

# Brexit—product liability, package holiday personal injury claims and rail accidents in the EU

**Personal Injury analysis: Rob Hunter, an experienced international personal injury barrister at Devereux Chambers, discusses three statutory instruments made under section 8(1) of the European Union (Withdrawal) Act 2018 (EU(W)A 2018), focusing on consumer protection, package travel and railway accidents from the perspective of a personal injury lawyer. The purpose of each SI, the changes it makes and its practical implications are considered. More broadly, Hunter asks: taking these three examples, what will be the impact of Brexit Regulations in the personal injury field?**

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## European Union (Withdrawal) Act 2018

At 11 pm (UK time) on 31 December 2020, there was a minor revolution in the UK legal system. Thereafter, UK courts were to apply retained EU law but no longer bound by future developments in EU law.

The preservation of EU law—more accurately, EU law on New Year's Eve 2020, had obvious advantages. Since 1973, a good deal of UK law has originated from the EU and so retention was essential for continuity. But legislative copy-and-pasting has its downsides: without amendment, thousands of references to EU institutions, their powers and duties, as well as rules predicated on membership of the European common market would become part of UK law.

Parliament's solution was EU(W)A 2018, s 8(1). This provided government ministers with the power to make regulations in respect of any failure of retained EU law to operate effectively with limited parliamentary scrutiny. Such regulations became known as the Brexit Regulations.

On one level, the ministerial power to edit was necessary. It was certainly desirable as an efficient means of correcting references to redundant EU bodies and the like. However, the breadth of the power, to 'make such provision as the Minister considers appropriate', was controversial during the passage of EU(W)A 2018. The following SIs are three examples of its use in the personal injury field.

## Product Safety and Metrology etc (Amendment etc) (EU Exit) Regulations 2019, SI 2019/696

The purpose of SI 2019/696 was to create the framework for a UK internal market and to maintain current consumer protections following the UK's exit from the EU. There was no change in product safety policy. Nonetheless, the SI will have an impact on product liability claims.

The aim of the drafter was to collate all relevant product safety regulations in one place. Consequently, the SI itself is unwieldy, consisting of 659 pages divided into 6 parts and 37 schedules. The Office for Product Safety and Standards has published guidance with a view to helping companies prepare for the end of the transition period and beyond, which is likely to be updated:

UK Product Safety and Metrology What's changed from 1 January 2021 in relation to Great Britain?

From the personal injury perspective, the main changes are amendments to the Consumer Protection Act 1987 (CPA 1987).

Practitioners will recall that CPA 1987 provides a right of recourse against the importer of a defective product, not only the producer. Prior to 1 January 2021, importers were those who brought products into the EU. From 1 January 2021, importers were redefined as those who brought products into the UK market (see CPA 1987, s 2(2)(c) as amended by SI 2019/696, Sch 3, para 3).

Consequently, UK companies who import from the EU to the UK are now open to a new area of potential liability. In practice, if the company that imported the defective product also sold it to the claimant, then the change may have a minor impact. This is because pre-existing contractual duties are likely to offer the same or similar protection to the buyer. Where the importer was not the seller, the change is more significant.

Domestic distributors from the EU face the largest change. They are now potentially liable as importers and will be straightforward to serve and sue in the UK courts. They may find themselves an attractive defendant, particularly if there are concerns about whether the seller is solvent. Consequently, UK distributors should plan for the possibility of contribution proceedings against a foreign company in their contractual arrangements with suppliers. Insurers will need to set premiums with all of this in mind.

Another substantive change to CPA 1987 was the removal of the power to modify to reflect changes to the Council Directive 85/374/EEC (the Product Liability Directive), which was the underlying European law (see: CPA 1987, s 8 as repealed by SI 2019/696, Sch 3, para 5). For the moment, UK law remains aligned with European law, but in the longer term, there is obvious potential for divergence as consumer protection is an area of activity for the European Commission.

Similar amendments were made to the General Product Safety Regulations 2005 (GPSR 2005), SI 2005/1803. The definition of 'producers' was changed from: EU manufactures to UK manufacturers; and from a person that places a product from outside the EU on the EU market to outside the UK on the UK market (see: GPSR 2005, SI 2005/1803 para 2, as amended by SI 2019/696, Sch 9, para 2(e)). Consequently, more UK companies (previously mere 'distributors') will become responsible for 'producer' obligations, which include labelling, information sharing, product testing and recall. There is a 24-month transition period.

The remainder of SI 2019/696 largely consists of amendments to product safety requirements across a wide variety of sectors, ranging from toys and cosmetics to lifts and offshore installations. Many incorporate detailed technical specifications, which accounts for the size of the SI. The purpose of the amendments is to:

- port current safety and accuracy standards from the EU to the UK market
- introduce a system of UK accreditation
- replace the CE marking that indicates compliance with the relevant EU legislation with a new UK Conformity Assessed marking

There are also other changes concerning market surveillance and labelling and transitional provisions.

### **Package Travel and Linked Travel Arrangements (Amendment) (EU Exit) Regulations 2018, SI 2018/1367**

This Brexit Regulation made two broad changes to the 2018 Package Travel Regs, SI 2018/634. First, existing UK regulations that had transposed EU law were substituted for references to the underlying directives. Secondly, organisers of packages and traders facilitating linked travel arrangements established outside the UK were obliged to provide security (see: SI 2018/634, paras 19 and 26 as amended by SI 2018/1367, paras 5 and 10). Previously, such companies were exempt if established in the EU.

The changes made by SI 2018/1367 are unlikely to have much impact in the field of personal injury. Broadly speaking, the government has faithfully implemented the Package Travel and Linked Travel Arrangements Directive.

In the long run, divergence from the EU is possible as the UK courts will not be bound by decisions or principles laid down by the Court of Justice after 1 January 2021 (EU(W)A 2018, s 6(1)). On the other hand, there is already a body of caselaw concerning the preceding Directive (Council Directive 90/314/EEC transposed by The Package Travel, Package Holidays and Package Tours Regulations 1992, SI 1992/3288)—to include in due course the outcome of the Supreme Court reference in *X v Kuoni Travel Ltd* [2019] UKSC 37. Further, UK courts may ‘have regard’ to future decisions (EU(W)A 2018, s 6(2)). In this context, it is likely the UK courts will heed interpretation by the Court of Justice in the interests of uniformity and the promotion of efficient cross-border trade and travel.

### **Rail Passengers’ Rights and Obligations (Amendment) (EU Exit) Regulations 2018, SI 2018/1165**

The main changes made by this SI were to Regulation (EC) No 1371/2007 concerning compensation to rail passengers. This Regulation provides for the rights of rail passengers and contains a number of core provisions including: ticketing and provision of information; liability for accidents (including the right to advance payments to cover immediate needs within a 15-day time limit); liability for loss of luggage; and insurance requirements. It also contains non-core provisions in relation to compensation for delays and cancellations, mobility assistance and carriage of bicycles.

The central purpose of the SI was to limit the regulation to domestic rail travel. Consequently, there are amendments to references to Member States, obligations on the Commission and amounts of money in euros. From the personal injury perspective, the key change is that the protection offered to passengers is restricted to rail journeys within the UK

#### **Enter divergence?**

In the three sample SI considered above, the Brexit Regulations are true to their purpose. With few exceptions, they provide the framework for a UK market and are otherwise changes of form not substance that codify retained EU legislation in domestic law. From a personal injury perspective, the two most significant changes are the shift of liability onto UK companies who bring products into the UK market and the reduction in the ability of UK claimants to obtain redress from EU-based traders. Over time, it is likely that EU law will diverge further, particularly in the area of consumer protection.

*Interviewed by Pietra Asprou*

Rob Hunter is a highly regarded senior junior at Devereux Chambers who has practised exclusively in personal injury and clinical negligence for more than a decade. He has experience of the full spectrum of serious injuries, especially brain, obstetric and the most severe orthopaedic injuries such as amputation. Fatal claims are also a particular *area* of expertise.

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