reasonable at the time of the contract to expect that that condition could practicably be complied with;

6. Whether the goods were manufactured or adapted to the special order of the customer;

7. The width of the clause; generally the wider the clause, the greater the possibility of its being considered unreasonable.

If the clause purports to limit liability to a specified sum, the following additional matters are relevant:

a) The resources available to meet the liability; and
b) how far it was open to the producer to obtain insurance cover.

(Indeed, case law consistently emphasises the importance of the availability of' insurance and its cost.)

It is essential in any product liability claim to consider who else might be liable in respect of the product. It might be that the product was damaged after it left the factory, or when it was placed on the shelf in the supermarket or during transit. In this regard it would be essential to obtain copies of all the relevant Terms and Conditions as soon as possible in order that contributions can be obtained from relevant parties. It may well be possible to exclude or limit liability on behalf of the Insured based upon their Terms and Conditions.

B. Incorporation of Terms and Conditions

It is often the case in claims between manufacturers that one or both will seek to rely upon their Terms and Conditions. In order to rely upon these one or both will have to prove that their Terms and Conditions were incorporated when the contract was agreed.

It is often the case where parties have been dealing with each other for some time that the contract for the supply or purchase of goods is made on the telephone. The Purchaser will contact a Supplier on the telephone and having been informed of the relevant price will agree the relevant amounts and date of delivery. This information will be recorded by the Supplier in his books. At that stage there is a contract. The mere fact that the supplier subsequently receives a Purchase Order containing the Purchaser's Terms and Conditions is irrelevant. Likewise the fact the supplier sends an Acknowledgment of Order form setting out their own terms and conditions of supply may also be irrelevant. In both sets of circumstances the relevant Terms and Conditions have not been incorporated. It is essential to consider in these circumstances the precise way in which the Order was made.

It is always worth advising the Insured to ensure that when a purchase is either made or received by telephone that the person making or receiving the order refers to the fact that the agreement is subject to their relevant Terms and Conditions and that these are available for inspection if required. Such a reference would have the effect of' incorporating those Terms and Conditions. Evidence of this ought to be contained on a small sheet of paper upon which the Order is marked or received. A small box to be ticked confirming that reference has been made to the relevant terms and conditions is more than sufficient proof.

C. "Battle of the Forms"

It is often the case that the relevant parties have been in a business relationship for a number of years. In these circumstances Acknowledgment of Order forms and Purchase Orders may have been exchanged. The parties' Terms and Conditions usually conflict. In these circumstances the Court will have to consider which, if either, of the parties' Terms and Conditions applies. There is little judicial guidance on this point. It is however my firm view that in normal circumstances the Court would be reluctant to allow one party's preference over the other if in fact both had repeatedly made their own Terms and Conditions available without having at any point made it clear that they were no longer willing to proceed further unless all transactions were to be subject exclusively to their Terms and Conditions. In the event that

only one party repeatedly promoted its Terms and Conditions, without having incorporated them in the individual contracts they may be found to have been incorporated due to the "course of dealing". (Kendall -v- Lillico [1969] 2 AC 31).

4. CONTRIBUTORY NEGLIGENCE

Basically if the Claimant's injuries or damage have been caused partly by the negligence of the defendant and partly by their own negligence then at common law the Claimant's damages will be reduced. This rule of "contributory negligence" first appeared at the beginning of the 19th century although the general idea can be traced far earlier. Indeed the strict liability of an innkeeper for the safekeeping of his guest's goods was negated if the goods were stolen because of the guest's own fault **Spencer and Spencer (1567).**

It is worth noting that this principle was set down very clearly in the leading case of' **Butterfield v Forrester (1809) 11 East 60.** In this case the defendant wrongfully obstructed a road by putting a pole across it. The plaintiff, riding violently on the road in the dusk, was overthrown by the pole and injured. The pole was visible at a distance of 100 yards. It was found that the defendant was not liable to the plaintiff. Justice Bayley stated:

> "If he had used ordinary care he must have seen the obstruction; so that the accident appeared to happen entirely from his own fault"

In the case Lord Ellenborough Chief Justice added

> "One person being in fault will not dispense with another's using ordinary care for himself".

Everyone will of course appreciate the injustice of the above claims.

Present law/Law Reform (Contributory Negligence) Act 1945

Section 1(1) of the 1945 Act provides as follows:

> **"Where person suffers damage as a result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage."**

The Act clearly states that the plaintiff's conduct is relevant to the damages recoverable. Thus there may be a reduction where a motorcyclist fails to wear a crash helmet, where a passenger in a car does not wear his seat belt or where a passenger rides with the driver whom he knows to have taken substantial quantities of alcohol. Basically the plaintiff is found responsible if he failed to take reasonable care for his own safety.

Contributory negligence in cases of statutory breach of statutory duty

This is particularly relevant to cases dealt with under the Consumer Protection Act 1987 as set out previously. It was settled by the House of Lords in 1939 that contributory negligence is a defence to an action for breach of statutory duty **(Caswell** -v- **Powell Duffryn Associated Colleries (Coal Mines Act 1911) [1940] AC 152.** This principle was confirmed in The Law Reform (Contributory Negligence) Act 1945. The general principles of contributory negligence are the same as where the cause of action is founded in negligence. In practice, however, where the statute creates an absolute obligation to secure the existence of a certain state of affairs, e.g. that the dangerous parts of machinery shall be securely fenced under the Factories Act, the question of contributory negligence may be treated rather differently. It has often been stated that statutes such as the Factories Act exist to protect workmen from the consequences of their own carelessness. The Courts are therefore slow to hold workmen guilty of contributory negligence when the defendant is in breach of a statutory duty in circumstances where the original breach is very serious. Therefore the rules relating to encasing dangerous

machinery under the Factories Act which create a strict liability might well be interpreted by the Courts as being circumstances where the Courts would be loathe to agree to a reduction of damages on the basis of contributory negligence unless the employee acted recklessly. In the circumstances of the Consumer Protection Act it will be interesting to see whether or not the Courts take a robust view as to the liabilities proposed by the Act relating to the manufacture and sale of "defective" goods.

One area of contributory negligence which obtained particular mention recently related to the extent to which a defendant could argue for a reduction in contractual damages based upon contributory negligence. At first instance the Court had decided in the case of **Barclays Bank Plc v Fairclough Building Limited [199413 WLR 1057,** CA that a substantial reduction in damages could be made in circumstances where the Claimant was clearly negligent and their negligence contributed substantially to loss arising out of a breach of contract. The Court of Appeal however stated that in an action for damages for breach of a strict contractual obligation, the provisions of the Law Reform (Contributory Negligence) Act 1945 did not entitle the defendant to raise in his defence contributory negligence by the plaintiff.

5. **PRODUCT RECALL**

However careful a manufacturer is, there is always the risk that one day he will have to face the prospect of recalling his product in order to limit potential loss and injury to consumers.

The impact of product recall can be immense; no doubt you will remember the recent Perrier fiasco. One would hope that manufacturers have in place a product recall plan, should the worst come to the worst.

The typical product liability policy does not cover the manufacturer for loss caused by the product recall, neither does it cover the repair or replacement cost of the defective product. However, it may be possible to obtain cover by purchasing a products guarantee policy, and extending it to cover these additional costs as well as the usual repair and replacement costs. Of' course, even if' this additional cover is in place, Underwriters will seek to reserve their position if there is any hint that there was a problem with the product prior to its recall known before inception of the policy. **[add insert]**

General Product Safety Directive - effect on Product Recall

Until the General Product Safety Regulations 1994 came into force in October 1994 there was little legislation relating to a producer's ability to recall defective products. A number of industries had codes of practice. Whilst the Product Liability Directive ensures that those injured by products obtain compensation, the General Products Safely Directive attacks the problem from the other end: it concentrates on trying to prevent dangerous objects getting onto the market in the first place.

The general safely requirement under this Directive is defined by reference to personal health and safety only and not to property. It imposes requirements concerning the safety of products intended for consumers or likely to be used by consumers if such products are to be placed on the market by producers or supplied by distributors. It extends the general safety requirement introduced by the CPA, but extends the requirement beyond those products and the persons affected.

The Regulations themselves do not create a civil liability. However it is wise to assume that if someone is in breach of the Regulations, or has been found to be in breach of the Regulations, that in itself will provide a perfect basis to launch a civil claim. Through that route the Regulations will be of indirect assistance to a litigant. The Regulations impose criminal sanctions, but it must be remembered a conviction carries substantial evidential weight. All the more so since under the Civil Evidence Act such a conviction is admissible in evidence in subsequent civil proceedings, when the burden of proof is then shifted from the Plaintiff to the Defendant. The lesson to defendant producers and distributors, and their insurers, is that criminal proceedings have to he taken seriously bearing in mind their impact in civil proceedings.

The legislation also imposes upon a producer three specific duties:

1. Information

Sufficient information must be` available to customers to enable them to assess

whether there is any inherent risk.

2. Monitoring

The producer must have in place a system to enable him to monitor, analyse and test the product continuously in order to detect any new or potential risks.

3. Recall

The producer must also ensure that he is in a position to recall the product speedily and efficiently in the event that any defect is found.

A question which frequently arises is who pays for the cost of the recall where the product is dangerous because of a defective component supplied by a subcontractor. This is a matter of contractual agreement between the parties. A term will be implied by law into the contract for the supply by the sub-contractor that the component is of "satisfactory quality" and reasonably fit for its intended purpose. Recall costs would be a foreseeable result of a breach of the implied term. It is also necessary to consider which party was responsible for the design, whether the component was supplied to the end producer's specification, and whether the end producer relied on the component manufacturer's skill and judgment in selecting the particular component.

The leading reported case in English law concerning duty to warn and recall concerned the manufacturer of cars who bought in wheel bearings. The bearings were defective and the car was unsafe. Under the new regulations the manufacturer and the bearing manufacturer both have duties to initiate a recall.

Practical implications

Under Regulation 8 producers have a duty to avoid risks which may arise and to take appropriate action to withdraw the product from market. Producers will have to ensure that they have in place proper recall procedures. This is a heavy burden on administrative resources and expenses. It will involve receiving telephone calls from potential consumers, from retailers asking what to do and from persons generally returning products. The recall costs themselves can be substantial.

Although insurance cover cannot cover the cost of' fines or other punishments (contrary to public policy and unenforceable) recall cover is available for the recall costs and for the legal costs in criminal proceedings (in the Magistrates' Courts and Higher Criminal Courts).

As a result of the Regulations there is an increased emphasis needed in distributorship agreements to ensure that product recall provisions are included and to require distributors to take part in campaigns. From the point of view of distributors they must seek to include safely information from the manufacturer (bearing in mind the duty to enquire imposed on the distributor) and the distributor may wish to seek indemnity for civil damages.

6. EU DIRECTIVE ON UNFAIR TERMS AND CONSUMER

CONTRACTS

Consumer Contracts are now affected by the recent EU Directive on Unfair Terms and Consumer Contracts, which were implemented in England and Wales with effect from 1st July 1995.

The concept of "fairness" under the new regime is largely satisfied by explanation, and making the consumer fully aware of the terms and conditions which are being relied upon by the manufacturer.

Regulations apply to all contracts concluded between the seller and the buyer on the one hand a consumer on the other. This includes Insurance Contracts.

Under the regulations any contractual terms, which has not been "individually negotiated", is now avoidable, if it is "unfair". The new regime is therefore more stringent than that under the Unfair Contract Terms Act 1977.

Significantly, it is the particular term alone rather than the whole contract which is avoidable.

UNFAIR - the regulations defined as "unfair":

> **"Any terms which contrary to the requirements of good faith cause a significant imbalance to the parties rights and obligations under the contract to the detriment of the Consumer".**

Thus the first step is to consider whether or not a term is "contrary to the requirements of good faith". Schedule 2 of the Regulations directs, when considering the concept of "good faith" regard should be had to:

1. The strength of the party's particular bargaining positions.
2. Whether the consumer had an inducement to agree to the term.
3. Whether the goods or services were sold or supplied to the special order of the consumer.
4. The extent to which the seller has dealt "fairly and equitably" with the consumer.

The concept of "fairly and equitably" justifies a definition in itself but none is given. In practice the Courts are likely to resort to a "reasonableness" test.

In addition to being "unfair" to be voidable a term must create a "significant imbalance in the parties rights and obligations ... to the detriment of the Consumer".

Guidance can be found in Schedule 3 of' the Regulations which provides 17 (no-exhaustive) examples of situations where an imbalance in the parties rights has been created to the detriment of the consumer. One of these is:

> **... irrevocably binding the consumer to terms of which he had no real opportunity of becoming acquainted before the conclusion of the contract. "**

In general, Insurers and suppliers of services and goods ought to be mindful of any contractual involvements to which they would normally seek to rely including both limitation and exclusion clauses.