Product Liability

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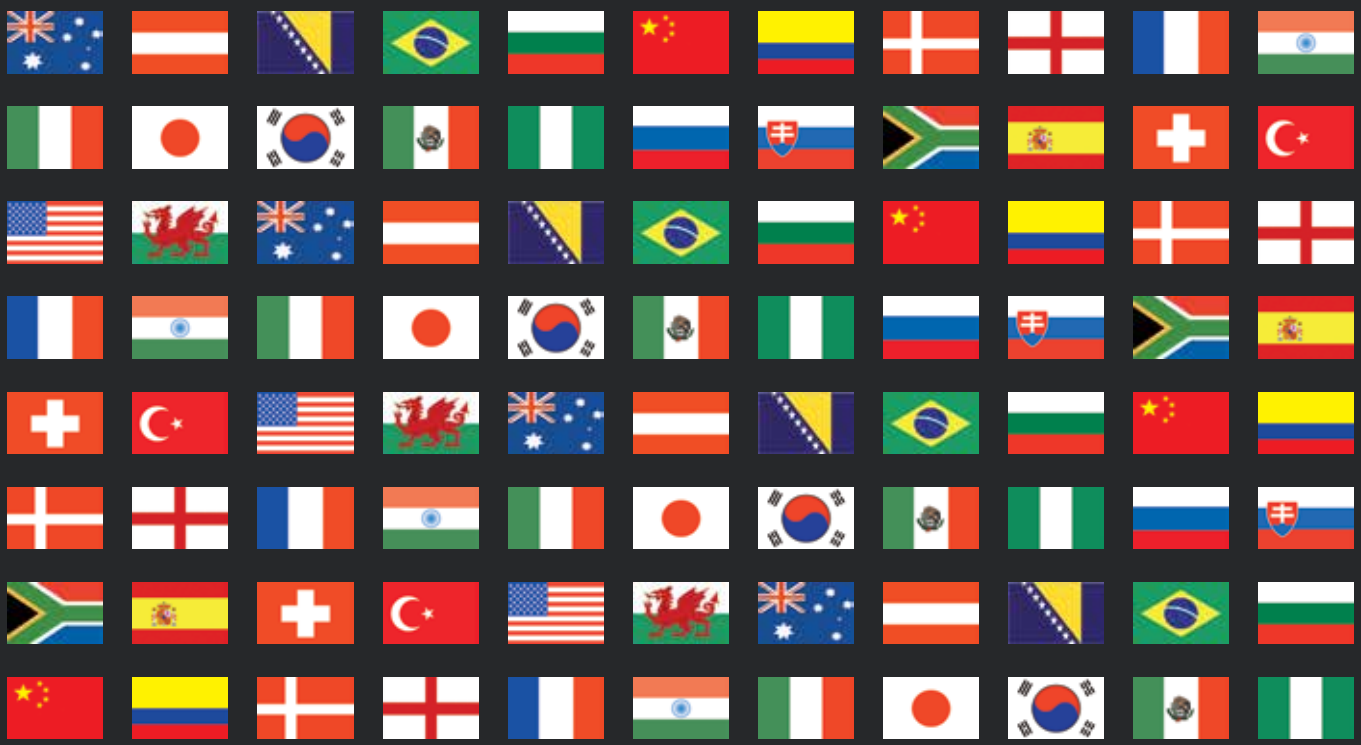

2018

GETTING THE DEAL THROUGH

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Product Liability 2018

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Eleventh edition

Getting the Deal Through is delighted to publish the eleventh edition of *Product Liability*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes Switzerland.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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

GETTING THE DEAL THROUGH

London
June 2018

England & Wales

Simon Castley and Jon Hudson

Shook, Hardy & Bacon International LLP

Civil litigation system

1 The court system

What is the structure of the civil court system?

Civil claims in England and Wales may be brought in the High Court for claims valued at over £100,000 (or £50,000 for personal injury claims) or in the county courts (for all other claims). There is also a small claims procedure for lower value claims to be processed in an expedited and less formal fashion. 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 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 impact 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 Judges and juries

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 Pleadings and timing

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 (the 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 (within the jurisdiction), 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. Extensions of time may be obtained either by consent or by application to the court. After the defence is filed, the court will decide, provisionally, the 'track' that appears most suitable for the case (see question 6), 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 Pre-filing requirements

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. There can be various sanctions, including costs, for not complying with the pre-action protocols.

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 Summary dispositions

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 of the 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 Trials

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 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 Group actions

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. 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.

There is currently 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.

The Consumer Rights Act 2015 (the CRA) came into force on 1 October 2015. This legislation introduced 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 enables consumers and businesses to seek redress through a 'collective proceedings order' in respect of anticompetitive 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 opt-out aspect only applies to UK domiciled claimants but non-UK claimants are able to opt in to the claim. The rules include a number of safeguards, such as a preliminary merits test and a requirement for the CAT to decide whether the claim should proceed on an opt-in or opt-out basis. Two of the earliest claims brought under this procedure, *In re Pride Mobility Scooters* and *In re Mastercard*, were unsuccessful for various reasons before they reached a full hearing. As such, the full impact of the legislation is not yet known, although commentators stress the complexity of valuing and potentially apportioning damages among claimants in such claims.

In April 2018, the EU Commission announced its 'New Deal for Consumers', which is made up of a raft of proposals with the aim of updating and strengthening EU laws on consumer rights and specifically improving enforcement. Among them is a proposed directive that would introduce representative actions for the protection of the collective interests of consumers. The proposed directive would allow authorised consumer groups to bring group actions on behalf of a group of consumers. The available remedies would be expanded beyond injunctive relief. Qualified entities would be able to seek three types of remedy: injunction orders, redress orders or declaratory decisions. The Commission's stated aim is to have the directive approved and on EU statute books by May 2019. The directive would then need to be implemented by member states at national level within a two-year period. Given that the transition period for the UK's exit from the European Union is expected to end on 31 December 2020, it is, therefore, unlikely that the UK will be under an obligation to implement the provisions of the directive before leaving the EU.

8 Timing

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 Pretrial discovery and disclosure

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 dictate 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 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 of the 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 Evidence

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 that 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 Expert evidence

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 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 his or her role.

12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Strict liability claims under the Consumer Protection Act 1987 (the CPA) (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 Non-compensatory damages

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 Justice Jackson (the Jackson Review), there were recommendations for an additional 10 per cent uplift in general damages. These recommendations were not included in LASPO 2012, which implemented other recommendations made in the Jackson 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 Legal aid

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 currently not available to fund general personal injury claims arising out of negligence or breach of a duty.

Prior to 1 April 2013, when LASPO 2012 came into force, legal aid was available in multi-party 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.

15 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party funding of litigation was historically 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.

While the third-party funding model was mostly used in certain commercial and insolvency disputes, there have been recent indications that the claimants are using the financial support of funders in consumer actions in which group litigation orders are sought. A recent example concerns funding provided for car owners in proceedings to recover losses allegedly suffered in connection with auto exhaust issues.

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 their code of conduct in November 2011, which sets out standards of practice and behaviour. The Justice Minister indicated in January 2017 that the government had no plans at that time to introduce regulation of third-party litigation funding or undertake a formal assessment of the effectiveness of the voluntary code.

16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Conditional fee arrangements (CFAs) are permissible in England and Wales. Lawyers may represent clients on a 'no win, no fee' basis. However, under the provisions of LASPO 2012, claimants' lawyers may not recover any success fees under a CFA from a defendant, so claimants must pay their own 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 also been available since 1 April 2013 under LASPO 2012. These contingency fee arrangements are termed 'damages based agreements'. 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.

LASPO 2012 revoked the obligation to notify the court and other parties about the funding arrangements in place for a party after 1 April 2013, with the exception of mesothelioma claims in which a claimant would be seeking to recover the cost of ATE insurance.

17 'Loser pays' rule

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.

However, the reforms that came into force on 1 April 2013 to implement the recommendations in the Jackson Review 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 fails 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 Product liability statutes

Is there a statute that governs product liability litigation?

Strict liability for product liability claims in England and Wales is imposed by the CPA, which implemented the European Product Liability Directive (85/374/EEC). Under the CPA, 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 Traditional theories of liability

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 or 'privity'). 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. Consumer contracts are now regulated by the CRA, which came into force on 1 October 2015 (see question 20).

Product liability claims in England and Wales are commonly pleaded concurrently under the CPA, in negligence and in contract. Liability under the CPA or for death or personal injury resulting from negligence cannot be excluded in any contract.

20 Consumer legislation

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.

The CRA came into force on 1 October 2015, strengthening the law relating to the supply of goods and services to consumers and on unfair contract terms, as well as introducing a new limited opt-out collective action for competition law claims (see question 7). The legislation contains provisions including requirements that contracts to supply goods must now include a term that the goods are of satisfactory quality and comply with the description applied to them, and that statements made by manufacturers, importers, distributors and retailers of the product, for example, in labelling and advertising, must be factually correct and will form part of the contract with a consumer. These statutory rights may not be excluded in a contract.

Under a 2024 amendment to the Consumer Protection from Unfair Trading Regulations 2008, where a trader has engaged in certain forms of misleading or aggressive behaviour, a purchaser may be entitled to a refund of up to 100 per cent of the item's value, or damages. The latter can be in respect of not just financial loss but also physical distress, inconvenience or discomfort.

Further, as mentioned in question 18, the CPA imposes strict liability for product liability claims in England and Wales.

21 Criminal law

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

The General Product Safety Regulations 2005 (the 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, which can include a fine of up to £20,000 and imprisonment of up to 12 months.

These regulations will likely be replaced once the 'Product Safety and Market Surveillance Package' that is currently before the European Parliament is eventually enacted. This will make provision for revised product safety and market surveillance rules.

22 Novel theories

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

In March 2015, the European Court of Justice (ECJ) ruled in the *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – The health fund* case that, even if a medical device is functioning correctly, it can be deemed defective by virtue of it belonging to the same group or production series of products that have a significantly high risk of failure or have already malfunctioned. While this decision is of most direct relevance to implanted devices, it may have wider implications in the context of products whose operation can have far-reaching health consequences. In its judgment, the ECJ also found that the damage caused by a surgical operation for the replacement of a defective implanted medical device, such as a pacemaker or an implantable cardioverter defibrillator, can constitute an injury for which the producer is liable. This is only the case if such an operation is necessary to overcome the defect in the product in question. The ECJ added that it is for the national court to verify whether that condition is satisfied.

23 Product defect

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

In order to establish a product defect under the CPA, the claimant must show that the product is not as safe as persons generally are entitled to expect, taking into account all the circumstances. 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.

The High Court judgment in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB) provided important clarification on the assessment the level of safety that persons are generally entitled to expect. The court held that the focus must first be on whether the product suffered from a 'defect' and not on identifying 'the harmful characteristic which caused the injury'. The court also confirmed that the level of safety is not to be 'assessed by reference to actual expectations of an actual or even a notional individual or group of individuals' but rather by what persons 'generally are entitled to expect'.

24 Defect standard and burden of proof

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).

In *Baker v KTM Sportmotorcycle UK Ltd & Anor* (2017) EWCA Civ 378, the claimant was injured in an accident involving alleged brake failure in a motorbike. The court held that there was no need for the claimant to plead and prove a specific design or manufacturing defect, or for the claimant to show how a defect was caused, provided that there was sufficient evidence for the court to find that there was a defect.

25 Possible respondents

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

Under the CPA, a claimant may bring a claim against the producer of the product, any person who has held him or herself out to be the producer by applying his or her own name to the product (referred to as '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. Others within the supply chain can also be liable in certain circumstances if upon request they do not give details of the aforementioned producer, own brander or importer.

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 Causation

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. In *Hufford v Samsung Electronics (UK) Ltd* [2014], it was held that the claimant does not need to specify or identify the defect with precision. He or she only needs to prove in general terms that a defect exists and that it caused the damage.

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 in relation to mesothelioma claims (eg, *Fairchild v Glenhaven* (2002), *Barker v Corus* (2006) and *Sienkiewicz v Greif (UK) Ltd* (2011)). In these cases, causation was established where the claimant demonstrated that the defendant's wrongdoing had materially increased the risk of injury. The principle was extended to a lung cancer claim where the cause of damage was multiple exposures to asbestos (*Heneghan v Manchester Dry Docks Ltd and Others* [2016] EWCA 86). In the *Sienkiewicz* case, UK Supreme Court justices commented that the courts would be wary about extending the exception to other types of claim and this view was confirmed by the Supreme Court in *Ministry of Defence v AB and others* [2012] UK SC9. In *Heneghan*, the Court of Appeal stated that the exception could be applied to situations that are 'not materially different' to the *Fairchild* case, so it would appear unlikely at present that the courts will extend this exception to product liability claims.

In *Howmet v Economy Devices* (2016), the Court of Appeal considered a claim in negligence in connection with a product issue concerning a fire risk control device that was malfunctioning. The court found that a system put in place by the claimant to deal with a product it knew to be defective in essence interrupted the chain of causation and led to failure of their claim.

27 Post-sale duties

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. While parties will remain liable for damage caused by their defective products under the CPA 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, 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. Post-sale duties at common law will be harder to enforce in the event that the product continues to be used despite awareness of the alleged defect.

Limitations and defences

28 Limitation periods

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 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 State-of-the-art and development risk defence

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 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 Compliance with standards or requirements

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, 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 if the producer can show that the defect is attributable to compliance with any requirement imposed by or under any enactment of any Community obligation.

31 Other defences

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

Other defences to claims made under the CPA include:

- the product was not supplied by the defendant;
- the product was not supplied in the course of a business; and
- 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 and in negligence.

32 Appeals

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 appellate 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 Status of product liability law and development

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 and a comprehensive product safety regime provided by the GPSR. 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 impact of the funding reforms introduced by LASPO 2012 on the volume of claims will be seen over the coming years. The CRA came into force in October 2015. It strengthened the law relating to the supply of goods and services to consumers and on unfair contract terms, as well as introducing a new limited opt-out collective action for competition law claims (see question 7).

34 Product liability litigation milestones and trends

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 *Fairchild*, *Barker* and *Sienkiewicz* cases referred to in question 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.

The ECJ's 2015 decision in the *Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – The health fund* case is noteworthy as it ruled that even if a medical device is functioning correctly, it can be deemed defective by virtue of it belonging to the same group or production series of products that have a significantly high risk of failure or have already malfunctioned. Some commentators have predicted that this ruling may facilitate claims.

On 11 March 2015, the Supreme Court ruled in *Montgomery v Lanarkshire Health Board (Scotland)* [2015] that a doctor has a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment, and of any reasonable alternative or variant treatments. Failure to do so may be held as negligent. This decision may underscore the need for pharmaceutical and medical device manufacturers to provide full and clear information to doctors in relation to any material risks in the use of their products.

In *NW, LW, CW v Sanofi Pasteur MSD SNC, Primary health insurance fund of Hauts-de-Seine, Carpimko*, case C-621/15 (following a referral by the French courts), the ECJ ruled on the interpretation of article 4 of the Product Liability Directive, which provides a three-pronged requirement for the injured person to prove the damage, defect and causal relationship between the damage and defect. The Court ruled that article 4 must not be interpreted as precluding national evidence rules that conclude there is a defect and a causal link in circumstances where medical research neither establishes nor rules out the link. This was on the proviso that the evidence in question is 'serious, specific and consistent'. The Court specified that an evidentiary standard that excludes anything but 'certain proof' could make it impossible to establish producer liability and undermine the defect-based premise of the Directive. The ECJ, however, also ruled that the article 4 claimant's burden would effectively be undermined if national courts were to go so far as to allow methods of proof that would presume a causal link between the damage and defect when certain predetermined evidence would be presented. While this ruling might be seen as authorising a relaxation of causation tests, it remains the case that a defect in the product must still appear to be the most plausible explanation for the damage. The ECJ was also explicit that this ruling on evidence only applies in actions involving the liability of a producer of a vaccine, although wider guidance is given on the fundamental principles of the Product Liability Directive.

Update and trends

In 2017, the government published the Automated and Electric Vehicles Bill, which would extend compulsory motor insurance, to include product liability for motorists using driverless vehicles. The legislation will mean a single insurer will cover both the driver's use of the vehicle and the automated vehicle technology, so that if a driverless vehicle is found to have caused an accident, the victim will be able to claim directly from the insurer. The insurer will in turn have a right of recovery against the responsible party, which may include the vehicle's manufacturer. The Bill is currently at the committee stage in the House of Lords.

In October 2016, the European Commission announced that it would be undertaking an expanded review of the Product Liability Directive, including a formal evaluation designed to examine its effectiveness, efficiency, relevance, coherence and EU added value. The evaluation was to examine the key features of the Directive and determine if it was still fit for purpose, particularly in the light of technological developments and progress such as the 'Internet of Things'. A consultation on the evaluation ran from January to April 2017. Detailed results regarding stakeholder feedback were published. The majority of respondents found the Directive struck a fair balance between the interests of producers and consumers but for some technological products (eg, software or automated tasks), its application might be uncertain. In March 2018, the European Commission published a call for experts on liability and new technologies as part of this evaluation. It is not yet known if or when any concrete proposals for a revised directive will be issued.

35 Climate for litigation

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, a general cultural disinclination towards litigation, and the availability of publicly funded healthcare.

The culture both in the UK and EU-wide is currently 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. Further, certain larger claimant law firms are increasingly well resourced and efficient, often providing comprehensive and user-friendly information to those who might wish to sign up for a claim.

36 Efforts to expand product liability or ease claimants' burdens

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

The CRA came into force in October 2015. It strengthened the law relating to the supply of goods and services to consumers and on unfair contract terms, as well as introducing a new limited opt-out collective action for competition law claims (see question 7).

The introduction of QOCS has, to some extent, reduced the financial risks of litigation to the claimant. However, the removal of the possibility of recovering success fees under CFAs and ATE insurance premiums may prove to be a disincentive as claimants will have to pay these costs out of any damages awarded to them.

In July 2017, Lord Jackson published his review of the fixed recoverable costs regime, which included proposals for extending the present regime in England and Wales with the aim of making the costs of going to court more certain, transparent and proportionate for litigants. Lord Jackson's proposals are now with the government for consideration.

On a wider basis, the courts in England and Wales are rapidly adopting electronic filing for legal claims and process.

In April 2018, the EU Commission announced its 'New Deal for Consumers', which is made up of a raft of proposals with the aim of updating and strengthening EU laws on consumer rights and specifically improving enforcement. Among them is a proposed directive that would introduce representative actions for the protection of the collective interests of consumers. The proposed directive would allow authorised consumer groups to bring group actions on behalf of a group of consumers. Qualified entities would be able to seek three types of remedy: injunction orders, redress orders or declaratory decisions. The Commission's stated aim is to have the directive approved and on EU statute books by May 2019.

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