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The International Comparative Legal Guide to:
Product Liability 2011

A practical cross-border insight into product liability work

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Commercial Dispute Resolution

Chapter 26

England & Wales

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1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

Product liability claims may be made under the Consumer Protection Act 1987 ("CPA"), in negligence or in respect of breach of contract. Although claims can be made in respect of the breach of some statutory obligations, such as certain duties imposed by product safety and health and safety legislation, consumer fraud legislation does not give rise to private law rights to claim compensation.

The CPA, which implements the Product Liability Directive, 85/374/EEC, in the UK, imposes liability on the producer of defective products for damage caused by the defect. A product is defective if it is not as "safe as persons generally are entitled to expect", taking account of a number of factors including any instructions or warnings provided with the product and the manner in which it has been marketed. Liability is strict: it is not necessary to prove that the manufacturer was at fault in causing the defect. The Claimant need only prove a defect and a causal relationship between the defect and the injury.

Claims may only be brought under the CPA in respect of products put into circulation (i.e. entering the distribution chain) after 1 March 1988. Claims relating to products supplied before this date must be brought in negligence or for breach of contract.

In order to establish negligence, it is necessary to prove that the Defendant owed a duty of care to the Claimant, that he breached that duty by failing to take reasonable care, and that the breach caused the damage complained of. Such claims are commonly brought against the manufacturer of a defective product, although they may also be brought against other parties in the supply chain, if fault can be established.

Claims for breach of contract may only be brought against the immediate supplier of the defective product to the person injured. Liability is strict where the contract has been breached and will depend upon the terms of the contract agreed between the parties or implied into the contract. Under the Sale of Goods Act 1979 (as amended) and the Supply of Goods and Services Act 1982 standard terms are implied into all contracts for the sale of goods, unless the parties agree to exclude them. Products sold in the course of business must:

- be of satisfactory quality; and
- comply with the description applied to them or a sample supplied.

The seller will not be liable for faults drawn to the buyer's attention prior to the contract, or which should have been revealed by the buyer's examination of the goods.

Additional obligations apply to contracts between a business and a consumer ("consumer contracts"). There is a presumption that goods that malfunction during the first six months after delivery were in breach of contract at the time of supply. Public statements made by manufacturers, importers, distributors and retailers of the product, for example in labelling and advertising, must also be factually correct and form part of the retailer's contract with the consumer.

There are also restrictions on the extent to which manufacturers, retailers and others in the supply chain can exclude or limit their liability. Under the Unfair Contract Terms Act 1977, the implied term of satisfactory quality cannot be excluded in consumer contracts (and it may only be excluded in business contracts if the exclusion is reasonable). Liability under the CPA and for death or personal injury resulting from negligence can never be excluded. Other liability for negligence may only be excluded if the restriction is reasonable. Additional rights apply in respect of standard terms not individually negotiated with consumers.

In practice, claims for breach of contract are rarely brought in respect of the supply of defective medicines. Where medicines are supplied on prescription by the National Health Service there is no contract between the patient and the prescribing doctor or the pharmacist dispensing the drugs. In general, contractual claims will therefore only arise where medicines are supplied privately.

Claims for breach of statutory duty can be brought where the courts are satisfied that a statute was intended to create a private law right, actionable by an individual harmed by the breach. It is well established that claims can be made in respect of damage caused by the breach of many product safety and health and safety regulations. However, no such rights have been found to arise from breach of consumer statutes such as the Trade Descriptions Act 1968, the Consumer Protection from Unfair Trading Regulations 2008 and the Business Protection from Misleading Marketing Regulations 2008, which regulate unfair commercial practices and the provision of trade descriptions and advertisements to consumers. To date there has been no UK litigation similar to the consumer fraud litigation pursued in some US states.

1.2 Does the state operate any schemes of compensation for particular products?

Yes. Under the Vaccines Damage Payments Act 1979 fixed compensation is paid to persons suffering severe disablement as a

result of certain vaccinations. Compensation schemes are also sometimes set up to resolve specific claims, e.g. the schemes relating to HIV and Hepatitis C contamination of blood products.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Under section 2 of the CPA, liability principally rests on the 'producer' (the manufacturer), the importer of the product into the EU, or an own brander (i.e. any person who, by labelling or the use of trademarks, holds himself out as being the producer of the product). The supplier (whether the retailer, distributor or a wholesaler) may be liable in place of the manufacturer if he fails to identify the producer or at least the person who supplied the product to him. The ECJ in its judgment of 2 December 2009 in Case C-358/08; *O'Byrne v Aventis Pasteur SA* said that the requirement is "the supplier, against whom proceedings are brought by an injured person, inform the latter, on its own initiative and promptly, of the identity of the producer or its own supplier". Whether these conditions are met is a factual matter to be determined by the national court. The CPA postulates the obligation to identify being triggered by a request by the Claimant and it is questionable whether the plain meaning of the words of the English statute can be interpreted in line with the ECJ's ruling. A revision of the CPA is likely to be required.

In negligence, fault rests on the party found to be negligent; this can be any person or organisation in the supply chain.

Contractual liability may be passed down the supply chain through a series of contractual agreements between the manufacturer, distributor, retail supplier, customer and others, depending on proof of breach of the contractual terms in each case and subject to any exclusion clauses.

1.4 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

Claims for a failure to recall may be brought under the CPA, in negligence and in contract. A duty to withdraw unsafe products underpins the CPA as this imposes strict liability for defective products. Manufacturers/retailers may owe a duty of care in negligence to institute a recall or product withdrawal in appropriate cases. They owe a duty to keep the products they produce/supply under review and to warn of risks that come to light after the product has been supplied. If warnings are not adequate to manage the risk, the product may need to be modified or withdrawn.

Under the General Product Safety Regulations 2005 (the "GPS Regulations"), producers must ensure that they only place safe products on the market, and must take measures to manage any risks that are identified including, in appropriate cases, issuing warnings or withdrawing or recalling the product from the market. The GPS Regulations impose an obligation on producers and distributors to inform the authorities if a product is unsafe. Although the regulations impose criminal penalties, breach of the requirements may be of evidential value in supporting a civil claim.

1.5 Do criminal sanctions apply to the supply of defective products?

Yes. Criminal sanctions are imposed for breach of the GPS Regulations. It is an offence for a producer to offer or agree to supply or otherwise place an unsafe product on the market, punishable on conviction with a maximum fine of £20,000 and/or a 12-month term of imprisonment (if the case is tried on indictment in the Crown Court). A range of penalties apply to other breaches of the GPS Regulations. The enforcement authorities also have the power to issue notices compelling the producer to take certain actions, e.g. compelling the withdrawal or recall of products or requiring the provision of warnings.

The GPS Regulations apply to all products to the extent that these are not subject to other specific safety requirements imposed by EU law. Separate regulations apply to specific types of products, such as medicines, medical devices, foods, toys, cosmetics, machinery and electrical equipment, and this legislation imposes its own criminal sanctions.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

The Claimant has the burden of proving his/her case on the 'balance of probabilities':

- Under the CPA, the Claimant must prove that the product is defective, and that the defect caused damage to the Claimant. However, where the producer relies on defences under the CPA, including the development risks defence, the producer has the burden of proving that defence: see the answers to questions 3.1 and 3.2 below.
- In negligence, the Claimant must prove that the Defendant breached the duty of care he owed to the Claimant, and that this negligence caused damage to the Claimant.
- In contract, the Claimant must establish that the Defendant breached his contract with the Claimant by supplying product(s) that did not meet the terms and conditions of the contract, and that such breach damaged the Claimant. The burden of proving breach of contract is reversed in the case of consumer contracts if the product malfunctions in the first six months after delivery; the product is presumed not to conform to the contract at the time of supply.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

The Claimant has the burden of proving on the balance of probabilities that the Defendant's product caused or materially contributed to the Claimant's injuries. The traditional test of causation is the 'but-for test': the Claimant must prove that, but for the Defendant's negligence, or (as the case may be) supply of a defective product, the Claimant would not have sustained the injury. However, in a series of decisions (*Fairchild v Glenhaven Funeral Services Ltd and Others* [2002] 3 All ER 305, *Barker v Corus (UK) Plc* [2006] 2 WLR 1027 and *Sienkiewicz v Grief (UK) Limited* [2011] UKSC 10) the Supreme Court has ruled that special rules apply in relation to mesothelioma claims. In such cases causation will be established where the Claimant demonstrates that the Defendant's wrongdoing materially increased the risk of injury (whether the tortious breach of duty was by a single or by multiple tortfeasors). A number of the Law Lords commented in the *Sienkiewicz* case that the Courts would be wary about extending that exception to other classes of claim and it therefore appears unlikely that the Courts will extend the so-called "Fairchild exception" to product liability claims.

What amounts to a material contribution depends on the facts. Where the alleged injury is non-divisible and there are several possible causes, but it cannot be established which of them caused the injury, causation may not be established (*Wilsher v Essex Area Health Authority* [1988] AC 1074). However, in the case of a divisible injury, such as pneumoconiosis, where the injury is caused by multiple factors which have an additive or multiplicative effect, and the tortious cause materially contributed to the injury, causation may be established (*Bonnington Castings Limited v Wardlaw* [1956] AC 613), but liability is likely to be apportioned to reflect the extent of the tortfeasor's liability for the injury. These principles have not been applied to product liability claims.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

At present the position remains that, where it cannot be established which of several possible producers manufactured the defective product, the Claimant's evidential burden cannot be met and the claim will be dismissed. The English courts have not adopted so-called "market-share" liability. In *Fairchild* (see the answer to question 2.2 above) Lord Hoffman considered this issue and stated obiter that market share liability did not fall within the scope of the present law on causation as the existence of several manufacturers supplying the same defective product did not materially increase the risk of injury. However, he indicated that the issue should be left for further consideration. In *Barker v Corus* he drew a comparison between the *Fairchild* principle and market share liability, but again declined to decide the point. It remains to be seen whether the English courts will extend the *Fairchild* decision to impose market share liability where the manufacturer of the defective product cannot be identified. In this context, an important distinction needs to be made between liability based only on marketing a product ("market-share liability") and a fact-pattern closer to *Fairchild* in which the Claimant has been exposed to the same drug made by different manufacturers and the actual dose or doses of the drug which caused or materially contributed to the cause of the injury cannot be identified.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

A failure to warn may give rise to liability under both the CPA and in negligence.

The CPA specifically identifies the "get up" of the product and any instructions or warnings relating to its use as part of all the circumstances to be taken into account in assessing if the product is defective. Whilst it seems clear that warnings provided directly to consumers with the product must be taken into account in assessing liability under the CPA, the extent to which warnings provided to intermediaries, such as doctors, should be taken into account as part of "all the circumstances" is uncertain and has not yet been decided by the English courts. In the so-called "*Hepatitis C*" case (*A and Others v The National Blood Authority and Others* [2001] 3 All ER 298), the court ruled that the medical profession's knowledge of the possible risk of infection with the Hepatitis C virus arising from the use of blood products was irrelevant in assessing whether those products were defective. The defect was assessed by reference to the legitimate expectations of the public at large. The fact that physicians were aware of the risks of infection was irrelevant as they did not generally inform patients of those risks and the risks were therefore not known and accepted by patients. It remains uncertain how the English courts would approach this issue if there was evidence that the intermediary generally provided warnings to consumers. It should be noted that the *Hepatitis C* decision concerned a product which fell outside the statutory system for licensing of medicinal products and the regulatory requirement for appropriate prescribing information.

In negligence, manufacturers and suppliers owe a duty to take reasonable care to provide adequate warnings and instructions with their products. There is no duty to warn of dangers that are obvious or a matter of common knowledge (see for example, *B (A Child) v McDonalds Restaurants Ltd* [2002] All ER (D) 436, where the court found McDonalds were not negligent in supplying cups of hot tea and coffee without a warning as consumers generally knew that there was a risk of scalding if hot drinks were spilled). Manufacturers owe a duty to warn of dangers identified after the product was first supplied.

In some circumstances warnings provided to learned or responsible intermediaries may be sufficient to discharge the manufacturer's duty of care in negligence. Whether such a warning is sufficient will depend on factors including the likelihood and gravity of the risk and the practicality of providing a personal warning to the ultimate consumer. The learned intermediary doctrine has become less important in cases involving medicinal products as manufacturers of medicines are now required to provide patient information leaflets with their medicines unless the warnings and information can be provided on the container or outer packaging of the product.

A failure to warn in breach of duty may sometimes be sufficient to establish liability even if it cannot be established that the inadequate warning caused the damage suffered by the Claimant. In *Chester v Afshar* [2005] 1 AC 134 the House of Lords found that a neurosurgeon was liable for his negligent failure to warn of a rare but serious complication of spinal surgery even though the risk was unavoidable and the Claimant would probably have had the surgery, in any event, even if later. The court considered that a remedy should be available where there was a failure to obtain informed consent. It is unclear whether the same principles would be extended beyond the facts peculiar to that particular case or whether they would be adopted in a product liability context in relation to a company's obligation to warn in product information.

A contrasting approach was adopted in the case of *Coal Pension Properties Ltd v Nu-Way Ltd* [2009] EWHC 824 (TCC). The manufacturer of a gas booster for use in gas heating systems failed to give sufficient warning about the risk of the booster casing cracking if inspection and maintenance were not carried out regularly and effectively. However, the manufacturer was not liable for an explosion caused by a gas leak from a cracked casing because the court held that as a matter of fact the operator of the system would not have heeded the warning and would not have had the casing replaced, whether they had been warned or not.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Under the CPA, the following defences are available:

- the defect is due to compliance with legal obligations imposed by UK or EU law;
- the defective product was not supplied by the Defendant;
- the product was not supplied for profit and in the course of business;
- the defect did not exist at the time the product was supplied;
- the so-called "development risks defence" applies: the state of scientific and technical knowledge at the relevant time was not such that a producer of products of the same description as the allegedly defective product might be expected to have discovered the defect if it had existed in his products while they were under his control; and
- if the product was a component used in another product, the producer of the component will not be liable if he can show that the defect was due to the design of the final product, or to defective specifications provided to the component producer by the producer of the final product.

The Defendant has the burden of proving each of these defences. Such defences have rarely been successful. However, in *Terence Piper v JRI (Manufacturing) Limited* [2006] 92 BMLR 141, the Court of Appeal found that the manufacturer of a defective hip prosthesis was not liable when the prosthesis fractured after implantation as the prosthesis was not defective at the time it was supplied to the hospital. The court was satisfied, based on evidence of the manufacturer's inspection and quality control systems, that a defect in the surface of the prosthesis would have been detected prior to delivery, even though there was no evidence of inspection of the specific prosthesis. It was not necessary for the manufacturer to prove the actual cause of the defect and when it arose.

Liability under the CPA and in negligence may also be limited by the principles of contributory negligence (see the answer to question 3.6 below).

In negligence it is a defence if the Claimant freely and voluntarily agreed to run the risk of injury in full knowledge of the nature and extent of the risk (*volenti*). Otherwise, the Defendant will defeat the claim if the Claimant cannot establish each of the elements of negligence. Thus if the Defendant can show that no duty was owed, or his conduct was reasonable, or the negligent act or omission was not causally related to the damage, or that no damage was in fact sustained, he will escape liability. Proof that the fault in the product was not discoverable based on the state of scientific knowledge at the time of supply is often described as the 'state of the art' defence (see the answer to question 3.2 below).

In contract no specific defences arise, but the claim will fail if the Claimant cannot establish the breach of contract and damage due to that breach.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

Yes, there is a development risks defence. The UK Government opted to include it in the CPA: see the answer to question 3.1 above. Under the CPA it is for the producer to prove that the defect was not discoverable.

The defence was considered by the English courts in the "*Hepatitis C*" case, which found that its scope is limited. Based on current authority the defence applies if the defect was not discoverable in the light of the scientific and technical knowledge at the time the product was supplied. The Defendant's conduct is irrelevant. The court found that the defence was not available if the existence of the defect in the product was, or should have been, known. It was irrelevant whether or not the defect could be avoided because measures to identify and rectify the defect were impractical or impossible.

In negligence, whether the Defendant exercised reasonable care in relation to the design/development, manufacture, supply, marketing and, in appropriate cases, licensing of the product, will be assessed in the light of the state of scientific and technical knowledge at the time these activities were carried out. Manufacturers also owe a continuing duty to warn of any faults identified after the product has been supplied and, where a warning is not sufficient, to modify or withdraw the product. If the Defendant manufacturer is able to show that he acted in the way that a reasonable manufacturer would have done, this is often described as the "state of the art" defence. It is significantly wider than the development risks defence outlined above, because the court must assess the Defendant's conduct; not just whether the defect was discoverable. Factors such as whether the defect could be avoided and compliance with statutory obligations are relevant.

These issues are not relevant to claims for breach of contract.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

It is a defence to proceedings under the CPA if the manufacturer can show that the defect is due to compliance with UK or EU laws. Otherwise there is no general defence under the CPA, in negligence, or in contract, in circumstances where the manufacturer is able to demonstrate compliance with regulatory and statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product.

Such compliance is, however, of evidential value, and may help in the defence of negligence claims by demonstrating that the manufacturer exercised reasonable care. It may also be a relevant circumstance for the purpose of determining what persons are generally entitled to expect in relation to the safety of a product for the purpose of proceedings under the CPA. Although the Defendant's conduct is generally irrelevant for the purpose of CPA claims, evidence that it had in place appropriate systems to detect any defects in the product and for post marketing surveillance may also be relevant to the question of whether a defect was "discoverable" for the purpose of establishing whether the development risks defence is applicable. Such systems are commonly mandated by statute, for example, in the field of medicines and medical devices.

However, failure to comply with a regulatory standard, compliance with which is not required by law, may not be decisive in determining liability. In *Tesco v Pollard* [2006] EWCA Civ 393, Tesco were not liable for supplying a bottle of dishwasher powder in a screw top bottle, where the child resistant cap fitted did not meet the British Standard, as there was no statutory requirement for such a cap to be fitted and all that the public could legitimately expect was that the bottle would be more difficult to open, which it was.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

In general, a final judgment or order is conclusive as between the parties to the proceedings and their successors (save where the judgment can be set aside, for example because of fraud, or because the decision was not based on the merits). An estoppel arises that prevents the parties from re-litigating in subsequent proceedings the decision or any issues that were an essential part of the legal basis of the judgment.

In principle, an estoppel cannot arise in proceedings involving non-parties. However, in certain circumstances it may be possible to defeat a challenge to a prior decision by a party to that decision on grounds of abuse of process. For example, it may be an abuse of process in group litigation to seek to re-litigate in the individual proceedings generic issues decided in the lead actions. Even if the doctrines of estoppel and abuse of process do not apply, the prior findings of another court based on similar facts are likely to be persuasive.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Yes. Claims for contribution or indemnity can be made against a third party where the third party is liable to the Claimant for the same damage as the Defendant. Such claims can be brought either in the same proceedings (by means of a "Part 20" claim) or in subsequent proceedings. In the case of subsequent proceedings the claim must be brought within two years from the date of judgment in or settlement of the Claimant's claim.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

Yes. Liability under both the CPA and in negligence can be limited if the Defendant can prove that the Claimant's negligence caused or contributed to the damage.

4 Procedure

4.1 In the case of court proceedings is the trial by a judge or a jury?

Trials are by a judge.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

Yes, but this power has never been used in the product liability field. In practice, assessors are most commonly appointed where technical issues arise. In product liability claims they haven't been appointed to assist the court in deciding issues of liability; on the whole in such cases the court prefers to leave technical issues to the experts called by the parties themselves and to evaluate the experts' evidence having heard it tested in cross-examination.

The court can appoint one or more assessors to assist the judge to enable him to reach a properly informed decision on matters in which the assessor has skill and expertise. The assessor provides assistance as directed by the court. This can include sitting with the judge during all or part of the trial and preparing a report for the court on any matter at issue in the proceedings. The assessor does not have judicial status and does not play a part in deciding the case; his role is to educate and assist the judge.

Under the Civil Procedure Rules ("CPR"), which lay down procedural rules for the conduct of proceedings in England and Wales, the parties to any proceedings must be notified of the appointment of the proposed assessor and can raise objections.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

Yes. Where claims give rise to common or related issues of fact or law the court has the power to make a group litigation order ("GLO") enabling it to manage the claims covered by the order in a co-ordinated way. Many group claims have been brought over the last 30 years in relation to defective products and medicines, cases of industrial disease and sudden accidents or disasters.

The procedure is 'opt-in'. Claims managed under a GLO remain individual actions in their own right. However, the court will usually order that one or more actions that are representative of the rest of the claims cohort are tried as lead actions. The outcome of the lead actions does not, in theory, determine liability in the remaining cohort of claims, but those actions will establish findings of law and fact that may, in practice, allow the parties to compromise or simplify resolution of the remainder of the litigation by focusing further proceedings on clarifying any remaining points of principle.

Proceedings can be brought by any party that has a claim, whether an individual, a company or another legal entity. There is currently no mechanism by which claims can be brought by a representative body on behalf of a number of claimants (see the answer to question 4.4 below).

Once a GLO has been made a group register will be established on which details of the individual claims to be managed under the GLO are entered. A managing judge will also be appointed with overall responsibility for case management of the litigation. He may be assisted by a Master or District Judge appointed to deal with procedural matters.

Co-ordinating judges have an extremely wide discretion to manage the litigation as they see fit. The court will usually make directions, including directing the transfer of claims to the court that will manage the litigation, giving directions to publicise the GLO so that Claimants may join the group register, and imposing a cut-off date during which claims proceeding under the GLO must be issued. The court often also appoints lead solicitors to act on behalf of the Claimants and Defendants.

Claims can also be pursued in a representative action where one representative Claimant or Defendant acts on behalf of a group of individuals. The procedure is rarely used as it is only available where the group of litigants have the same interest in one cause of action; it is not available if they have different defences or remedies. The court also has power to consolidate a number of individual proceedings into one action, or order that two or more claims should be tried together.

There is currently no 'opt out' class action procedure in England and Wales. The scope of the present rules on collective actions and whether an 'opt out' procedure should be introduced has been considered by a number of committees. The Government does not presently support the introduction of a generic right to a collective action. Instead, it considers that a collective action procedure should be introduced on a sector-specific basis if there is evidence of need and following an assessment of the available options, in particular regulatory options (such as giving regulators the power to order the payment of compensation). There is sector-specific legislation in the competition field and legislation may shortly be introduced in the areas of financial services and consumer protection law (see the answer to question 4.4 below).

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

No. Proceedings must be brought by the person/body that has suffered the damage/injury. There is presently no means of bringing a product liability claim through a representative body as part of a collective action.

However, representative actions may be brought on behalf of consumers seeking damages for infringement of competition law, and legislation may also shortly be enacted in the financial services sector. The status of plans proposed by the former Labour Government to establish a "Consumer Advocate", with power to bring representative proceedings on behalf of consumers in cases where there has been a breach of consumer protection legislation is uncertain. In June 2010 it was reported that the new Consumer Advocate role would be merged with Consumer Focus, an existing statutory body representing consumer rights, but in October 2010 the Government announced that Consumer Focus may itself be abolished and its powers transferred to the Citizens Advice service.

4.5 How long does it normally take to get to trial?

This depends on the complexity of the case and the value of the claim. According to the 2009 Judicial and Court Statistics published by the Ministry of Justice, unitary actions proceeding in the County Court (excluding certain small claims which are fast-tracked), on average, took 48 weeks from the issue of proceedings until trial. Equivalent statistics are not available for High Court actions, but these cases are generally more complicated and therefore take longer to come to trial. Complex group actions may take many years to come to trial. For example, in the third generation, oral contraceptives litigation it took approximately six and a half years from the issue of the first proceedings until judgment. In all cases, delay is largely a result of the conduct of the parties and is not inherent in the court system. Delays may also occur in publicly funded group litigation as regular reviews of the case carried out by the Legal Services Commission can lead to funding being revoked and the case being delayed while this decision is submitted to an appeal process (which can then result in funding being restored, and the action once again proceeding) – see further the answer to question 7.3 below.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Yes. In accordance with general case management powers the judge can order the trial of preliminary issues of law and fact in separate proceedings prior to the main trial, and can decide the order in which issues are to be tried in the main trial. In a suitable case, the court also has the power to give a summary judgment dismissing a claim which has no realistic prospect of success.

4.7 What appeal options are available?

An appeal may only be made with the permission of the court (either the appeal court or the lower court that made the decision subject to appeal) and such permission will only be granted if the appeal appears to have a real prospect of success or there are other compelling reasons why it should be heard.

The appeal will usually be limited to a review of the lower court's decision, but the court retains the power to order a re-hearing in the interests of justice. An appeal will be allowed where the decision of the lower court was wrong (because the court made an error of law, or of fact, or in the exercise of its discretion) or was unjust because of a serious procedural or other irregularity of the lower court. However, in practice, the courts will rarely disturb findings of fact made by the trial judge who had the benefit of hearing first hand the witness and expert evidence.

The appeal court may affirm, vary or set aside any order or judgment made by the lower court, order a new trial or hearing or make any other appropriate order.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

Experts are generally appointed by the parties to litigation rather than by the courts. No expert may give evidence, whether written or oral, without the court's permission and the court may, in appropriate cases, dispense with expert evidence or require that evidence on a particular issue be given by a single joint expert. (The court will select a joint expert from a list prepared by the parties if they cannot agree who should be instructed.)

The extent of the expert evidence that is permitted will depend on the type and value of the claim, with more extensive evidence permitted in complex cases. In all personal injury cases, the Claimant must serve a medical report with his or her Statement of Case substantiating the injuries alleged in the claim.

Expert evidence should be independent and comprehensive. An expert owes an overriding duty to assist the court on matters falling within his expertise; and this duty overrides any obligation to the party instructing the expert. Experts can only give evidence on matters of opinion falling within their expertise.

Evidence must be provided in the form of a report disclosed to the other parties. The Court Rules give the parties a right to put written questions to an expert about his or her report in order to clarify the report. Where several experts are instructed it is usual for experts in particular disciplines to meet on a "without prejudice" basis, after the exchange of reports and before giving oral evidence, in order to explore areas of agreement and narrow the matters in dispute.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/ expert reports exchanged prior to trial?

The factual and expert evidence that the parties intend to rely upon at trial must be provided in the form of witness statements and expert reports that are disclosed by the parties prior to the trial.

Evidence is usually mutually exchanged, but the court may, in appropriate circumstances, direct that it is served sequentially. Factual and expert witnesses are required to give oral evidence at the trial unless the court orders otherwise. However, the witness can only amplify the evidence given in his/her written statement or report with the court's permission.

Witnesses are not generally required to present themselves for pre-trial deposition. However, the court may order evidence to be given by deposition if the witness is unable to attend the trial. The increased use of video conferencing facilities has reduced the use of depositions in proceedings in England and Wales. Evidence can be taken by video if the witness is abroad or too ill to attend court.

4.10 What obligations to disclose documentary evidence arise either before proceedings are commenced or as part of the pre-trial procedures?

A party to an action is required to disclose the documents in his control on which he relies and which adversely affect his own case or support another party's case. A document is in a party's control if he has, or had, physical possession of it, a right to possession of it, or a right to inspect and take copies of it. The obligation may therefore extend to documents in the hands of a party's professional advisers or an associated company provided control can be established.

'Document' means anything on which information of any description is recorded and includes paper records, drawings, microfilms, information held on tape, video, CD or DVD, and electronic documents such as emails and metadata (including electronic documents that have been 'deleted' which are held on servers and back up systems).

The parties are required to conduct a reasonable and proportionate search for disclosable documents. The obligation to give disclosure continues until the action is at an end and applies to documents created while the proceedings are underway. Additional obligations apply in the case of the disclosure of documents held in electronic form and the Court Rules require the parties to exchange information about the electronic documents that they hold and to seek to agree the scope of searches for electronic documents.

The duty to disclose the existence of documents is a strict one and is enforced by the court. A party may not rely upon any documents that it does not disclose. Moreover, if a party withholds documentation that should have been disclosed, the court may impose cost penalties or draw an adverse inference.

Disclosable documents are identified in a List of Documents served on the opposing party. All disclosed documents can be inspected save for those which are privileged from inspection. Two of the most important types of privilege are "legal advice privilege", which applies to confidential communications between a lawyer and his client made for the sole or dominant purpose of seeking or giving legal advice and assistance, and "litigation privilege", which applies to documents between the potential party, his lawyer and any third party, created after litigation is contemplated or pending, for the sole or dominant purpose of seeking or giving advice in relation to the claim, or collecting evidence for use in the litigation. Legal advice privilege only applies to lawyer-client communications with company employees who are regarded as the "client" (generally senior managers or the in-house lawyer), not all employees. Litigation privilege will only apply if there is a real likelihood of litigation, rather than a mere possibility.

Disclosure usually takes place after pleadings setting out the parties' cases have been served. In addition, a party may also seek an order for disclosure of specific documents or classes of documents. However, the court also has power to order pre-action disclosure in appropriate cases in order to fairly dispose of the proceedings. Such disclosure may only be ordered in respect of specific documents or classes of documents that would have to be disclosed in any event once the proceedings are underway. Any documents disclosed in accordance with these rules may only be used in connection with the proceedings in which they are disclosed until such time as they are referred to at a hearing held in public, or the parties agree, or the court otherwise gives permission.

4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?

Yes. There are a variety of different methods including mediation, arbitration and neutral evaluation. The courts encourage the use of alternative dispute resolution ("ADR") to resolve disputes and the pre-action protocols to the court rules provide that the parties should consider whether some form of ADR is more suitable than litigation before commencing proceedings. While the courts cannot compel the parties to use ADR procedures (*Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576), failure to follow the protocols may result in a cost sanction. Indeed, courts have refused to award costs to a successful party where they unreasonably refused to mediate (*Dunnett v Railtrack plc* [2002] EWCA Civ 303).

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, see our answer to question 5.2 below.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the Court have a discretion to disapply time limits?

Under the Limitation Act 1980, the basic limitation period for tortious actions (including negligence claims) and for breach of contract is six years from the date on which the cause of action accrued. Additional requirements apply in the case of latent damage caused by negligence.

Special time limits apply to personal injury claims for damages in respect of negligence, nuisance or breach of duty. In such cases, the claim must be brought within three years from the date on which the cause of action accrued (i.e. the date of injury or death) or the date of knowledge by the Claimant of certain facts. The date of knowledge is when the Claimant is aware of the identity of the Defendant, that the injury was significant, and that it was attributable in whole or part to the alleged negligence, nuisance or breach of duty. The court has a discretionary power to disapply this time limit where it would be equitable to do so.

Where proceedings are brought under the CPA there is also a general long-stop provision. A right of action under the CPA is extinguished 10 years after the defective product was put into circulation and this applies irrespective of the other provisions of the Limitation Act (including the requirements relating to the date of knowledge set out above). In Case C127/04, *O'Byrne v. Sanofi Pasteur MDS Limited and Sanofi Pasteur SA* the ECJ held that "a product is put into circulation when it is taken out of the manufacturing process operated by the producer and enters a

marketing process in the form in which it is offered to the public in order to be used or consumed".

In a further reference in the same proceedings (Case C-358/08, *Aventis Pasteur SA v OB*), the ECJ ruled that national legislation cannot permit the courts to substitute one producer Defendant for another company (in this case mistakenly sued as a producer) after the long-stop period has expired. A subsequent decision of the Court of Appeal has cast doubt on the correctness of the original decision of the Court of Appeal in the case of *Horne-Roberts v SmithKline Beecham plc* [2002] 1 WLR 1662, and it seems likely that in a case where the facts were similar but involved amendment of a claim to substitute a new Defendant after expiry of a period of limitation (as opposed to the long-stop provision, to which the *Aventis Pasteur* decision would apply), the Court would not exercise its discretion to allow such an amendment (*Lockheed Martin Corporation v Willis Group Ltd* [2010] EWCA Civ 927).

Special rules apply to persons under a disability, during such period as they are a minor or of unsound mind. In general, time only begins to run for limitation purposes when the Claimant dies or ceases to be under a disability. However, the 10-year long-stop for CPA claims still applies.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Where an action is based on the Defendant's fraud, or the Defendant has deliberately concealed any fact relevant to the Claimant's right of action, the relevant limitation period does not begin to run until the Claimant has, or could with reasonable diligence have discovered the fraud or concealment.

6 Damages

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

It is possible to seek a range of remedies including monetary compensation (damages) and injunctive or declaratory relief. However, most Claimants in product liability cases seek to recover damages.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Under the CPA, damage includes death or personal injury (including mental injury) or loss of, or damage to, property for private use and consumption (provided the damages recoverable in respect of property loss exceed the minimum threshold of £275). Damages are not recoverable in respect of damage to the defective product itself.

In negligence, damages are awarded to put the injured party into the position he would have been in if the negligent act had not occurred. Damages can be recovered for death or personal injury (including mental injuries), damage to property and damage to the product itself. Pure economic losses which are not consequent on physical damage are not generally recoverable in negligence.

In contract, damages are intended to put the injured party into the position he would have been in if the contract was performed. Damages are usually awarded for monetary loss (for example, in respect of damage to property and to the defective product itself), but they can include non-pecuniary losses, such as damages for death or personal injury (including mental injury), where this was within the parties' contemplation as not unlikely to arise from the breach of contract. Economic losses, such as loss of profits, are recoverable if these are a foreseeable consequence of the breach.

In the case of mental injuries, the English courts only permit recovery for recognised psychiatric injuries. Mere anxiety or distress are not actionable and are not, on their own, sufficient to ground a claim for damages (see *AB and Others v Tameside & Glossop Health Authority and Others* [1997] 8 Med LR 91).

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

Medical monitoring claims of the type pursued in the USA in recent years have not been litigated before the English courts. English law does not generally permit recovery of the cost of tests or investigations unless the product has actually malfunctioned and caused physical or psychiatric injury or damage. Such medical monitoring costs are usually treated as medical expenses consequential on the main injury.

The courts have ruled that minor physical signs, such as pleural plaques on the lungs, which are neither ordinarily visible nor symptomatic and do not impair bodily functions, do not amount to 'damage' on which a claim for compensation can be based. Furthermore the combination of minor signs, the risk of future injury and anxiety that such injury may occur cannot be aggregated to make an actionable tort. In *Johnston v NEI International Combustion Limited and Others* [2007] UKHL 39, the House of Lords made it clear that claims could only be brought in tort where the Claimant had sustained a symptomatic injury. However, if a contractual relationship exists it may be possible to recover damages in contract for the risk of developing such an injury/disease.

The extent to which the courts will permit a Claimant to recover damages for a recognised psychiatric injury sustained as a result of the Claimant becoming aware that he is at risk of sustaining a serious disease or injury depends on whether, in the circumstances of the case, such damage was a foreseeable consequence of the Defendant's fault/defect and therefore, whether the Defendant owed a duty of care to the Claimant. In the *Johnston* case (see above) the House of Lords declined to extend the law to allow the recovery of damages in such circumstances. A Claimant was diagnosed with depression as a result of anxiety caused by his knowledge that he was at risk of sustaining an asbestos-related disease. The Court found that there was insufficient evidence to allow it to conclude that an ordinary person would have sustained a psychiatric injury in these circumstances and concluded that the injury was not reasonably foreseeable and therefore dismissed the claim.

The *Johnston* case can be contrasted with the Creutzfeldt-Jacob Disease Litigation, (*Group B Plaintiffs v Medical Research Council and Another* 41 BMLR 157), where the court found that children who were at risk of contracting CJD (but who had not yet contracted the disease and might never do so) could recover damages for psychiatric injuries sustained as a result of knowledge of that risk. Liability was established because the Claimants' psychiatric injuries were a foreseeable consequence of the Defendants' negligent actions, due to the close relationship between the children and the Defendants who supplied the human growth hormone to them, the fact that they were minors and did not choose the treatment, that there were only a limited number of Claimants, and the seriousness of the potential illness. The *CJD* case was

considered by the House of Lords in Johnston, who commented that there were special factors which applied to the case that allowed the court to find that a duty of care was owed. In the absence of such special circumstances, it therefore appears that the English courts will not generally allow a Claimant to recover damages where he/she sustains a recognised psychiatric illness as a result of becoming aware that he/she is at risk of sustaining a disease/illness, or to recover the costs of future medical monitoring to determine if that disease/injury has arisen. If such liability can be established, medical expenses consequent on the psychiatric injury, such as tests to determine if the disease has been sustained, are recoverable.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

Punitive or exemplary damages are rarely, if ever, awarded. They are not generally available in respect of claims for breach of contract. Although they are available in tort claims (see *Kuddus (AP) v Chief Constable of Leicester Constabulary* [2001] 2 WLR 1789), exemplary damages will only be awarded in certain limited circumstances, including where the Defendant's conduct was calculated to make a profit that exceeds the compensation recoverable by the Claimant or where there has been oppressive, arbitrary and unconstitutional conduct by Government servants (see *Rowlands v Chief Constable of Merseyside* [2006] All ER (D) 298 (Dec)). Exemplary damages are not generally recoverable in circumstances where a Defendant has already been fined in respect of his conduct (see *Devenish Nutrition Limited v Sanofi-Aventis SA and Others* [2007] EWHC 2394 (Ch)).

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

There is no such limit.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

In general, a Claimant may unilaterally discontinue all or part of his/her claim at any time. However, the court's permission is required for compromise or settlement of proceedings instituted against or on behalf of a minor (aged under 18) or an adult who is incapable of managing their own property and affairs. Court approval is also usually sought where there is a settlement or compromise of an unlitigated claim made by, or on behalf of, or against, such a person as a compromise is not enforceable without the approval of the court. There is no requirement to seek court approval in other circumstances, for example, on the settlement of the claims comprising a group action.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

Yes. Under the Social Security (Recovery of Benefits) Act 1997, where compensation is paid in respect of an accident, injury or disease, the compensator is liable to repay to the Government state benefits paid to the Claimant in respect of that accident, injury or disease. The scheme is administered by the Compensation Recovery Unit ("CRU"), which issues certificates setting out the recoverable benefits (CRU payment). The compensator can offset the CRU payment against certain types of compensation paid to the Claimant (in respect of loss of earnings, costs of care and loss of mobility). No deductions can be made from the damages paid in respect of the injury/disease itself.

A similar scheme applies to the recoupment of National Health Service ("NHS") charges in accordance with the Health and Social Care (Community Health and Standards) Act 2003. Where the Claimant has received NHS treatment or been provided with NHS ambulance services as a result of the injury which is being compensated, the costs of that treatment must be paid by the compensator in accordance with a statutory tariff.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

The assessment of costs is a matter for the court's discretion. The general rule is that the unsuccessful party pays the costs of the successful party (costs "follow the event"), including both court fees and legal costs (including incidental expenses). However, the court can make such orders as it considers appropriate, reflecting matters such as the parties' success or failure on particular issues in the proceedings (issue based cost orders) and the parties' conduct. Where a party makes an offer to settle (known as a "Part 36 offer") and this is not accepted by the other party in satisfaction of their claim, unless that other party achieves a better result at trial, he may become liable for all costs incurred after the Part 36 offer was refused.

Of particular importance in product liability actions are the rules relating to the recovery of costs from publicly funded Claimants. (Most group litigation in the product liability field is funded by legal aid.) Costs will only be enforced against a publicly funded Claimant in exceptional circumstances, as the Claimant may only be ordered to pay such amount as is reasonable taking account of all the circumstances, including the parties' resources. Although costs are generally awarded against a legally-aided party they cannot be enforced without the court's permission and, in practice, this will not be granted unless the Claimant's financial position improves significantly. In effect this means that Defendants are unlikely to recover their costs of defending unsuccessful proceedings brought by legally-aided Claimants.

Although Defendants may seek costs against the Legal Services Commission ("LSC"), who are responsible for administering legal aid services, costs will only rarely be awarded at first instance, as it is necessary to prove the Defendant will suffer hardship unless the award is made. Costs awards are normally made if the LSC funds an appeal and this fails.

If the amount of costs cannot be agreed between the parties they will be assessed by the court to determine if the sums claimed are reasonable; costs are commonly discounted (sometimes by up to one third) on assessment. The court also has power to manage the costs incurred during the course of the litigation. For example, it can impose a cap on the costs to be incurred by the parties where there is a substantial risk that without such an order the costs incurred will be disproportionate to the amounts in issue and the costs cannot be adequately controlled through usual case

management procedures (see *AB and Others v Leeds Teaching Hospitals NHS Trust* and in the matter of the Nationwide Organ Group Litigation [2003] Lloyds Law Reports 355). These orders do not prevent the parties from exceeding the cap, but merely bar the recovery of costs above the cap from the unsuccessful party. The court can also order the parties to provide an estimate of the costs that they would seek to recover if they were successful in the case.

In November 2010 the Government published "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales". As part of a package of measures including significant changes to the rules on Conditional Fee Agreements ("CFAs") and the recoverability of After the Event ("ATE") insurance premiums and the legalisation of a form of contingency fees described as Damages Based Agreements ("DBAs"), the Government have proposed the introduction of Qualified One-way Cost Shifting ("QOCS") in personal injury cases and in some other types of claim (although not in commercial claims). Where QOCS applies there would be a presumption that the Claimant would not to be liable for the Defendant's costs if the claim fails, unless the Claimant had acted unreasonably or the Court orders that the parties' financial circumstances are such that the Claimant should be liable for all or part of the Defendant's costs. The intention appears to be to introduce rules equivalent to the current cost protection afforded to legally-aided Claimants. One-way costs shifting could significantly increase the ability of Claimants' lawyers to mount product liability claims, including group actions. If Claimants and their lawyers know they are protected against the risk of having to pay the Defendant's costs if they lose, they may be prepared to pursue litigation in a way that was previously only realistic with the benefit of legal aid funding. The consultation on these proposals closed in February 2011 and it is expected that legislation will be introduced later this year.

7.2 Is public funding e.g. legal aid, available?

Public funding is available in England and Wales.

7.3 If so, are there any restrictions on the availability of public funding?

Civil legal aid is only available to fund advice on specific types of issues including family, immigration and social welfare matters, claims for clinical negligence and cases involving a 'wider significant public interest'. It is not generally available to fund contractual or tortious claims, and for personal injury claims arising from negligence or breach of a statutory or contractual duty equivalent to negligence. Legal aid will also be refused if alternative funding is available, for example, if the Claimant's case can be pursued under a CFA. The combination of these rules means that the majority of product liability claims involving personal injury are unlikely to benefit from public funding, unless they qualify for exceptional funding on the basis that there is a 'significant wider public interest' in funding the case. If the type of work is eligible, full funding will only be granted if the following requirements are met:

- means test – the applicant meets certain financial eligibility criteria; and
- cost-benefit test – the likely benefit of the proceedings to the applicant and others justifies the likely costs, having regard to the prospects of success.

Additional criteria apply to the funding of 'high cost' cases and group litigation. Funding may be refused in the light of the resources available; a high cost case will have to compete against other cases which also meet the basic funding criteria and which are seeking funding. The LSC sets funding priorities which may change from time to time and have regard to the overall resources available in the Central Budget. An annual affordability review is carried out which takes account of factors including the prospects of success, the likely costs, the importance of the case to the Claimants and the public interest. Guidance issued by the LSC makes clear that legal aid will not generally be granted to conduct scientific research and that actions against manufacturers of products that are subject to a sophisticated regulatory regime (such as medicines) will generally be considered a lower funding priority.

These factors will be reassessed throughout the course of the litigation as new information becomes available. The Defendant may submit written representations to the LSC opposing funding or seeking discharge of the Claimant's legal aid certificate.

The effect of these rules is that public funding is only available to pursue product liability claims in strictly defined circumstances. However, the Government is consulting on proposals that would restrict further the availability of public funding. Its 2010 consultation paper "Proposals for the Reform of Legal Aid in England & Wales" proposes that civil legal aid should largely be abolished for tort and other general claims. The test for providing exceptional funding would be changed and broadly, such funding would only be available where necessary to allow the Government to comply with its national and international legal obligations (such as under human rights legislation) and in the context of inquests. Funding would no longer be provided for non-inquest cases, such as product liability cases, on the basis that there is a significant wider public interest in funding these claims; the practical effect of his change is that public funding would no longer be available to pursue complex product liability claims.

The consultation also seeks views on whether additional sources of funding legal aid should be introduced, either from interest earned on lawyers' general client accounts, or through a supplementary legal aid scheme funded by a levy paid from damages awarded in successful legally-aided cases. These proposals are being considered together with separate proposals for the reform of civil litigation funding and costs rules (see the answers to questions 7.1 and 7.4). The consultation on these proposals closed in February 2011 and it is expected that new rules will be introduced later this year.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Yes, through CFAs. Contingency fees are not presently permitted.

There are broadly two types of CFA: "no win no fee" agreements; and "less (or nothing) if you lose" agreements. The precise terms of the CFA are strictly regulated and agreements that fall outside the legal requirements are unenforceable. A feature is that under a CFA the costs recoverable against the unsuccessful party are increased in return for accepting no, or a reduced fee if the claim/defence is unsuccessful. But in order to protect the unsuccessful party against an award of costs in favour of the other party it is usual to combine a CFA with either insurance or membership of an organisation, such as a trade union, that will bring proceedings on behalf of its members and pay the costs of an unsuccessful action. A range of "after the event" ("ATE") insurance products are available and in some cases insurers may agree to defer the payment of premiums in return for an increased premium. The success fee and any premium paid to obtain legal expenses insurance will be recoverable in addition to legal costs, where a party with the benefit of a CFA successfully pursues or defends an action. A further source of funding is the provision of legal expenses insurance commonly attached to household insurance policies. However, the sum

insured is often insufficient to enable anything more than the bringing of a relatively uncomplicated claim.

However, in its "Proposals for Reform of Civil Litigation Funding and Costs in England and Wales" the Government has proposed significant changes to these arrangements. In particular, it has proposed that:

(1) Damages Based Agreements (DBAs), allowing a form of contingency fees, should be legalised so as to offer Claimants choice in terms of how to fund their claims. Under a DBA the payment received by the lawyer is calculated by reference to the damages awarded to the client.

(2) In the case of CFAs, the ATE insurance premium and, in most cases, the success fee would no longer be recoverable from the unsuccessful Defendant and these sums would be paid by the Claimant out of the damages he recovers. In personal injury cases a success fee of up to 10% of the general damages award would be recoverable from the Defendant. However, the effect on Claimants of these changes would be mitigated in personal injury and some non-commercial claims through the introduction of Qualified One-way Cost Shifting (see the answer to question 7.1 above).

(3) In the case of both CFAs and DBAs the success fee or percentage of damages payable would be capped at 25% of general damages (i.e. damages for pain and suffering). Damages for future care and loss would be ring-fenced.

Some commentators have raised concerns that it would be uneconomic to pursue complex personal injury claims under these arrangements, and the Government is seeking views on this and on whether alternative arrangements (e.g. no cap on damages, a higher cap, or the retention of some element of recoverable success fee) should be permitted for these type of claims.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Yes, in certain circumstances. In *Arkin v Borchard Lines* [2005] 1 WLR 2055 the Court of Appeal made clear that, in principle, third party funding may be an acceptable means of funding litigation. However, certain third party funding arrangements may be unenforceable. In *R (Factortame) Ltd v Transport Secretary (No.8)* [2002] EWCA Civ 932 the court held that in deciding whether a funding agreement is objectionable (champertous) the courts will take into account whether the funder controls the proceedings, whether the agreed recovery rate is fair and whether the agreement facilitates access to justice. The key test is control: if the funder controls the proceedings the agreement will usually be champertous and unenforceable. In addition, as he will generally be treated as if he was a party to the proceedings, he will be exposed to costs liability.

Arkin concerned the award of costs against a third party funder. The Court of Appeal held that in the case of an objectionable agreement the funder will be liable to pay his opponent's costs without limit if the claim fails; in the case of acceptable agreements the funder's cost liability is limited to the amount of the funding he provided. In the context of proceedings carried out under a CFA, the Court of Appeal has recently clarified that a firm of solicitors' agreement to indemnify a client against their liability for costs if they were unsuccessful was permissible and was not champertous (*Sibthorpe and Others v London Borough of Southwark* [2011] EWCA Civ 25)

The Solicitors Code of Conduct provides that there can be no third party funding in cases of personal injury and death. However a recent report by a senior Judge, Lord Justice Jackson, who carried out a wide-ranging review of the costs of litigation in England & Wales, has proposed that this restriction be lifted. It has also been proposed that third party funders should be regulated and the Civil Justice Council is currently consulting on proposals to introduce a self regulatory "Code of Conduct for the Funding by Third Parties of Litigation in England and Wales".

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in England & Wales.

Save as outlined above there have been no new developments or trends of note.

Acknowledgment

This chapter was prepared jointly by Alison Brown and Ian Dodds Smith of Arnold & Porter (UK) LLP and Michael Spencer QC of Crown Office Chambers. Alison Brown's profile can be found in Chapter 1 "*Recent Developments in European Product Liability*".

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Arnold & Porter is an international law firm with over 600 attorneys in nine offices in the U.S. and London and Brussels. With more than 100 attorneys engaged in product liability matters, Arnold & Porter is one of the most experienced firms internationally, providing clients with an integrated product liability service on a transatlantic basis.

The European product liability group is a recognised leader in the UK and Europe, with comprehensive experience in handling the defence of claims. Its lawyers have been at the forefront of "group action" litigation, with experience derived from the successful defence of many major multi-claimant cases that have been brought in the UK and elsewhere in the EU over the last 30 years. In the US, the firm has acted both as national counsel for companies and as trial counsel in cases involving personal injury and property damage claims.

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