

PERFECT RECALL

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GOUGH SQUARE CHAMBERS

Recalling common sense

Recall is about applying practical common sense

- Harm is not just about fatalities
- Lies, damn lies and statistics
- Don't do rocket science unless you're a rocket scientist
- The conflicted man, a friend and a foe

GPSR 2005

Regulation 15 – Recall Notices:

- (1) defines when recall notice can be issued- dangerous (unsafe) product

- >(4) Conditions
 - > Other enforcement action insufficient
 - > Current action by producer is currently unsatisfactory
 - > The arbitration process has not been triggered

- >(5) Serious risk requiring urgent action

- >(10) Recovery of costs and expenses

GPSR 2005

Regulation 16 – Supplementary Provisions:

- >(1) Give opportunity to person to “submit his views” before service, unless urgent.
- >(2) Sets out the contents of a safety notice (product, reasons and rights available).
- >(6) Set out compensation provisions for badly recall notices if a product is in fact safe
- >(7) Authority may vary a safety notice but not more restrictive or onerous.

GPSR 2005

Regulation 17 – Appeals against safety notices:

- >(1) Appeal to the Magistrates' Court within 21 days to vary or set aside.
- >
- >(6) Producer can apply within 7 days for an order suspending the effect of the Notice.

- >(2) sets out the circumstances in which the Court may set aside a Notice.
 - > Not dangerous
 - > Or conditions in 15(4) not complied

- >(10) Order made by the Magistrates' Court may be appealed to the Crown Court

Harm in EU product safety

law

Harm is more than death and serious injury

- > EU general risk assessment methodology: RAPEX EU COM(2013)76
- > *“the concept of harm under this methodology may encompass injury or damage to the health of people or damage to property, economic damage to consumers, damage to environment, security and other aspects”*
- > The Shepherd’s bush fire in August 2016 – no deaths or serious injury
 - > Significant property damage
 - > People had to be moved – often vulnerable people
 - > Damage to environment pollution
 - > Local economy- underground station

Lies, damn lies and statistics

Be cautious about statistical analysis

- >EU Rapex product safety focus on probability of harm
 - > Example: a hammer breaks and the “ejected” part strikes the user's head. The probability is $>1/10,000$, based on a number of probabilities (probability of hammer breaking $1/10$, broken part hits user $1/10$, hitting the users head $1/3$ and hitting users eye $1/20$),
- >2015/16 there were 11 deaths from household appliances
- >Statistical analysis is only one part of the assessment
 - > multiple deaths from a single incident
 - > Increasing level of risk

Local authority rocket scientists

Use experts to assess expert issues

- >Product safety involves the assessment of technical, electrical and engineering issues

- >Producer will often have in-house experts, but
 - > Closely connected to development of product
 - > May be under commercial pressure

- >Use independent experts for three things: (1) technical (2) statistics; and (3) practicalities of a recall

- >Power to charge (s.27A RESA) “costs reasonably incurred by exercise of its functions” – insert into PA agreement

Primary authority conflicts

Friend and foe?

>Which? failed judicial review of Peterborough CC involved allegation of failure to distinguish between enforcement duties and PA relationship

- > RESA duty to give “advice and guidance”
- > GPRS duty to “enforce the regulations” [pro-active EU law duty]

>Robustly independent

- > Document carefully enforcement decisions
- > Consider asking another authority to take the decision (possibly s.101)
- > Peer review of a decision may have seen the horse bolt



Questions

Any questions
