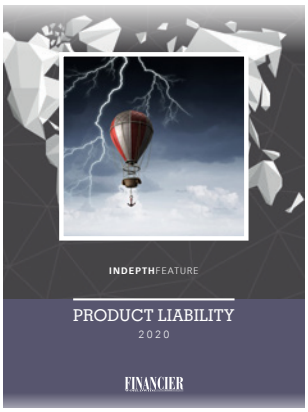

SHOOK
HARDY & BACON

INDEPTH FEATURE Reprint February 20

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

Respondents

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.

LEO FIELDING
Associate
Shook, Hardy & Bacon International LLP
+44 (0)20 7332 4500
lfielding@shb.com

Leo Fielding handles a variety of UK and multinational claims and regulatory issues relating to product liability. In addition to product liability, he has experience in advising on complex, cross-border commercial litigation, arbitration, internal investigations and regulatory issues.

Shook, Hardy & Bacon International LLP

Q. Reflecting on the past 12-18 months, what trends would you say have defined product liability claims in the UK? What are some of the common causes of product liability claims in the UK? Could you highlight any recent, high-profile cases which shed light on the nature of this type of dispute?

A: Product recalls, strengthening consumer voices and increased government engagement in product safety issues have become recent drivers of litigation in the UK. The past 12-18 months have seen an increase in product recalls in the UK across all sectors, including food, automotive, medical devices and general consumer products. There are various reasons for this upward trend. First, manufacturers are becoming more familiar with their regulatory obligations, leading to greater numbers of safety notifications and corrective actions. Second, the volume of products purchased online is increasing, with significant numbers of counterfeit and non-compliant products being purchased by consumers. Finally, there is continued and growing pressure from consumers and regulators for high standards of safety in products, meaning that companies are more readily taking corrective action if a potential safety issue arises. Product litigation is an inevitable consequence.

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

A: In 2018, the European Commission reported on the effective application of the EU Product Liability Directive (PLD) across the EU. The Commission concluded that despite challenges, "the Product Liability Directive continues to be an adequate tool". However, given the significant advances in technology since the introduction of the PLD, in particular with regard to connected products, artificial intelligence (AI) and robotics, the Commission set up an expert group on liability and new technologies to consider areas where clarification might be needed. Ultimately, the Commission may update certain elements of the PLD, such as the concepts of 'defect', 'damage', 'product' and 'producer'. However, this is not expected in the short term. Post-Brexit, there may be some divergence in product safety standards going forward. However, the government has emphasised that there

Shook, Hardy & Bacon International LLP

Companies must recognise and accept that judicial and cultural approaches differ and may influence how matters are ultimately resolved.

will be no reduction in product safety or consumer protection as a result.

Q. What general advice can you offer to companies in terms of handling multijurisdictional claims, with different judicial systems and processes?

A: Coordination is imperative. It is worth investing in global coordinating counsel, to ensure that there is a comprehensive, joined-up approach across every jurisdiction. Global counsel should work with local counsel, advising on the company's overall defence strategy and educating on the technical aspects of the product, with experts if necessary. Having one counsel adopt this supervising role ensures a common understanding of the product, the safety issues and defence themes across all jurisdictions. Companies must recognise and accept that judicial and cultural approaches differ and may influence how matters are ultimately resolved. While maintaining a consistent global approach is important, there must be some malleability to accommodate jurisdictional variants. Companies must also be aware that some legal systems are 'front-loaded' and may require detailed

Shook, Hardy & Bacon International LLP

pleadings and disclosure of a significant amount of documentary evidence at an early stage. This can take a company by surprise, particularly if the country in which the initial actions commenced does not take this approach.

Q. What are some of the specific challenges facing accused companies involved in a product liability claim?

A: A 2016 decision of the European Court of Justice (CJEU) has presented a significant new challenge for defendant companies. In its decision, the CJEU held that, where products belonging to the same production series have a potential defect, all products in that production series could be considered defective, without the need to establish that any specific product was, in fact, defective. The context of the decision was a defect in a medical device and the CJEU considered that the patients were entitled to a high level of safety due to the risk of death if the product malfunctioned. The extent to which this decision will extend to other types of products remains to be determined by national courts, but certainly presents a challenge for defendant companies.

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 can take various steps to minimise the likelihood and extent of product liability claims and manage any potential safety issue that may arise, First, they must implement a robust quality assurance system throughout the production phase. Second, they must ensure quality assurance checks are both scheduled and unannounced, considering any specific product safety risks posed by manufacture in particular jurisdictions. Third, they must implement a global process for documenting and effectively escalating potential safety issues. This includes identifying the various sources of information on potential safety issues, such as complaints, warranty claims, legal actions, regulatory enquiries, social media commentary and press coverage. Fourth, they must understand the product's global

Shook, Hardy & Bacon International LLP

regulatory landscape, identifying the legal triggers for notifying regulators about a potential safety issue, understanding how any notification should be made, in what format and within what time frame. They must also obtain information as to civil, administrative and criminal penalties for any non-compliance. Fifth, they must devise a product recall plan. This should be kept succinct and user-friendly and use flow-charts and diagrams where possible. The plan should include contact lists and must be kept up to date. Staff should be trained on the recall process and what will be expected of them should a recall situation arise. Who holds the authority to make legal, commercial and financial decisions should also be ascertained in advance. Finally, companies must identify and engage those who will be likely to support the company in a recall situation, such as lawyers, PR companies and logistical support for telephone helplines, product collection and destruction. This will help the company move nimbly if a recall situation arises.

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: In examining the safety of the product, the court will examine evidence to determine whether the product was as safe "as persons generally are entitled to expect", according to the Consumer Protection Act 1987. Such an examination will consider "all of the relevant circumstances". This is likely to include whether the product complied with relevant applicable safety standards and will look at the product testing being undertaken and scientific research considered by the company prior to the product being placed on the market. When developing a new product, particularly one that may have novel aspects, it is advisable to seek legal advice as to the applicable regulatory regime and the requirements that the regime place on manufacturers and those in the supply chain. It is important to get this right as some products, such as medical devices, are much more highly regulated than others, and require greater levels of specific pre-market evaluation before the product can be placed on the market. Legal advisers can guide companies

Shook, Hardy & Bacon International LLP

through the applicable process to ensure that the appropriate requirements are fulfilled. Prior to 2016, little emphasis was placed by defendants' counsel on compliance with product standards, as courts did not consider such compliance to be particularly persuasive evidence that a product was not defective. However, recent case law in the UK now suggests that judges will put greater emphasis on the compliance of a product with standards. ❑

www.shb.com

For more than a century, the world's leading companies have turned to **SHOOK, HARDY & BACON** to obtain favourable results under the most contentious circumstances. The firm's clients expect more than wins. They engage Shook both inside and outside the courtroom to protect their business investments and maximise opportunities for growth. Shook believes that legal excellence begins and ends with relationships founded on creative and practical solutions. The firm's attorneys approach every challenge with integrity, tenacity and collegiality to achieve the best results for those they represent.

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

LEO FIELDING Associate
+44 (0)20 7332 4500
lfielding@shb.com

SHOOK
HARDY & BACON