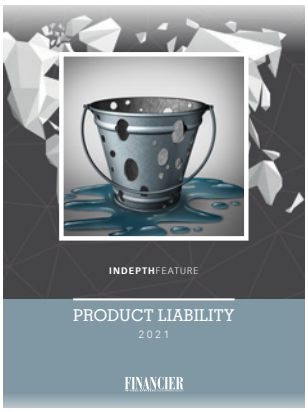

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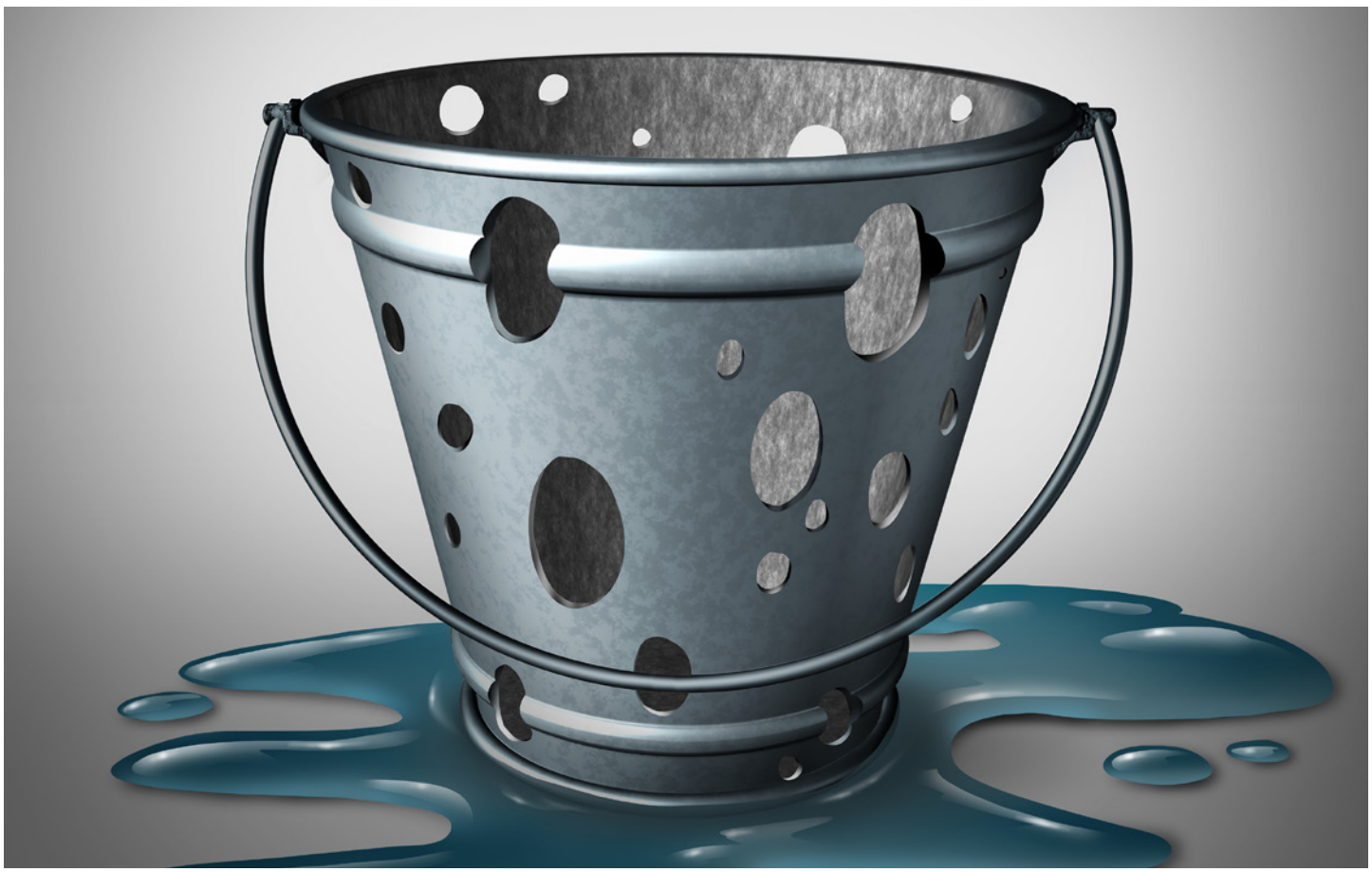
PRODUCT LIABILITY

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



UNITED KINGDOM

Shook, Hardy & Bacon International LLP

Respondent

ALISON NEWSTEAD
Partner
Shook, Hardy & Bacon International LLP
+44 (0)20 7332 4500
anewstead@shb.com

Alison Newstead is a product liability specialist, handling a variety of UK and multinational claims and regulatory issues across all industries. She has longstanding experience in coordinating pan-European defence strategies for consumer product manufacturers and advises companies on a full range of product safety issues, from initial discovery of a potential safety issue, to risk evaluation and recall action. Ms Newstead often counsels manufacturers in compliance and product safety obligations, guiding clients through regulatory investigations and prosecutions.

REPRINT

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Q. Reflecting on the past 12-18 months, what trends would you say have defined product liability claims in the UK? Have you seen an increase in such cases?

A: Claimant law firms continue to focus on a range of traditional product liability issues, including medical devices, food safety, electrical products and cosmetics. However, we can expect increasing numbers of claims regarding connected products, particularly when safety is allegedly compromised by security breaches. We have already seen examples of this with medical devices, toys and automobiles. Statistics produced by the European Commission (EC) show that of the top five categories of consumer products recalled in the European Union (EU), toys remain the largest category of products recalled, followed by automotive, clothing and textiles, electrical appliances and cosmetics. These categories are likely to shape the nature of product liability claims commenced in the future.

Q. What are some of the common causes of product liability claims?

A: Product liability claims principally arise from a defect in design or manufacturing or due to defective instructions or warnings. Design defects can come in many guises, be it the actual product design, the materials specified or the failure to incorporate required safety features into the product. Manufacturing defects may arise due to modifications to production machinery, changes to specified materials, a lack of training of those manufacturing the products or insufficient quality control. Defective instructions or warnings are a common theme in many product liability claims and are becoming more difficult to address by manufacturers as new, increasingly complex, products are made available to consumers.

Q. Have any recent regulatory and legislative developments in the UK had an impact on product liability claims?

A: The UK's departure from the EU has led to the amendment of the Consumer Protection Act 1987 and a change in the definition of 'producer'. Prior to Brexit, claims were predominantly directed at the manufacturer of a product or the first importer of a product into the EU.

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Post-Brexit, while the position does not change for a manufacturer, the focus of liability shifts from the first importer of a product into the EU to the first importer of a product into the UK. This means that UK distributors that may have previously avoided being drawn into product liability claims as they were not considered as relevant importers for the purposes of the Act, will now find themselves subject to a claim. UK importers should ensure that they have the necessary insurance to respond to such claims, as well as checking regulatory obligations that may now attach to them.

Q. Could you highlight any recent, high-profile cases which shed light on the nature of this type of dispute?

A: The case of *Bailey and others v. GlaxoSmithKline* endorsed the approach taken in *Wilkes v. DePuy* and *Gee v. DePuy*. In these cases, the judge indicated that a holistic approach should be taken when determining whether products are defective. As a result, the benefits of a product should be considered alongside the risks. Also of note is the conclusion of a coroner in 2020 who found that air pollution "made a material contribution" to the death of a child following an asthma attack. The child lived near a busy road where nitrogen dioxide levels exceeded World Health Organization (WHO) and EU guidelines. The coroner concluded that the child had been exposed to "excessive" levels of pollution and listed air pollution as a cause of death. It is likely that such findings will translate into product liability claims, albeit questions will remain as to who will be the appropriate defendants.

Q. What general advice can you offer to companies in terms of handling product liability claims in the UK? How important is it to plan for recalls, conduct thorough investigations and manage reputational fallout?

A: Product liability claims can be divided into two phases: a pre-action phase and a formal litigation phase. Save in some limited circumstances, the parties must proceed through the pre-action phase before commencing legal proceedings. Companies should afford sufficient time and resources to the pre-action phase, as it presents a valuable opportunity to dispose of the matter. Robust evidence

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supporting a pre-action denial of liability can be extremely helpful in bringing a swift end to a potential claim. In terms of planning for corrective action, it is imperative that companies understand the regulatory environment in which they are operating. How and when to carry out a risk assessment, the triggers and time limits for making notifications, as well as knowing what information a regulator is likely to request, should all be understood. Having a tried and tested recall plan is vital. Recalls carry huge reputational risks; a well-prepared recall plan will reduce common pitfalls that managing a recall can often bring.

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Q. What steps can companies take to reduce their risk of becoming embroiled in a product liability case, such as improving quality processes and addressing defects throughout a product's life cycle?

A: Companies can take a number of steps to reduce the likelihood of being presented with a product liability claim. Implementing a robust quality assurance system will help minimise claims arising from potential design and manufacturing

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defects. Any such quality assurance system should cover the entire production phase and be both scheduled and unannounced. Maintaining a joined-up and effective system to identify and escalate potential safety issues is paramount. Such a system should draw not only from customer complaints and claims, but also other available sources, such as regulatory enquiries, social media commentary and press coverage – both in the UK and in other global markets.

Q. Do you expect the number of product liability claims to increase in the months ahead? What factors might affect such cases?

A: The COVID-19 pandemic will inevitably have an impact on the product liability landscape. There are likely to be claims relating to products which were placed on the market to counter the effects of COVID-19, such as hand sanitisers and face masks. Medical devices and pharmaceutical products used to diagnose, treat or prevent COVID-19 infection are also likely to become the focus of claims. There are many reasons why such products may be the focus of claims: the speed at which demand for certain products increased will inevitably have led to products being rushed to market, with some producers not adhering to the relevant product safety standards. Counterfeit products are also likely to be a source of claims. Many novel products have been introduced throughout the pandemic and may well give rise to claims regarding their safety. We may also see claims arising out of the knock-on effect of the pandemic in other products which are not specifically COVID-related. The supply of some raw materials and components has been interrupted and producers may have turned to alternative materials and methods of production to meet demand. Such changes can be a source of potential product safety issues.❑

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ALISON NEWSTEAD Partner
+44 (0)20 7332 4500
anewstead@shb.com

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