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The International Comparative Legal Guide to:

Product Liability 2012

10th Edition

A practical cross-border insight into product liability work

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Preface:

■ Preface by Tom Spencer, Counsel, GlaxoSmithKline Plc.

General Chapters:

1	Recent Developments in European Product Liability – Ian Dodds-Smith & Alison Brown, Arnold & Porter (UK) LLP	1
2	The EU General Product Safety Regime – John Meltzer & Rod Freeman, Hogan Lovells International LLP	5
3	Update on U.S. Product Liability Law – Sara J. Gourley & Sherry A. Knutson, Sidley Austin LLP	13
4	International Electronic Discovery – Nicole B. Boehler, CBM International Lawyers LLP	22
5	Product Liability and Product Recall Insurance in the UK - Practical Issues – Anthony Dempster & Howard Watson, Herbert Smith LLP	37
6	Implications of Recent U.S. Governmental Enforcement Activities on Pharmaceutical and Medical Device Products Liability Actions – Lori G. Cohen & Christiana C. Jacxsens, Greenberg Traurig, LLP	42
7	The Practicalities of Managing a Global Recall – Richard Matthews & Fabian Volz, Eversheds	52
8	Solutions to Tackle the Growing Exposure to Product Regulations in Multiple Jurisdictions – Mark A. Kinzie & Patricia A. Hietter, Aventure	60
9	Generic Pharmaceutical Liability — Challenges and Changes – Steven F. Casey, Jones, Walker, Waechter, Poitevent, Carrère & Denègre L.L.P.	66
10	Recent Developments in U.S. Aviation Product Liability Laws – Donald R. Andersen	70

Country Question and Answer Chapters:

11	Argentina	Bulló – Tassi – Estebenet – Lipera – Torassa – Abogados: Daniel B. Guffanti & Mariano E. de Estrada	76
12	Australia	Clayton Utz: Colin Loveday & Jocelyn Kellam	82
13	Austria	Fiebinger Polak Leon & Partner Rechtsanwälte GmbH: Peter Polak & Karina Hellbert	91
14	Belgium	Béatrice Toussaint Avocat: Béatrice Toussaint	98
15	Brazil	Veirano Advogados: Luiz Guilherme Miglora & Vitor Lourenço Simão Castro	108
16	Canada	Gowling Lafleur Henderson LLP: Mary M. Thomson & Nicholas Kluge	114
17	China	Smith & Partners, in affiliation with CBM International Lawyers LLP: Terence Lee & Karrie Cheung	121
18	England & Wales	Arnold & Porter (UK) LLP: Ian Dodds-Smith & Alison Brown Crown Office Chambers: Michael Spencer QC	128
19	France	Hogan Lovells (Paris) LLP: Thomas Rouhette & Cécile Derycke	140
20	Germany	Hogan Lovells International LLP: Ina Brock & Dr. Sebastian Lach	151
21	Greece	Bahas, Gramatidis & Partners: Dimitris Emvalomenos	159
22	Hong Kong	Smith & Partners, in affiliation with CBM International Lawyers LLP: Terence Lee & Karrie Cheung	165
23	Ireland	Matheson Ormsby Prentice: Tom Hayes & Michael Byrne	171
24	Israel	Caspi & Co.: Norman Menachem Feder & Gad Ticho	181
25	Italy	Hogan Lovells Studio Legale: Francesca Rolla & Christian Di Mauro	189
26	Japan	Anderson Mōri & Tomotsune: Tetsuro Motoyoshi & Taisuke Yamamoto	200
27	Korea	Kim & Chang: Sang Ho Han & Inhak Lee	207
28	Luxembourg	Allen & Overy Luxembourg: Donata Grasso	214
29	Netherlands	Hogan Lovells International LLP: Klaas Bisschop & Karen Jelsma	221
30	Norway	Advokatfirmaet Wiersholm, Mellbye & Bech AS: Magnus Hellesylt & Kjeld Arne R. Thomassen	232
31	Poland	Baker & McKenzie Krzyżowski i Wspólnicy sp. k.: Ewa Rutkowska	238
32	Romania	Pachiu & Associates: Remus Ene & Adelina Somoigai	246

Continued Overleaf ➡

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Country Question and Answer Chapters:

33	Singapore	Allen & Gledhill LLP: Dr Stanley Lai, SC & Amanda Soon	254
34	South Africa	Cliffe Dekker Hofmeyr Inc.: Pieter Conradie	262
35	Spain	Monereo Meyer Marinel-lo Abogados, S.L.P.: Belén Arribas Sánchez & Ramon M. Romeu Cònsul	268
36	USA	Hogan Lovells US LLP: Lauren S. Colton & Allison Caplis	277

EDITORIAL

Welcome to the tenth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

Ten general chapters. These are designed to provide readers with a comprehensive overview of key product liability issues, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 26 jurisdictions.

All chapters are written by leading product liability lawyers and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Ian Dodds-Smith of Arnold & Porter (UK) LLP and Michael Spencer QC of Crown Office Chambers for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.co.uk

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PREFACE

I'm delighted to have been asked to introduce the tenth edition of *The International Comparative Legal Guide to: Product Liability*.

The guide continues to be an invaluable source of information and comes this year with ten very interesting and varied general chapters as well as the extremely informative country question and answer section, covering 26 jurisdictions.

I make constant reference to the guide for matters concerning product liability globally; I'm also aware that my colleagues in Europe and across the world continue to rely on the guide as a first port of call for information on product liability and helps inform their advice.

The area of product liability continues to provoke interest from all areas, which I hope will necessitate future editions of this excellent guide.

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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. In Case C-358/08; *O’Byrne v Aventis Pasteur SA*, the ECJ said that the requirement is that “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.

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. In *Ministry of Defence v AB and others* [2012] UK SC9 (in the “Atomic Veterans” group litigation), the Supreme Court confirmed that view, 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 was 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 group litigation a judgment or order is binding on the parties to all claims that are on the group register at the time the judgment or order is made, unless the court orders otherwise.

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. 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 assessors have not 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 (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. It is unclear whether proposals made in 2009 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, will be pursued.

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 2010 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 50 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.

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 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).

4.12 In what factual circumstances can persons that are not domiciled in England & Wales, be brought within the jurisdiction of your courts either as a defendant or as a claimant?

The rules on jurisdiction in cases involving parties domiciled in the EU are governed by the Judgments Regulation, EC 44/2001, which provides that, in tort claims, a Defendant may be sued in the courts of the place where the tort occurred (article 5(3)), which may be either the place where the harmful event giving rise to the tort occurred, or the place where the damage occurred. In proceedings involving a number of parties, jurisdiction may also be established against a Defendant domiciled in another EU country if they are a proper defendant to proceedings brought in England and Wales against another party and the claims are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments arising from separate proceedings" (article 6(1)).

Where the claimants are non-EU, the English courts generally have jurisdiction to hear cases brought against persons domiciled in England. The courts no longer have discretion to refuse jurisdiction against such English Defendants on the ground that the courts in another jurisdiction would be a more suitable venue for the trial of the action (*Owusu v Jackson* [2005] ECR I-1383).

Proceedings may be brought in England and Wales by foreign claimants against English based corporations or bodies based on their actions or those of their subsidiaries in other jurisdictions. For example, group actions have been pursued in England in respect of actions arising from exposure in South Africa to asbestos mined or processed by an affiliate of an English company (*Lubbe v Cape Plc* [2000] 1WLR 1545); by a group of claimants from the Ivory Coast against a British based oil trader, *Trafigura*, for damage allegedly caused by the dumping of toxic waste and by a group of Bangladeshi villagers against The Natural Environment Research Council, a British organisation which allegedly conducted a negligent survey, in respect of damage arising from contaminated ground water (*Sutradhar v Natural Environment Research Council* [2006] UKHL 33).

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. Knowledge of attribution may be established where a Claimant's subjective belief that his injury is capable of being attributed to the breach of duty/defective product is held with sufficient confidence to make it reasonable for him to begin to investigate whether he has a valid claim (*Ministry of Defence v AB and others* [2012] UK SC9). The court has a discretionary power to disapply this time limit where it would be equitable to do so. In doing so it can take into account the merits of the case and whether the claim has a reasonable prospect of success (Ministry of Defence case above).

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 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. In *Johnston v NEI International Combustion Limited and Others* [2007] UKHL 39, 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. The injury was not a foreseeable consequence of the Defendant's fault/defect and, therefore, the Defendant did not owe a duty of care to the Claimant.

The courts have also 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 the *Johnston* case (see above) 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.

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 general rule is that the unsuccessful party pays the legal costs of the successful party, (including expert fees and other incidental expenses such as court fees). However, the assessment of costs is a matter for the court's discretion and 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. If the amount of costs cannot be agreed between the parties it will be assessed by the court to determine if the sums claimed are reasonable and proportionate; costs are commonly discounted (sometimes by up to one third) on assessment.

Where a party makes an offer to settle which meets certain procedural requirements (a "Part 36 offer") and this is not accepted by the other party in satisfaction of the claim, unless that other party achieves a better result at trial he may become liable for all costs incurred after the offer was made, payable on an indemnity basis, and interest on the value of the claim payable at an enhanced rate.

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] Lloyd's 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.

Where Claimants are publicly funded through legal aid, costs will only be enforced against them in exceptional circumstances, as a Claimant will 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 successfully defending 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.

The Legal Aid, Sentencing and Punishment of Offenders Bill, which is currently being debated by the UK Parliament, will introduce significant changes to the rules on costs and funding, in particular regarding Conditional Fee Agreements (CFAs), the recoverability of After the Event (ATE) insurance premiums and the legalisation of a form of contingency fees described as Damages Based Agreements (DBAs - see the answer to question 7.3). As part of its package of measures, the Government has also proposed the introduction of Qualified One-way Cost Shifting (QOCS) in personal injury cases. It is anticipated that this proposal will be introduced by means of secondary legislation and the Civil Justice Council ("CJC") has set up a working party that will develop practical proposals to assist with its implementation.

Where QOCS applies, there would be a presumption that the Claimant would not be liable for the Defendant's costs if the claim fails, unless the Claimant had acted fraudulently or 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 costs protection afforded to legally aided Claimants. One-way costs shifting could enhance Claimants' lawyers' ability 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.

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?

Legislation is currently being debated by the UK Parliament which will significantly restrict the availability of public funding. The current legal regime is set out below, but substantial changes are likely to be implemented during 2013.

Under the current regime, civil legal aid is only available to fund advice on certain types of issues including family law, immigration and asylum, social welfare, mental health, disputes with public authorities such as the police, claims for clinical negligence, and cases involving a 'wider significant public interest'. It is not generally available to fund general contractual or tortious claims, including personal injury claims. Legal aid will also be refused if alternative funding is available, for example if the view is taken that the claimant's case can be pursued under a CFA.

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. Legal aid funding will be refused for low value claims (where the damages are likely to be £5,000 or less) pursued as part of a group action unless they relate to certain allegations of serious wrongdoing by public authorities (such as abuse of children or vulnerable adults) or are selected as test cases or lead claims. In these circumstances the other low value claims which are part of the overall cohort of group claims must be funded by other means, usually under a CFA.

Funding may also 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 Legal Services Commission (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.

The effect of these rules is that public funding is only available to pursue product liability actions in strictly defined circumstances. However, as indicated above, draft legislation (the Legal Aid, Sentencing and Punishment of Offenders Bill) currently being debated by the UK Parliament, is likely to restrict further the availability of public funding. The Bill 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 this change is that public funding would no longer be available to pursue complex product liability claims. The legislation is expected to be implemented during 2013.

As part of the consultation process which led up to the Bill, alternative means of funding legal aid were proposed, for example, by setting up a Contingency Legal Aid Fund funded by interest earned on lawyers' general client accounts, or by a levy on the damages awarded to successful legally aided claimants. However, it appears that such changes do not form part of the Government's current plans and are not likely to be implemented in the short term.

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

Yes, under current rules funding is available through CFAs, but contingency fees are not permitted. However, the Legal Aid, Sentencing and Punishment of Offenders Bill, if enacted in its present form, will make significant changes to these arrangements and in particular, permit Damages Based Agreements, a form contingency fee.

There are broadly 2 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 the costs recoverable against the unsuccessful party are increased in return for accepting no fee 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” 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 are currently recoverable in addition to legal costs, where a party with the benefit of a CFA successfully pursues or defends an action although, again, the Bill will change these arrangements.

The Bill proposes that:

- (1) Damages Based Agreements will 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 success fee will no longer be recoverable from the unsuccessful Defendant and this will be paid by the Claimant out of the damages he recovers; and
- (3) ATE insurance premiums will no longer be recoverable from unsuccessful Defendants, save in certain circumstances for premiums to cover the risk of having to pay the opposing side’s costs relating to expert reports in clinical negligence cases.

Further changes will be introduced by means of secondary legislation. Additional measures proposed in the Government’s report “Reforming Civil Litigation Funding and Costs in England and Wales - Implementation of Lord Justice Jackson’s Recommendations” include:

- (1) Non-pecuniary general damages will be increased by 10% in tort cases for all claimants.
- (2) In personal injury claims the success fee or percentage of damages payable under both CFAs and DBAs will be capped at 25% of damages, other than those for future care and loss. In other cases a success fee of up to 100% of base costs can be negotiated.
- (3) Qualified One-way Cost Shifting will also be introduced in personal injury claims (see the answer to question 6.1 above).

Some commentators have raised concerns that it will be uneconomic to pursue complex personal injury claims under these proposals, and it remains to be seen whether alternative arrangements (e.g. no cap on a percentage of damages, or a higher cap) will be permitted for this type of claim when draft secondary legislation is published.

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. 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).

A voluntary “Code of Conduct for the Funding by Third Parties of Litigation in England and Wales” has been agreed by members of the Association of Litigation Funders and sets out standards of practice and behaviour for members.

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 800 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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