GETTING THE DEAL THROUGH

Product Liability

in 37 jurisdictions worldwide

2009

Contributing editors: Harvey L Kaplan and Gregory L Fowler

Published by
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Contributing editors
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Gregory L Fowler
Shook Hardy & Bacon LLP

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Joseph Samuel

Marketing managers
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Robyn Hetherington
Dan White
Tamzin Mahmoud
Elle Miller

Marketing assistant
Ellie Notley

Subscriptions manager
Nadine Radcliffe
Subscriptions@GettingTheDealThrough.com

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Sara Davies
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Editor-in-chief
Callum Campbell

Publisher
Richard Davey

Product Liability 2009
Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910

ISSN 1757-0786

Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

Law Business Research

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England & Wales

Simon Castley and Aaron Le Marquer
Shook, Hardy & Bacon International LLP

Civil litigation system

1 The court system

What is the structure of the civil court system?

Civil claims in England and Wales are brought in the County Court (where the value of the claim is below £15,000, or £50,000 for personal injury claims) or the High Court (for all other claims).

Appeals from the County Courts and High Court are heard by the Court of Appeal Civil Division. The court of final appeal in England and Wales is the Appellate Committee of the House of Lords, although this will be replaced by a new UK Supreme Court in October 2009.

2 Judges and juries

What is the role of the judge in civil proceeding and what is the role of the jury?

The court system is an adversarial one, each party usually being represented by an advocate and most civil cases being heard by one judge at first instance. There are no juries in civil cases except for claims in defamation, fraud, malicious prosecution or false imprisonment.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

Civil litigation is governed by the Civil Procedure Rules 1998 (CPRs). The CPRs are supplemented by a number of pre-action protocols that provide relatively detailed guidelines as to the actions required of the parties before proceedings are commenced.

The pre-action protocol for personal injury claims obliges claimants to send a sufficiently detailed letter of claim detailing the allegations made against the defendant before any proceedings are commenced. The defendant then has a period of three months to investigate before admitting or denying liability. If no response is received from the defendant, or liability is denied, the claimant is free to issue proceedings by filing and serving a claim form on the defendant. A defence dealing with each and every allegation must then be filed, generally within 14 days, although extensions of time are possible.

4 Trials

What is the basic trial structure?

The trial timetable will normally be agreed between the parties or set by the judge at a case management conference. Claims are allocated to 'tracks'. Small claims and fast-track claims will normally be listed for less than one day. Multi-track claims (claims of higher value or greater complexity of issues) will normally last longer, and a multi-party product liability trial could extend to a number of weeks.

Oral evidence is given by lay and expert witnesses for both parties, although each witness's evidence-in-chief will take the form of a written witness statement (or, in the case of expert witnesses, an expert report) which will have been filed in advance of the trial. Each party will have the opportunity to cross examine the opposition's witnesses at trial.

Legal advisers in England and Wales are split into solicitors and barristers. The division of responsibilities between these professions can be confusing, but in general the solicitors are instructed directly by the claimant or defendant from the start, and are responsible for managing the case and for communicating with the opposition's representatives. Barristers (usually referred to as 'counsel') are instructed by solicitors to undertake courtroom advocacy and to provide advice on specialist points of law.

5 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

A group litigation order (GLO) may be made by the court where a number of claims give rise to common or related issues of fact or law. The court then has a wide discretion to manage the claims as it sees fit. There is no opt-out class action mechanism in England and Wales, and a GLO serves only to bring together individual claims litigated in their own right. Any further claimants wishing to join the GLO will still need to issue their own proceedings.

There is currently a limited right for designated consumer bodies to bring representative actions on behalf of consumers in competition (antitrust) claims only. The Civil Justice Council has recommended, in a report published in December 2008, that a generic collective action be introduced which would enable any type of claim, including product liability actions, to be brought on an 'opt-in' or 'opt-out' basis. The recommendations are wide ranging, and it remains to be seen whether the government will take any action to implement any or all of them. In late 2008 The European Commission also published a Green Paper on Collective Redress, in which a number of options for improving access to justice for consumers by the implementation of EU-wide collective actions are discussed.

6 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

This will vary widely depending on the complexity of the issues at stake and the attitude of the parties. The CPRs, which govern all civil litigation in England and Wales, place great emphasis on settlement of

claims before trial, but a complex product liability action that does proceed could easily take several years to reach trial.

The length of the trial is again determined by the complexity of the issues and the amount of evidence to be heard. Whereas a relatively straightforward individual product liability claim with minimal expert evidence might be disposed of in one day or less, a trial of a group claim with complex legal, technical and procedural issues may run to a number of weeks.

Evidentiary issues and damages

7 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

Disclosure is governed by the CPRs, which dictate that each party must disclose a list of those documents in his control upon which he relies, as well as those which adversely affect his own case, and which support or adversely affect the other party's case. Disclosure takes place at a relatively early stage of proceedings after service of pleadings. Both parties are under a duty to conduct a reasonable search for disclosable documents, and this duty is a continuing one which both parties must have regard to at all stages of proceedings, up to and including trial.

Some pre-action protocols (eg, that for personal injury) provide for early disclosure of documents before proceedings have been issued, and mechanisms also exist for a party to apply to the court for an order for pre-action disclosure in other cases where such an order might help to settle or dispose of the claim fairly and efficiently.

8 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by opposing party?

Witness evidence is presented in the first instance in the form of a written witness statement which will have been disclosed to the other party prior to the trial. This will stand as evidence-in-chief of each witness.

In the courtroom witnesses will be asked to confirm the contents of their witness statements, before being cross-examined by the advocate of the opposing party.

9 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

The court does have powers to appoint experts although in practice these are seldom if ever used in product liability cases. It is, however, normal for the court to make use of its discretion to allow or restrict the use of expert evidence by the parties. The court may allow each party to instruct its own expert in a given field, or it may order that a single joint expert is appointed. In either case, the expert's duties lie to the court, not to the instructing party, and all expert evidence is in theory therefore considered to be independent.

Where each party has instructed its own expert, the normal practice will be to exchange expert reports at an early stage. Each party then has the opportunity to put questions to the other party's expert, and the experts will normally then meet and produce a statement for the court identifying those issues which are agreed between the experts, and those which are in dispute. If the expert evidence is to be relied upon by the parties, each expert will be cross-examined at trial by the opposing party's advocate.

10 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Strict liability claims under the Consumer Protection Act 1987 (see question 16) may be made for damages in respect of personal injury (both bodily and mental where a medically recognised psychological illness has been caused), and in respect of damage to property (subject to a de minimis claim of £275). No claim may be made under the Act for damage to the product itself.

Claims in negligence and contract may similarly be made for damages in respect of personal injury and property damage, although they will be subject to considerations of remoteness and contractual exclusion or limitation. Damages in contract may include the recovery of the cost of damage to the product itself.

11 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

In practice, damages awarded are virtually always calculated on a compensatory basis. Exemplary and aggravated (punitive) damages are available only in very limited circumstances in England and Wales and will only be awarded at the discretion of the court.

Litigation funding, fees and costs

12 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

Legal aid is available in England and Wales via the Legal Services Commission, although the accessibility of public funding has been much restricted in recent years, and is currently not available to fund general personal injury claims arising out of negligence or breach of a duty.

Major reforms to the system are currently under consultation, but in their present form these will not alter the availability of public funding to product liability claimants.

13 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party funding of litigation has historically been disallowed in England and Wales by the common law doctrines of maintenance and champerty. Recent developments have, however, seen the courts relax their approach to third-party funding in certain circumstances and such funding is now widely available. Indeed a number of commercial parties are reportedly in the process of setting up investment funds with the express purpose of funding litigation with a view to sharing in any awards made by the court to successful claimants.

The third-party funding model is mostly used in certain commercial and insolvency disputes, but depending on its success and popularity, there is likely to be an appetite among the claimant lawyer community to seek to widen its application to multi-party actions which have the potential to present a highly profitable proposition to third party funders.

The Civil Justice Council has recommended that consideration be given to creating a statutory basis for third-party funding as an alternative to public funding or contingency or conditional fees, and this is an issue which is likely to be instrumental in shaping the future litigation culture in England and Wales.

14 Contingency fees

Are contingency or conditional fee arrangements permissible?

Conditional fee arrangements (CFAs) are presently permissible in England and Wales, whereby lawyers act on a 'no win, no fee' basis in return for an uplift of up to 100 per cent on their fees in the event of a successful claim. This has to some extent taken the place of legal aid in providing access to justice to potential claimants who are unable to fund their own claims. Contingency fees on the other hand, whereby lawyers share in any damages awarded to their clients, are currently not allowed.

The existence of a CFA must be notified to the other party at an early stage of proceedings in order for the lawyer's success fee to be recoverable from the losing party under the loser pays rule.

In November 2008 the Civil Justice Council published the results of a study into the operation of contingency fees in the US. The report concluded that contingency fees could operate effectively in the UK should the need arise to introduce them, but stopped short of a firm recommendation that a contingency fee mechanism be introduced. It remains to be seen whether the government will take any action in this regard.

15 'Loser pays' rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

The basic rule in England and Wales is that the losing party will be ordered to pay the reasonable costs of the successful party. The court has wide discretion to vary this rule in awarding costs to either side, and will take into account the compliance of each party with the CPRs, as well as their general conduct in the litigation.

As a general rule any step taken by a party that unnecessarily incurs or increases costs is likely to result in an adverse costs award against that party to the extent that the costs have been unnecessarily incurred or increased.

Where a claimant is funded by a CFA (as described above) he will usually purchase an 'after-the-event' insurance policy to cover himself for liability for the other side's costs in the event that the claim is unsuccessful.

Sources of law

16 Product liability statutes

Is there a statute that governs product liability litigation?

Strict liability for product liability claims in England and Wales is imposed by the Consumer Protection Act 1987 (CPA), which implemented the European Product Liability Directive (85/374/EEC). Under the CPA a producer is liable for damage caused by defective products, ie, those products that are not as safe as 'persons generally are entitled to expect'. The claimant does not need to show any fault on the part of the producer, only the presence of the defect and a causal link between the defect and the damage.

17 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Claimants may also bring a claim in tort (negligence) or contract.

In order to establish a negligence claim, claimants must show that the defendant (usually the manufacturer) owed a duty of care to the claimant (there is an established duty between manufacturers and consumers at common law in England and Wales), that the duty was breached and that the breach caused damage to the claimant's person or property.

A claim in contract can only be brought against the party who supplied the defective product to the claimant (as the only party with whom the claimant has a direct contractual link). The claimant would usually rely on a term implied by statute into the contract for sale that the goods would be of satisfactory quality and reasonably fit for the purpose for which they were supplied.

Product liability claims in England and Wales are commonly pleaded concurrently under the CPA, in negligence and in contract.

18 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

In England and Wales claimants can bring a claim for breach of statutory duty where it is clear that a statute is intended to create private rights for individuals, however there are no consumer protection statutes other than the CPA which give rise to such private rights in respect of product liability claims.

19 Criminal law

Can criminal sanctions be imposed for the sale or distribution of products determined to be defective?

The General Product Safety Regulations 2005 (GPSR), implementing the European Product Safety Directive (2001/95/EC), impose a duty on producers to place only safe products on the market, and additionally to notify the authorities where an unsafe product has been marketed.

Criminal sanctions are imposed on producers who breach their duties under the GPSR, which can include a fine up to £20,000 and imprisonment of up to 12 months.

20 Novel theories

Are any novel theories available or emerging for product liability claimants?

There are a number of developments emerging for personal injury and negligence claims in general, which may have relevance to future product liability cases. In particular, in October 2007 the House of Lords ruled in the case of *Rothwell v Chemical & Insulating Co Ltd* on the issue of whether pleural plaques constituted compensable damage in claims made by employees who had been negligently exposed to asbestos by their employers. Although the plaques were themselves asymptomatic, they evidenced a higher risk of developing other compensable diseases caused by exposure to asbestos (eg, mesothelioma and asbestosis). The claimants sought the costs of medical monitoring and distress caused by awareness of the increased risk. The House of Lords ruled that the plaques did not constitute damage for the purposes of negligence and were not therefore compensable, but made it clear that this decision would not necessarily apply to claims made in contract, for which proof of damage is not an essential element of a cause of action. Whether this may give rise to a new wave of medical monitoring or 'worried well' product liability claims in England and Wales remains to be seen.

In July 2008 the Ministry of Justice launched a consultation into the issue, and, depending on the outcome of the consultation there is a possibility that, as has already happened in Scotland, the government will legislate to provide compensation for pleural plaque sufferers, effectively overturning the decision of the House of Lords. The results of the consultation are yet to be published.

21 Product defect

What breaches of duties or other theories can be used to establish product defect?

In order to establish a product defect the claimant must show that the product is not as safe as persons generally are entitled to expect. When deciding whether a product meets such a standard of safety the court will take into account all the relevant circumstances, including:

- the manner in which the product was marketed;
- any instructions or warnings given with it;
- what might reasonably be expected to be done with it; and
- the time the producer supplied the product.

A product will not be judged to be defective merely because a product supplied at a later date by the same manufacturer has a higher standard of safety.

22 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

The claimant bears the burden of proving that the product is defective on a balance of probabilities (ie, it is more probable that the product is defective than not).

The burden of proof may be shifted to the defendant where certain statutory defences are raised (see paragraph 29).

23 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

Under the CPA a claimant may bring a claim against the producer of the product, any person who has held himself out to be the producer by applying his own name to the product ('own branders'), and any person who imported the product into the EU in order to supply it to others in the course of his business.

A claim in negligence may be brought against any defendant from whom the claimant can show he was owed a duty of care. This will normally include the manufacturer of the product.

A contract claim may only be brought against a defendant with whom the claimant has a direct contractual relationship. This will normally be the party that supplied the product to the claimant (who may or may not also be the manufacturer).

24 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

The claimant bears the burden of proof to show, on the balance of probabilities, that the defendant's defective product caused the damage in respect of which he is claiming.

The simple 'but for' causation test has recently developed into a more complex legal issue in a line of cases dealing with multiple potential causes of damage (eg, *Fairchild v Glenhaven*, *Barker v Corus*), but it remains to be seen whether these principles will be carried over to product liability cases.

25 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

Various post-sale obligations are imposed on producers by the GPSR. While parties will remain liable for damage caused by their defective products under the CPA and common law regimes described above, they may incur criminal sanctions (a fine of up to £20,000 and 12 months' imprisonment) for failure to comply with their obligations under the GPSR, which include providing warnings and information regarding risks posed by a product that are not obvious, taking appropriate measures (including recall if necessary) to ensure the continuing safety of consumers, and notifying the authorities where an unsafe product has been placed on the market.

Limitations and defences

26 Limitation periods

What are the applicable limitation periods?

Claims in negligence or contract must be brought within six years of the accrual of the cause of action (or the date of knowledge of the claimant if later), or within three years for personal injury claims.

Claims under the CPA must be brought within three years of the same date, and in any event within a long-stop date of 10 years from the date the product was first put into circulation.

The court has discretion to extend these periods, and in particular has shown willingness to do so in personal injury actions where the defendant has been unable to show that it would suffer any real prejudice from an extension of the three-year period.

27 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

The CPA provides a state-of-the-art defence to claims made under the Act. The burden lies on the defendant to show that the defect was not discoverable in the light of the scientific and technical knowledge at the time the product was supplied.

The defence is not available to a producer once the risk becomes known (or ought to be known) to the producer.

28 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with standards whether mandatory or voluntary does not provide a defence to a claim brought under the CPA, or in negligence or contract. Evidence of such compliance is likely however to be influential in determining whether a product is defective, or (in the case of a negligence claim) whether reasonable care was taken by the manufacturer.

It is a defence to a claim under the CPA if the producer can show that the defect arose as a *result* of compliance with a mandatory legal requirement under English or European law.

29 Other defences

What other defences may be available to a product liability defendant?

Other defences to claims made under the CPA include:

- that the product was not supplied by the defendant;
- that the product was not supplied in the course of a business; and

Update and trends

The current hot topics affecting product liability litigation are the procedural issues of funding and collective actions. The prohibitions against third-party funding and contingency fees, in the absence of any collective opt-in or opt-out mechanisms, have provided effective barriers to the bringing of frivolous or unmeritworthy claims. The relaxation of the rules on third-party funding, and the emergence of various recommendations for collective actions (both at UK and EU level) as well as the contemplation of contingency fees in the UK, could all act together to dramatically alter the product liability litigation landscape in England and Wales. Much will depend on the government's response to recommendations and pressure from various quarters over the coming year.

- that the defect did not exist at the time the product was supplied.

In negligence it is a defence if the defendant can show that the claimant freely and voluntarily assumed the risk of injury, in the full knowledge of the nature and extent of the risk.

Allegations of contributory negligence may be raised to claims made both under the CPA and in negligence.

Jurisdiction analysis

30 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability law in England and Wales is a developed body of law, with strict liability imposed by the CPA 1987 and a comprehensive product safety regime provided by the GPSR 2005. Any limitations in access to redress for consumers lie primarily with funding issues that affect the litigation culture in England and Wales generally, not just those claims arising in product liability. In the absence of any opt-out class action mechanism or the ability of lawyers to accept contingency fees, the loser-pays rules provide a powerful disincentive to individual claimants to bring claims against large organisations that are perceived to have deep pockets and access to limitless legal resources.

31 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

Restrictions on funding have meant that there have been few high-profile product liability cases in England and Wales in recent years. However, as the funding environment continues to develop in the light of European and UK proposals on group actions, and the relaxation of the rules relating to third-party funding, it may be that claimants attempt to import recent developments in general personal injury and negligence law (see the *Rothwell*, *Fairchild* and *Barker* cases referred to above) into the product liability arena. None of these issues has yet had any effect on the frequency or nature of product liability cases in England and Wales, but should the government proceed to take action in accordance with the recommendations discussed above, this is likely to be reflected in both an increased number of product liability cases launched, and a shift in the nature of those cases (for example group actions representing a large class of claimants whose individual loss is too small to merit a claim by itself).

32 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

England and Wales has a relatively high level of 'consumerism' in comparison with other EU states, and the Middle East, Africa and Asia, although a relatively low level of claims for personal injury damage in comparison with the US.

However, consumers in the UK are more likely to seek redress via insurance, warranties, consumer organisations or ombudsman-type services than via litigation, owing both to the disincentives provided by the funding and costs regime, and a general cultural disinclination towards litigation.

The culture both in the UK and EU-wide is currently shifting to a greater emphasis on consumer protection via access to justice, and it may be that this is reflected in measures that will encourage greater use of product liability litigation to redress perceived wrongs in future years.

Shook, Hardy & Bacon International LLP

Simon Castley **scastley@shb.com**

25 Cannon St
London EC4M 5SE
United Kingdom

Tel: +44 20 7332 4500
Fax: +44 20 7332 4600
www.shb.com

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PRODUCT LIABILITY 2009 ISSN 1757-0789