Product Liability 2019

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LEXOLOGY
Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the twelfth edition of *Product Liability*, which is available in print and online at www.lexology.com/gtdt.

Lexology 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 Lexology 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 a new chapter on Ireland.

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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.

Lexology 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.

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Global overview

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The 2019 edition of this product liability survey, like those in years past, is intended to assist counsel in understanding developments in our respective national product liability laws and, based on that understanding, developing global product liability and risk minimisation strategies. While there is scope for arguing that the various national product liability regimes are becoming normalised as they continue to develop, it is also true that there remain critically important differences in both the procedural and substantive laws that make each jurisdiction's product liability system unique. As discussed more fully below, rapid technological change has often highlighted these national differences in approach rather than homogenising them. The reader is thus encouraged to seek advice from any of these well-qualified authors concerning the challenges posed by the product liability laws in their countries.

As we did last year, we take a forward-facing approach in this global overview to examine the effect of emerging technologies on the future of tort and product liability law. The pace of technological transformation has meant rapid changes in the global economy. The sharing economy has shifted how we travel, commute, purchase office space, make and obtain loans, and look for and market any number of goods and services – all made possible by online platforms powered by 'big data'. Big data and the associated internet of things (IoT), in turn, also rely on continuous collection and reporting from many additional consumer goods and services to provide enhanced services and also improve marketing. Automobile manufacturers are rushing to develop increasingly autonomous vehicles with the eventual goal being completely operator-free driving through communication and data-sharing between vehicles and infrastructure. Commercial operators are also seeking to change the use of airspace with the rise of commercial drones and the use of outer space through commercial space travel.

Two entities have recently taken the lead in examining traditional product liability concepts in the face of technological revolutions: the European Commission (EC) and the United States Chamber of Commerce's Institute for Legal Reform (ILR). Taking them in that order, in 2017, as discussed in last year's global overview, the EC completed a public consultation on the evaluation of the Product Liability Directive (85/374/EEC). The EC collected stakeholders' feedback on the application and performance of the Directive, and in particular:

- whether and to what extent the Directive meets its objectives of guaranteeing at EU level the liability without fault for damage caused by a defective product;
- whether it still corresponds to stakeholders' needs; and
- if the Directive is fit for purpose as regards new technological developments such as the IoT and autonomous systems.

Last year, the EC issued a final report on the application of the Product Liability Directive based on the 2017 evaluation. The EC re-affirmed its commitment to strict liability and found that having EU-level rules have clear added value but concluded that the current rules were not fully effective in dealing with complex products, such as many emerging technologies:

> *[The Directive's] effectiveness is hampered by concepts (such as 'product', 'producer', 'defect', 'damage', or the burden of proof) that could be more effective in practice. As the evaluation has also shown, there are cases where costs are not equally distributed between consumers and producers. This is especially true when the burden of proof is complex, as may be the case with some emerging digital technologies or pharmaceutical products.*

The EC has launched an expert group on liability and new technologies with two formation. The Product Liability Directive formation – which includes representatives from member states, industry, consumer organisations, civil society and academia – will help to interpret the provisions of the Product Liability Directive and assess the extent to which the provisions of the Directive are adequate to solve questions of liability in relation to traditional products, new technologies and new societal challenges. The New Technologies formation – made up of independent academic experts and practitioners – will assess and provide recommendations on whether and to what extent existing liability schemes are adapted to the emerging market realities following the development of the new technologies such as artificial intelligence, advanced robotics, the IoT and cybersecurity issues. By the middle of 2019, the EC intends to 'issue guidance on the Directive as well as a report on the broader implications for, and potential gaps in and orientations for, the liability and safety frameworks for artificial intelligence, Internet of Things and robotics'.

In the United States, the ILR has now published two analyses of the 'torts of the future', both of which see the future, and its challenges, in ways not dissimilar to those of the EC. We discussed its inaugural publication, *Torts of the Future: Addressing the Liability and Regulatory Implications of Emerging Technologies* and its guiding questions:

> *Emerging technologies are changing how we live, travel, and buy goods and services. If the pace of this transformation continues as expected, in 2025, it may be common for a refrigerator to reorder our food and a drone to deliver it, while a driverless car takes us to the spaceport for a flight into low-earth orbit. New technologies will undoubtedly improve lives but they also come with new risks. How can courts and policymakers address legitimate safety and privacy concerns without derailing or delaying progress?*

In 2018, the ILR analysed these same questions with respect to robotics and artificial intelligence, virtual and augmented reality, wearable devices and 3D printing in its *Torts of the Future II: Addressing the Liability and Regulatory Implications of Emerging Technologies*.

The ILR suggests that, for most claims, traditional principles of liability can adequately handle issues raised by emerging technologies without expanding those doctrines. The ILR does suggest that, for certain areas, alternatives to traditional tort liability may be the best way to meet competing challenges. Over the last year, governments and industry have discussed both options in the context of social media platforms. In the face of pending statutory changes, some commentators have suggested that traditional product liability concepts such as product 'defect' can and should be applied to social media platforms. For example, the New Zealand Privacy Commissioner has argued that social media companies could be held liable for designing and marketing a product, such as live streaming, that causes harm and that could be designed more safely. At least one American plaintiff has tried to advance these product defect theories in a suit against a dating app alleging the company had not taken adequate steps to prevent misuse and manipulation of the app, including for harassment and revenge pornography content. Both the federal trial and appellate court rejected this attempt and held that the Communications Decency Act also shielded Grindr from products liability cases based on user content.

Some of the traditional mechanisms for assessing product liability may not be appropriate for these new technologies that blur the line between tangible products and as providers of mobile services. Take, for example, autonomous vehicles, which are predicted in the next 25 years to be able to offer integrated driverless transportation with communication between vehicles and infrastructure. At that point, an autonomous vehicle will be expected to communicate with navigation devices, the surrounding environment and other vehicles. In terms of consumer expectations, consumers may begin to see the vehicles as infallible. In line with this view, at least one US plaintiffs' organisation, the American Association of Justice, has called for manufacturers to accept responsibility for all crashes caused by their cars. In contrast, adopting a risk-utility approach may justify, and result in, less liability for manufacturers as autonomous vehicles are expected to remarkably reduce accident frequency and severity and save a significant number of lives annually. The potential poor fit of traditional product liability notions has – as outlined above – led to initiatives in both the European Union and United States to re-examine existing regimes and analyse alternatives.

In summary, global product liability legislation, regulation and, of course, litigation will continue to present challenges not just for product manufacturers, but increasingly for legislative and regulatory bodies.

What follows in this volume is a multinational overview of potential product liability risks with a country-by-country summary of:

- their respective court systems, including the roles of lawyers, judges and juries, if any, as well as the nature of trials or hearings;
- theories of recovery available for product liability claims (strict, tort, contract, fraud, etc) and potential defences;
- discovery procedures available – disclosure and document production requirements – and the role of experts and company witnesses; and
- important means for assessing potential risks, such as the status of class actions, damage awards, fee arrangements and efforts to introduce or expand these types of access-to-justice provisions.

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