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# PRODUCT LIABILITY

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Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in product liability.

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# UNITED KINGDOM

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### *Respondents*



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Alison Newstead is a product liability specialist. She advises on a broad range of product liability and regulatory issues involving electrical equipment, industrial and consumer goods, health, wellness and medical device products, toys and food.

She advises companies throughout the product lifecycle, from pre-market risk analysis, placing products on the market and managing potential safety issues, including recall and enforcement action. She has longstanding experience in coordinating global strategies to respond to product safety issues and associated litigation.



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Leo Fielding handles a variety of UK and multinational claims and regulatory issues relating to product liability and commercial litigation. In addition to product liability, he has experience in advising on complex, cross-border commercial litigation, arbitration, internal investigations and regulatory issues. Before joining SHB, he spent six years in the commercial disputes team of Freshfields Bruckhaus Deringer in London and has spent time on client secondment at BP.

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**Q. Could you outline some of the key trends shaping product liability claims in the UK? How would you describe the current level of product liability claims?**

**A.** The current level of claims activity is difficult to gauge because product liability claims frequently settle out of court. However, it is clear from the alerts issued by the UK Office for Product Safety and Standards (OPSS) that serious defects continue to be identified by market surveillance authorities across the full range of industry sectors, with such defects often being a pre-cursor to product liability claims. In the past six months, the product categories most frequently the subject of alerts issued by the OPSS have been toys, electrical equipment, general machinery, hobby and sports equipment, and clothing, textiles and fashion items. Online marketplaces have also featured in the regulatory spotlight.

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**Q. Could you highlight any recent, high-profile cases which shed light on the nature of this type of dispute? What are some of the common causes of product liability claims within the UK?**

**A.** The case of *Bailey & Others v. GlaxoSmithkline UK Limited* has provided confirmation of the legal approach to the issue of defect in product liability claims brought under the Consumer Protection Act 1987 (CPA). This judgment reinforced the decisions of *Wilkes v. DePuy International Limited* and *Gee & Others v. DePuy*, in which the court stated that a flexible, holistic approach should be used in determining whether products may be defective under the CPA. This approach allows defendant manufacturers greater scope to argue that the benefits of a product should be considered alongside its risks in this context. Common causes of product liability claims include design defects, manufacturing defects, inadequate warnings and instructions for use, and inappropriate after-sales repair or service.

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**Q. Have any recent legal or regulatory developments affected product liability cases?**

**A.** In November 2021, the government published an analysis of responses to a consultation on product safety, which focused on issues concerning product design and manufacture, models of

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supply, including online marketplaces and buying directly from abroad, new products and technologies, evolving product lifecycles and enforcement. Responses from stakeholders highlighted a range of concerns, including a desire for both simplification and modernisation of current legislation, to address challenges posed by new innovative products, and the need for more effective regulation of e-commerce and the safety of products purchased online. Government proposals are awaited, but one can anticipate that any revisions will assist in ensuring that consumers have the right tools and information to take effective action, whatever the technical nature of a product or its origin of supply. UK lawyers will also be closely watching the work that is going on at the European level to revise the Product Liability Directive 85/374/EEC. The latest Commission consultation on reform – known as ‘Adapting liability rules to the digital age and circular economy’, launched in July 2021 – aims to amend the existing Directive, both in relation to digital technologies, but also in general product liability rules.

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**Q. What are some of the specific challenges for companies facing a product liability claim, including class actions? What steps should form part of their initial response?**

**A.** Companies defending product liability claims face multiple and complex challenges, particularly with respect to class actions. Claimant law firms are increasingly active and well-resourced due to a growth in third-party litigation funding. Claimant firms are making increased use of advertising and are enlisting public relations firms to rapidly build books of claimants. There are also signs of increasing cross-border coordination as claimant firms in mature jurisdictions export their know-how and personnel. A single fact pattern can generate claims against the same defendant in multiple jurisdictions and copycat claims against other businesses in the same industry. From the defendant company's perspective, the key first step will be to identify a designated person in the company to act as a contact point both internally and for any external lawyers and to ensure that all potentially relevant documents are preserved.

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**Q. When assessing a claim arising from a defective product, how should manufacturers go about calculating potential damages? What aspects need to be examined?**

**A.** A claim under the Consumer Protection Act 1987 or in negligence can be brought for death, personal injury and damage caused to private property as the result of a product defect. For claims alleging personal injury, 'general damages' can be claimed, for what is known as 'pain, suffering and loss of amenity'. To quantify such damages, it will be important to scrutinise the medical evidence to determine the injuries sustained and the effect of the injuries on the claimant. Past cases for similar injuries and guidelines known as the Judicial College Guidelines can be examined to gauge the likely level of damages. 'Special damages' can also be awarded, which cover items of a specific monetary value, such as loss of earnings and expenses associated with the injury such as care costs and travel expenses. Where damage to property has occurred, such losses may be claimed, but will need to be evidenced. This is commonly by way of invoices for replacements or repairs.

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**Q. Could you outline the proactive steps that companies need to take to prepare for a potential product liability claim, such as identifying product defects, planning for recalls, responding to investigations and managing reputational fallout?**

**A.** Companies have a legal obligation to adopt measures which enable them to be informed of any risks which their products might pose. This is to ensure that any potential product safety issues can be identified at an early stage and action taken to remove any unsafe products from the market. There are many sources which may alert a company to potential safety issues, including tracking customer complaints, warranty claims, reports from enforcement authorities, retailer feedback, social media postings and carrying out audits on sample products. A clear and robust internal policy to document and escalate potential safety issues identified to those who can assess risk and take action is crucial as this will ultimately reduce the risk of claims. It is also imperative for companies to have a product safety incident plan (PSIP) in order that swift and effective decisions can be made should a potential safety issue arise.

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**Q. How can legal involvement and preventive counsel during product development contribute to an improved defence in the event of a claim down the line?**

**A.** Design defects, manufacturing defects and inadequate warnings and instructions can all form the foundations of product liability claims. By working in partnership with lawyers at the product development and manufacture stage, companies can actively mitigate the likelihood of shortcomings in these areas and reduce the possibility of claims, regulatory action and reputational damage. Lawyers will be aware of specific areas in the design and production phase where failings may arise and will be able to counsel as to how best to avoid these. At the design stage, legal involvement can help ensure that the company has identified the regulations, standards and codes of practice that apply to the product under development. They can also ensure that the document requirements of applicable regulations for technical files and other record keeping are met. This might include ensuring that any design or manufacturing changes made during development are properly





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documented, such as the technical aspects of the change, why the change was needed and how the change was intended to address the issue at hand. In terms of manufacturing, defects commonly arise when third-party contractors deviate from the original product specifications. Ensuring that adequate quality control checks are in place to verify that the materials and components that third-party contractors are using are consistent with the prescribed product specifications can greatly assist in avoiding product safety issues and claims at a later stage. □

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