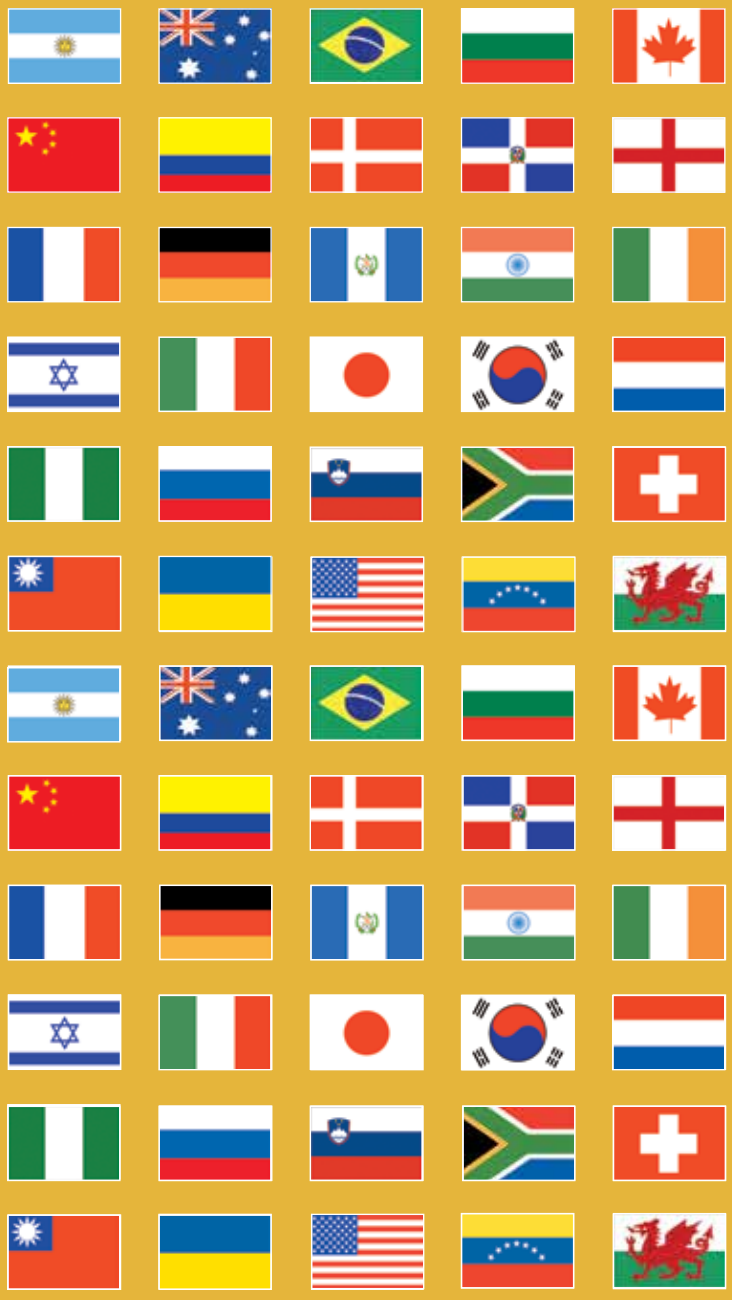
GETTING THE DEAL THROUGH

Product Liability

in 29 jurisdictions worldwide

2014

Contributing editors: Harvey L Kaplan, Gregory L Fowler and Simon Castley



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Product Liability 2014

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Getting the Deal Through is delighted to publish the seventh edition of *Product Liability*, a volume in our series of annual reports, which provide international analysis in key areas of law and policy for corporate counsel, cross-border legal practitioners and business people.

Following the format adopted throughout the series, the same key questions are answered by leading practitioners in each of the 29 jurisdictions featured. New jurisdictions this year include Argentina, the Dominican Republic and the Netherlands.

Every effort has been made to ensure that matters of concern to readers are covered. However, specific legal advice should always be sought from experienced local advisers. *Getting the Deal Through* publications are updated annually in print. Please ensure you are referring to the latest print edition or to the online version at www.gettingthedealthrough.com.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We would also like to extend special thanks to contributing editors, Harvey L Kaplan, Gregory L Fowler and Simon Castley of Shook, Hardy & Bacon LLP for their continued assistance with this volume.

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England & Wales

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Civil litigation system

1 What is the structure of the civil court system?

Civil claims in England and Wales are brought in the county courts up to a value of £25,000 (or £50,000 for personal injury claims) or the High Court (for all other claims). In April 2013, the small claims limit for non-personal injury claims was increased to £10,000. The small claims limit for personal injury remained unchanged at £1,000. In 2013, the government carried out a consultation proposing reforms aimed at reducing the number and costs of whiplash (neck injury) claims, including raising the small claims limit to £5,000 for some personal injury claims. The government has since indicated that, while it remained in favour of raising the limit, it would not do so until the effect of other reforms has been observed.

Appeals from the county courts and High Court are heard by the Court of Appeal Civil Division. The court of final appeal in England and Wales is the Supreme Court, which assumed the judicial authority previously held by the House of Lords in October 2009.

2 What is the role of the judge in civil proceedings and what is the role of the jury?

The court system is an adversarial one, each party usually being represented by an advocate and most civil cases being heard by one judge at first instance. There are no juries in civil cases except for claims in defamation, fraud, malicious prosecution or false imprisonment.

3 What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Civil litigation procedure is governed by the Civil Procedure Rules 1998 (CPR). Subject to pre-action requirements discussed below, proceedings are commenced by issuing a claim form in the relevant court. The claim form must then be served on each defendant within four months of issue, together with detailed particulars of claim. Each defendant must then file and serve its defence within 14 days. Alternatively an acknowledgement of service may be filed, in which case the defendant has a period of 28 days in which to file and serve its defence. After the defence is filed, the court will decide, provisionally, the track that appears most suitable for the case, serve on the parties a notice of proposed allocation, and order the parties to file the appropriate directions questionnaire. The claimant has the option of serving a reply, which must be served at the same time as the claimant's directions questionnaire. After service of a reply, pleadings are deemed to be closed, and no party may file or serve any further statement of case without the permission of the court.

4 Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

The CPR is supplemented by a number of pre-action protocols that provide relatively detailed guidelines as to the actions required of the parties before proceedings are commenced.

The pre-action protocol for personal injury claims obliges claimants to send a sufficiently detailed letter of claim detailing the allegations made against the defendant before any proceedings are commenced. The defendant then has a period of three months to investigate before admitting or denying liability. If no response is received from the defendant, or liability is denied, the claimant is free to issue proceedings by filing and serving a claim form on the defendant.

Product liability claims other than those arising out of personal injuries (mostly property damage claims) are not governed by a specific pre-action protocol, but all claims must comply with the practice direction on pre-action conduct, which sets out a number of general principles along similar lines.

5 Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

Part 24 of the CPR sets out a procedure by which the court may decide a claim or a particular issue without the need for a full trial. The court may give a summary judgment against the claimant or defendant on the whole of the claim or on a particular issue if it considers that the claimant has no real prospect of succeeding on the claim or issue; the defendant has no real prospect of defending the claim or issue; and there is no other compelling reason why the case or issue should go to trial. The application for summary judgment may be based on a point of law, the evidence available (or lack of it) or a combination of both. The court may give a summary judgment against a claimant in any type of proceedings, and against a defendant, except in some real estate and admiralty claims. Either party may make an application for summary judgment under Part 24 CPR and the application will be dealt with by the court at a summary judgment hearing. The court can also list the case for a summary hearing on its own initiative.

Summary judgment procedure is not supposed to be a mini trial. It is intended to dispose of cases where there is no real prospect of success from either perspective.

6 What is the basic trial structure?

The trial timetable will normally be agreed between the parties or set by the judge at a case management conference. Claims are allocated to 'tracks'. Small claims and fast-track claims will normally be listed for less than one day. Multi-track claims (claims of higher value or greater complexity of issues) will normally last longer, and a

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multi-party product liability trial could extend to a number of weeks or months.

Oral evidence is given by lay and expert witnesses for both parties, although each witness's evidence-in-chief will take the form of a written witness statement (or, in the case of expert witnesses, an expert report), which will have been filed in advance of the trial. Each party will have the opportunity to cross-examine the opposition's witnesses at trial.

Legal advisers in England and Wales are split into solicitors and barristers. The division of responsibilities between these professions can be confusing, but in general solicitors are instructed directly by the claimant or defendant from the start, and are responsible for managing the case and for communicating with the opposition's representatives. Barristers (usually referred to as 'counsel') are instructed by solicitors to undertake courtroom advocacy and to provide advice on specialist points of law.

7 Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

A group litigation order (GLO) may be made by the court where a number of claims give rise to common or related issues of fact or law. The court then has a wide discretion to manage the claims as it sees fit. There is no opt-out class action mechanism in England and Wales, and a GLO serves only to bring together individual claims litigated in their own right. Any further claimants wishing to join the GLO will still need to issue their own proceedings.

At present, there is a limited right for designated consumer bodies to bring representative actions on behalf of consumers in competition (antitrust) claims only. Only one such claim has so far been brought, by Which? (the Consumers' Association), in respect of alleged price-fixing of football shirts. The claim was settled and so the mechanism has not been fully tested in court.

In 2012, the government carried out a consultation on private actions in competition law. In its response to this consultation, published in January 2013, the government indicated that it would proceed with the introduction of a limited 'opt-out' collective actions regime for competition claims. The proposed legislation (the Consumer Rights Bill) was introduced to the UK Parliament at the end of January 2014. The bill proposes the creation of a new limited opt-out collective action for competition law claims on behalf of both consumers and businesses in the Competition Appeal Tribunal (CAT). This form of collective action will enable consumers and businesses to seek redress for anti-competitive behaviour via a representative body in respect of an entire class of affected consumers (other than those who actively opt out of the case). The bill is currently being reviewed at the committee stage of the legislative process in the House of Commons.

In 2013 the European Commission published a package of proposals, which covers collective redress in the areas of competition claims, consumer protection, environmental protection and data privacy. This included a recommendation, which is a non-binding instrument, that invites member states to harmonise their collective redress systems using common principles outlined by the Commission. The recommendation is to be implemented by July 2015, at which point the Commission will review progress and decide whether further action is needed, including future legislation. The common principles outlined in the recommendation include an opt-in model with group members having to be identified before a claim is brought. In addition, only 'ad hoc certified entities' would have standing to bring representative actions. The recommendation includes various safeguards aimed at avoiding the perceived excesses of US-style 'class actions' in Europe, specifically, by banning punitive damages, pre-trial discovery and juries.

8 How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

This will vary widely depending on the complexity of the issues at stake and the attitude of the parties. The CPR, which govern all civil litigation in England and Wales, place great emphasis on settlement of claims before trial, but a complex product liability action that does proceed could take several years to reach trial.

The length of the trial is again determined by the complexity of the issues and the amount of evidence to be heard. Whereas a relatively straightforward individual product liability claim with minimal expert evidence might be disposed of in one day or less, a trial of a group claim with complex legal, technical and procedural issues may run to a number of weeks or months.

Evidentiary issues and damages

9 What is the nature and extent of pretrial preservation and disclosure of documents and other evidence? Are there any avenues for pretrial discovery?

Disclosure is governed by the CPR, which dictates that each party must disclose a list of those documents in its control upon which it relies, as well as those which adversely affect its own case, and which support or adversely affect the other party's case. Disclosure takes place at a relatively early stage of proceedings after service of pleadings. Both parties are under a duty to conduct a reasonable search for disclosable documents (which includes electronic documents), and this duty is a continuing one that both parties must have regard to at all stages of proceedings, up to and including trial. The reforms introduced by the Legal Aid Sentencing and Punishment of Offenders Act 2012 (LASPO), which came into force on 1 April 2013, are aimed at encouraging parties to conduct litigation in a more cost effective manner. Once litigation is commenced, parties are now required to file a disclosure report before the first case management conference, describing which documents exist and their availability. The presumption in favour of standard disclosure in multi-track cases has been replaced by a 'menu' of options from which the court will choose to make an order on disclosure.

Some pre-action protocols (for example, that for personal injury) provide for early disclosure of documents before proceedings have been issued, and mechanisms also exist for a party to apply to the court for an order for pre-action disclosure in other cases where such an order might help to settle or dispose of the claim fairly and efficiently.

In accordance with Part 31 CPR, as soon as litigation is contemplated, the parties' legal representatives must notify their clients of the need to preserve disclosable documents (including electronic documents).

10 How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Witness evidence is presented in the first instance in the form of a written witness statement, which will have been disclosed to the other party prior to the trial. This will stand as evidence-in-chief of each witness.

In the courtroom, witnesses will be asked to confirm the contents of their witness statements, before being cross-examined by the advocate of the opposing party.

11 May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

The court does have powers to appoint experts although in practice these are seldom if ever used in product liability cases. It is, however, normal for the court to make use of its discretion to allow or restrict the use of expert evidence by the parties. The court may allow each

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party to instruct its own expert in a given field, or it may order that a single joint expert is appointed. In either case, the expert's overriding duty is to assist the court, not the instructing party, and all expert evidence is in theory therefore considered to be independent. Where each party has instructed its own expert, the normal practice will be to exchange expert reports at an early stage. Each party then has the opportunity to put written questions to the other party's expert, and the experts will normally then meet and produce a statement for the court identifying those issues that are agreed between the experts and those that are in dispute. If the expert evidence is to be relied upon by the parties, each expert will be cross-examined at trial by the opposing party's advocate. Since 1 April 2013, the court may direct that the evidence of the parties' experts in a particular discipline be heard concurrently.

In an April 2011 judgment the Supreme Court decided that an expert witness was not entitled to immunity from suit in connection with negligence in the performance of their role.

12 What types of compensatory damages are available to product liability claimants and what limitations (if any) apply?

Strict liability claims under the Consumer Protection Act 1987 (see question 18) may be made for damages in respect of personal injury (both bodily and psychological where a medically recognised psychological illness has been caused), and in respect of damage to property (subject to a de minimis claim of £275). No claim may be made under the Act for damage to the product itself.

Claims in negligence and contract may similarly be made for damages in respect of personal injury and property damage, although they will be subject to considerations of remoteness and contractual exclusion or limitation. Damages in contract may include the recovery of the cost of damage to the product itself.

13 Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

In practice, damages awarded are virtually always calculated on a compensatory basis. Exemplary and aggravated (punitive) damages are available only in very limited circumstances in England and Wales and will only be awarded at the discretion of the court. In the January 2010 review of the costs regime in England and Wales by Lord Jackson (the Jackson Review), there were recommendations for an additional 10 per cent uplift in general damages. These recommendations were not included in LAPSO 2012, which implemented other recommendations made in Lord Jackson's review. However, in July 2012, in *Simmons v Castle* [2012] EWCA Civ 1039, the Court of Appeal ruled that a 10 per cent uplift in general damages should apply to all applicable cases decided after 1 April 2013. The Court of Appeal revisited its decision in October 2012, in *Simmons v Castle (Number 2)* [2012] EWCA Civ 1288, deciding that the 10 per cent increase would not apply where the claimant had brought the proceedings under a conditional fee agreement entered into before 1 April 2013.

Litigation funding, fees and costs

14 Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Legal aid is available in England and Wales via the Legal Services Commission, although the accessibility of public funding has been much restricted in recent years and is not available to fund general personal injury claims arising out of negligence or breach of a duty.

Before 1 April 2013, when LAPSO 2012 came into force, legal aid was often available in multiparty actions for personal injury claims on the basis that these actions may have a significant wider public interest. However, the test for providing exceptional funding has now changed and is now only available where a failure to provide it would be a breach of human rights legislation. Funding will no longer be provided for other types of claims, even if it can be argued that there is a significant wider public interest in funding these claims.

15 Is third-party litigation funding permissible?

Third-party funding of litigation has historically been disallowed in England and Wales by the common law doctrines of maintenance and champerty. Developments have, however, seen the courts relax their approach to third-party funding in certain circumstances and such funding is now widely available. Indeed, a number of commercial funders are now in operation with the express purpose of funding litigation with a view to sharing in any awards made by the court to successful claimants.

The third-party funding model is mostly used in certain commercial and insolvency disputes, but depending on its success and popularity, and on the introduction of any reformed collective redress mechanism at UK or EU level, there is likely to be an appetite among the claimant lawyer community to seek to widen its application to multiparty actions, which have the potential to present a highly profitable proposition to third-party funders.

The Jackson Review (see question 13) recommended that third-party funders should subscribe to a voluntary code of practice, with consideration given to statutory regulation in due course depending on the development of the third-party funding market. The Association of Litigation Funders of England and Wales published its code of conduct in November 2011, which sets out standards of practice and behaviour.

16 Are contingency or conditional fee arrangements permissible?

Conditional fee arrangements (CFAs) are permissible in England and Wales. Lawyers are permitted to act on a 'no win, no fee' basis. However, under the provisions of LASPO 2012, where a CFA was entered on or after 1 April 2013, claimants' lawyers are no longer able to recover any success fees under a CFA from a defendant, so claimants must pay their lawyer's success fees (if any) out of any damages recovered. If the CFA was entered into prior to 1 April 2013, the success fee may still be recovered.

Contingency fees more along the lines of the US model (where lawyers charge a fee as a percentage of damages recovered) have been available since 1 April 2013 under LASPO 2012. These contingency fee arrangements are termed 'damages based agreements' (DBAs). The maximum amount that a lawyer can recover from the claimant's damages is capped at 25 per cent of damages (excluding damages for future care and loss) in personal injury cases; at 35 per cent in employment tribunal cases and at 50 per cent in all other cases.

LASPO 2012 also prevents claimants from recovering the costs of 'after the event' (ATE) insurance from a defendant. Again, these will have to be met out of the claimant's damages. These changes do not affect mesothelioma cases or insolvency cases.

17 Can the successful party recover its legal fees and expenses from the unsuccessful party?

The basic rule in England and Wales is that the losing party will be ordered to pay the reasonable costs of the successful party. The court has wide discretion to vary this rule in awarding costs to either side, and will take into account the compliance of each party with the CPR, as well as their general conduct in the litigation. As a general rule any step taken by a party that unnecessarily incurs or increases costs is likely to result in an adverse costs award against that party to the extent that the costs have been unnecessarily incurred or increased.

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However, the reforms that came into force on 1 April 2013 to implement the recommendations in Lord Jackson's report have significantly changed the costs regime in respect of personal injury cases. 'Qualified one-way costs shifting' (QOCS) has been introduced for personal injury claims, which means that claimants, subject to certain exceptions, will not be liable for the defendant's costs if their claim is unsuccessful. The claimant may lose the protection of QOCS if the court finds that the claim was 'fundamentally dishonest', the claim is struck out as having no reasonable grounds for bringing proceedings or as an abuse of process, or where the claimant has failed to beat the defendant's offer to settle under Part 36 of the CPR.

The normal costs principle that the loser pays still applies in all other claims.

Sources of law

18 Is there a statute that governs product liability litigation?

Strict liability for product liability claims in England and Wales is imposed by the Consumer Protection Act 1987 (CPA), which implemented the European Product Liability Directive (85/374/EEC). Under the CPA 1987, a producer is liable for damage caused by defective products (namely, those products that are not as safe as 'persons generally are entitled to expect'). The claimant does not need to show any fault on the part of the producer, only the presence of the defect and a causal link between the defect and the damage.

19 What other theories of liability are available to product liability claimants?

Claimants may also bring a claim in tort (negligence) or contract. In order to establish a negligence claim, claimants must show that the defendant (usually the manufacturer) owed a duty of care to the claimant (there is an established duty between manufacturers and consumers at common law in England and Wales), that the duty was breached and that the breach caused damage to the claimant's person or property.

A claim in contract can only be brought against the party who supplied the defective product to the claimant (as the only party with whom the claimant has a direct contractual link). The claimant would usually rely on a term implied by statute into the contract for sale that the goods would be of satisfactory quality and reasonably fit for the purpose for which they were supplied.

Product liability claims in England and Wales are commonly pleaded concurrently under the CPA 1987, in negligence and in contract.

20 Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

In England and Wales claimants can bring a claim for breach of statutory duty where it is clear that a statute is intended to create private rights for individuals, however there are no consumer protection statutes other than the CPA 1987, which give rise to such private rights in respect of product liability claims.

21 Can criminal sanctions be imposed for the sale or distribution of defective products?

The General Product Safety Regulations 2005 (GPSR), implementing the European Product Safety Directive (2001/95/EC), impose a duty on producers to place only safe products on the market, and additionally to notify the authorities where an unsafe product has been marketed.

Criminal sanctions are imposed on producers who breach their duties under the GPSR 2005, which can include a fine of up to £20,000 and imprisonment of up to 12 months.

22 Are any novel theories available or emerging for product liability claimants?

There are a number of developments emerging for personal injury and negligence claims in general, which may have relevance to future product liability cases. In particular, in October 2007 the House of Lords ruled in the case of *Johnston v NEI International Combustion Ltd* on the issue of whether pleural plaques constituted compensable damage in claims made by employees who had been negligently exposed to asbestos by their employers. Although the plaques (small areas of pleural thickening on the lungs) were themselves asymptomatic, they were argued to evidence a higher risk of developing other compensable diseases caused by exposure to asbestos (for example, mesothelioma and asbestosis). The claimants sought the costs of medical monitoring and distress caused by awareness of the increased risk. The House of Lords ruled that the plaques did not constitute damage for the purposes of negligence and were not therefore compensable, but made it clear that this decision would not necessarily apply to claims made in contract, for which proof of damage is not an essential element of a cause of action. Whether this may give rise to a new wave of medical monitoring or 'worried well' product liability claims in England and Wales remains to be seen.

Following the decision in *Johnston*, the Scottish Parliament moved swiftly to pass legislation that effectively reversed the decision, making damages in respect of pleural plaques recoverable by statute. Similar legislation came into force in Northern Ireland in December 2011. The Scottish legislation was subject to a legal challenge by insurers, but this challenge was denied by the Supreme Court in October 2011. In England and Wales, the Ministry of Justice consulted on whether similar action should be taken in England and Wales. In February 2010, the government announced, in response to the consultation, that no such measures would be taken, and the House of Lords decision therefore stands.

23 What breaches of duties or other theories can be used to establish product defect?

In order to establish a product defect the claimant must show that the product is not as safe as persons generally are entitled to expect. When deciding whether a product meets such a standard of safety the court will take into account all the relevant circumstances, including:

- the manner in which the product was marketed;
- any instructions or warnings given with it;
- what might reasonably be expected to be done with it; and
- the time the producer supplied the product.

A product will not be judged to be defective merely because a product supplied at a later date by the same manufacturer has a higher standard of safety.

24 By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

The claimant bears the burden of proving that the product is defective on a balance of probabilities (namely, it is more probable that the product is defective than not).

The burden of proof may be shifted to the defendant where certain statutory defences are raised (see question 30).

25 Who may be found liable for injuries and damages caused by defective products?

Under the CPA 1987, a claimant may bring a claim against the producer of the product, any person who has held himself or herself out to be the producer by applying his or her own name to the product

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('own branders'), and any person who imported the product into the EU in order to supply it to others in the course of his or her business.

A claim in negligence may be brought against any defendant from whom the claimant can show he or she was owed a duty of care. This will normally include the manufacturer of the product.

A contract claim may only be brought against a defendant with whom the claimant has a direct contractual relationship. This will normally be the party that supplied the product to the claimant (who may or may not also be the manufacturer).

26 What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The claimant bears the burden of proof to show, on the balance of probabilities, that the defendant's defective product caused the damage in respect of which it is claiming.

The simple 'but for' causation test has recently developed into a more complex legal issue in a line of cases dealing with multiple potential causes of damage (eg, *Fairchild v Glenhaven, Barker v Corus, Sienkiewicz v Greif (UK) Ltd*), but it remains to be seen whether these principles will be carried over to product liability cases.

27 What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Various post-sale obligations are imposed on producers by the GPSR 2005. While parties will remain liable for damage caused by their defective products under the CPA 1987 and common law regimes described above, they may incur criminal sanctions (a fine of up to £20,000 and 12 months' imprisonment) for failure to comply with their obligations under the GPSR 2005, which include providing warnings and information regarding risks posed by a product that are not obvious, taking appropriate measures (including recall if necessary) to ensure the continuing safety of consumers and notifying the authorities where an unsafe product has been placed on the market.

Limitations and defences

28 What are the applicable limitation periods?

Claims in negligence or contract must be brought within six years of the accrual of the cause of action (or the date of knowledge of the claimant, if later), or within three years for personal injury claims. Likewise, claims for defective products under the CPA 1987 must be brought within three years of the accrual of the cause of action (or the date of knowledge of the claimant, if later).

The court has discretion to extend these periods and, in particular, has shown willingness to do so in personal injury actions where the defendant has been unable to show that it would suffer any real prejudice from an extension of the three-year period.

In addition, a claim that a product is defective must be brought within a long-stop date of 10 years from the date the product was first put into circulation. In contrast to the limitation periods described above, the court has no discretion to extend the 10-year long-stop period.

29 Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

The CPA 1987 provides a state-of-the-art defence to claims made under the Act. The burden lies on the defendant to show that the defect was not discoverable in the light of the scientific and technical knowledge at the time the product was supplied.

The defence is not available to a producer once the risk becomes known (or ought to be known) to the producer.

30 Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with standards (whether mandatory or voluntary) does not provide a defence to a claim brought under the CPA 1987, or in negligence or contract. Evidence of such compliance is likely however to be influential in determining whether a product is defective or (in the case of a negligence claim) whether reasonable care was taken by the manufacturer.

It is a defence to a claim under the CPA 1987 if the producer can show that the defect arose as a result of compliance with a mandatory legal requirement under English or European law.

31 What other defences may be available to a product liability defendant?

Other defences to claims made under the CPA 1987 include:

- that the product was not supplied by the defendant;
- that the product was not supplied in the course of a business; and
- that the defect did not exist at the time the product was supplied.

In negligence it is a defence if the defendant can show that the claimant freely and voluntarily assumed the risk of injury, in the full knowledge of the nature and extent of the risk.

Allegations of contributory negligence may be raised to claims made both under the CPA 1987 and in negligence.

32 What appeals are available to the unsuccessful party in the trial court?

An unsuccessful party in a county court trial may appeal either to a more senior judge in the county court or directly to the High Court, depending on the judge that heard the original trial. An appeal from a High Court trial must be made to the Court of Appeal. Decisions in the Court of Appeal can ultimately be appealed to the Supreme Court (formerly the House of Lords), the court of last appeal in the English judicial system.

Appeals may be made on points of fact or law, although no new evidence will normally be heard in an appeal hearing. Permission to appeal must be sought, either from the original trial court or from the Appeal Court directly. The test for permission to appeal will be whether the appeal has a real prospect of success.

The costs of the appeal will be awarded following the 'loser pays' costs rule, with the further possibility that any prior costs order made by the trial judge may be overturned in the event that the appeal is successful.

Jurisdiction analysis

33 Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability law in England and Wales is a developed body of law, with strict liability imposed by the CPA 1987 and a comprehensive product safety regime provided by the GPSR 2005. Any limitations in access to redress for consumers lie primarily with funding issues that affect the litigation culture in England and Wales generally, not just those claims arising in product liability. The effect of the funding reforms introduced by LASPO 2012 on the volume of claims will be seen over the coming years.

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34 Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

Restrictions on funding have meant that there have been few high-profile product liability cases in England and Wales in recent years. However, as the funding environment continues to develop in the light of European and UK proposals on group actions, and with the relaxation of the rules relating to third-party funding, it may be that claimants attempt to import recent developments in general personal injury and negligence law, such as medical monitoring claims, (see the *Johnston*, *Fairchild* and *Barker and Sienkiewicz* cases referred to in questions 22 and 26) into the product liability arena. None of these issues has yet had any effect on the frequency or nature of product liability cases in England and Wales.

35 Describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

England and Wales has a relatively high level of 'consumerism' in comparison with other EU states, the Middle East, Africa and Asia, although a relatively low level of claims for personal injury damage in comparison with the US.

However, consumers in the UK are more likely to seek redress via insurance, warranties, consumer organisations or ombudsman-type services than via litigation, owing both to the disincentives provided by the funding and costs regime and a general cultural disinclination towards litigation.

Update and trends

The most important recent development relating to product liability litigation in England and Wales has been the implementation of the reforms on civil justice costs, aimed at encouraging parties to conduct litigation in a more cost-effective manner, which came into force on 1 April 2013 as discussed in this chapter. The true effect of these reforms will be seen over the next few years.

At present, the culture both in the UK and EU-wide is shifting to a greater emphasis on consumer protection via access to justice, and it may be that this is reflected in measures that will encourage greater use of product liability litigation to redress perceived wrongs in future years.

36 Describe any developments regarding 'access to justice' that would make product liability more claimant-friendly.

The Consumer Rights Bill, which proposes the creation of a new limited opt-out collective action for competition law, was introduced to the UK Parliament at the end of January 2014. The bill is currently being reviewed at the committee stage of the legislative process in the House of Commons.

LASPO 2012 came into force on 1 April 2013 and has made significant changes to the litigation funding regime in England and Wales. The introduction of QOCS will reduce the financial risk to the claimant. However, the removal of the possibility of recovering success fees under CFAs and ATE insurance fees may prove to be a disincentive as claimants will have to pay these costs out of any damages awarded to them.

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