



**British Institute of  
International and  
Comparative Law**

# Product Liability Forum Annual Review 2020

Product Liability Forum

## Product Liability Forum : Annual Review 2020

**Director:** Duncan Fairgrieve

<http://www.biicl.org/plf>

The objective of the Product Liability Forum is to allow for the practical application of policy and developments in product liability and safety law to be considered by leading lawyers in private practice, industry, academia, regulatory bodies and senior business managers, consumer representatives, public servants, public affairs professionals and other specialist practitioners. Its role is to analyse and improve the conduct of policy and practice in the spheres of product liability, product safety and mass torts.

The academic credentials of the Product Liability Forum set it apart from other bodies. It is not designed as a lobby group, nor is it to be identified with any particular perspective or sector. Mr Justice Burton, who gave judgment in the leading decision on product liability in *A v National Blood Authority*, has written that:

*'The British Institute of International and Comparative Law has been in the forefront of debate in the field of product liability, organizing conferences from which no self-respecting practitioner or academic in the area could afford to be absent.'*

(In Duncan Fairgrieve, *Product Liability in Comparative Perspective* (CUP, Cambridge, 2005)).

### Members of the Product Liability Forum include:

Addleshaw Goddard LLP	A&L Goodbody LLP
Arnold & Porter LLP	Arthur Cox
Burness Paull LLP	Cooley LLP
Crown Office Chambers	Freshfields Bruckhaus Deringer LLP
Geldards LLP	Henderson Chambers
Herbert Smith Freehills LLP	Hogan Lovells LLP
Kennedys LLP	Leigh Day
Mason Hayes & Curran LLP	Matheson
McCann FitzGerald	Serjeants' Inn Chambers
Shook Hardy & Bacon LLP	Signature Litigation
Taylor Wessing LLP	
Duniya Okada	Marcus Pilgerstorfer QC, 11 KBW

## **Honorary Members:**

Professor Richard Goldberg  
Professor Geraint Howells  
Professor Eleonora Rajneri  
Professor Erdem Bueyueksagis

## **Benefits of Membership**

- An invitation to exclusive Forum events. These are CPD-accredited.
- Access to a web-based database of legislation and judicial decisions on product liability, which is regularly updated, authoritative and user-friendly, including analysis from a Europe-wide network of academics and practitioners. Members of the Forum are allowed exclusive access to the legal materials (statutes, regulations, decisions etc) in their original language, and in a translated summary. Exclusive access is granted to Members for access to the analytical materials. The database covers all relevant legal sources applying to product liability in the relevant countries, whether that be legislation, regulations or case law. It is regularly updated whenever new information becomes available. National experts alert the team of new developments within their country.
- The opportunity to participate in an independently-run Forum that aims to influence policy and which provides an arena for ongoing and constructive debate with regulators and other decision-makers.
- The opportunity to act as speakers at both PLF and public events.
- Designated PLF representatives able to attend public BIICL standard evening events (2-3 hours) free of charge. Attendance to all other public events (such as half-day and day conferences) at a preferential rate.

## **Product Liability Research**

The status of the Product Liability Forum as a leader in the product liability and safety area has been recognized by the European Commission which has regularly requested our participation in the review process of the Product Liability Directive, including the 4<sup>th</sup> (2011) and 5<sup>th</sup> (2018) European Commission Reviews. In the current Review of the Product Liability Directive, the Product Liability Forum was asked by the European Commission to participate in their Fifth Review of the Directive, and the PLF was duly involved with that process, liaising with the Commission's contractor EY Law, facilitating the involvement of the PLF members in the review process, and organising a joint stakeholder meeting with the European Commission in June 2017. Duncan Fairgrieve's work on Product Liability, and assistance in compiling the resultant report, was acknowledged and referenced in the Evaluation Report produced by EY for the purpose of the European Commission's Fifth Report, entitled the *Evaluation of Council Directive 85/374/EEC on the approximation of laws, regulations and administrative provisions of the Member States concerning liability for defective products* (2018).

## **European Commission's Expert Group on Product Liability**

Duncan Fairgrieve was appointed in May 2018 to the European Commission's Expert Group on Product Liability. This is a prestigious appointment, as the Group is responsible for reviewing the operation of the Product Liability Directive and in particular to assist the Commission in drawing up guidance on the Product Liability Directive to facilitate its use in practice. Regular meetings have taken place during 2019, and work has been progressing on the drafting of the Guidance. We await now developments with the new Commission, including a possible amendment of the PLD.

## **Product Liability Research**

Various research has been undertaken this year on product liability related topics (see also publications below).

Duncan Fairgrieve has also completed a major research project resulting in the publication of the book *Product Liability* (Oxford University Press, 3rd Edition, 2020), 1112 pages (see further below).

In respect of the COVID-19 crisis, Duncan has undertaken research with Pr. Geraint Howells and Marcus Pilgerstorfer QC on the topic of emergency products with a research paper published on SSRN, and which has now appeared in *European Journal of Risk Regulation*.

## **Product Liability Database**

The Forum continues to run an innovative web-based database of legislation and judicial decisions on product liability, aiming to bring together selected judgments under the European Product Liability Directive. Each country report includes an analysis of domestic tort and contract law, the relevant procedural background, as well as the implementation of the Directive. This is then supplemented by case reports of the major decisions in the country under the implemented Directive. Commentary on each decision is provided by a team of national experts drawn from both academia and practice. This is a major research effort; no similar tool exists. This database is viewable from the PLF webpage (members' access only): <http://www.biicl.org/plf/database>

## **Forum Events**

Over the past year, a number of seminars and webinars have been organized under the aegis of the Forum, bringing together practitioners, academics and policymakers to examine the practical application of policy and developments in product liability and safety law.

During 2019 / 2020, we have welcomed many guest speakers from the UK and abroad, including the following distinguished speakers:

- **public sector and the judiciary** : Mrs Justice Cockerill, John Wilkinson, formerly Head of Devices, MHRA; Patrick Coupeaud and Christian Wiest, Judges at the Paris Commercial Court (Tribunal de Commerce de Paris).

- **academia** : Pr. Jean-Sebastian Borghetti, Paris II ; Professor Rachael Mulheron, Queen Mary University of London; Alexandra Sinclair and Dr Joe Tomlinson, Public Law Project; Professor Eleonora Rajneri, University of Eastern Piemont.
- **distinguished foreign colleagues** : Me Sylvie Gallage-Alwis, Signature Litigation Paris; Christophe Schmon, Beuc Brussels ; Brian Johnston, Mason Hayes & Curran; Jeff Bucholtz of King & Spalding (Washington DC) ; Mark Behrens and Phil Goldberg, Shook Hardy Bacon, Stijn Franken, Nauta Dutilh ; Alice Decramer, Signature Litigation Paris; Tom Sullivan Shook Hardy Bacon; Andrew Chamberlin, Ellis & Winters LLP ; Tripp Haston, Bradley LLP, US, Amy Sherry Fischer, Foliart Huff Ottaway & Bottom, and Elodie Valette, White & Case Paris.

The following PLF seminars have taken place this year:-

**19 June 2019. PLF event on Wednesday 19 June 2019 (17.00 - 19.30) on the topic of the ‘New Regulatory Landscape for Products post-Brexit.’** The event was run jointly with the MHRA and the Public Law Project, and brought together leading experts to examine the recent products-related Statutory Instruments and their impact on the regulation of products post-Brexit in spheres such as medicines (Human Medicines (EU Exit Regulations) 2019), chemicals (REACH etc (Amendment etc) (EU Exit) Regulations 2019), and general products (Product Safety and Metrology (Amendment etc) (Eu Exit) Regulations 2019). Speakers included Alexandra Sinclair and Dr Joe Tomlinson, Public Law Project, on the Brexit Statutory Instruments; Sam Rose, Which?, on the product safety regime post-Brexit; Katie Vernon, Hogan Lovells on the regulation of chemicals post-Brexit; Jacqueline Mulryne, Arnold Porter on the Medicines perspective; John Wilkinson, MHRA.

**16 October 2019. PLF event on Domestic Appliances and Product Liability.** The event focussed on the regulatory and litigation environment for white goods as well as the impact of AI and other challenges for industry. Speakers were Pierre Chalançon, Home Appliance Europe and Vorwerk; Christophe Schmon, Beuc Brussels, and Me Sylvie Gallage-Alwis, Signature Litigation Paris.

**23 January 2020. PLF event on Toxic Torts and Emerging Risks.** The event was run jointly with the IADC, and focussed on current regulatory and litigation patterns in respect of toxic torts and related risks around the globe. Speakers included Mark Behrens and Phil Goldberg, Shook Hardy Bacon, Stijn Franken, Nauta Dutilh and Sylvie Gallage-Alwis, Signature Litigation Paris.

**4 May 2020. PLF webinar on Emergency Products and Products Liability.** Speakers included Pr. Geraint Howells, Marcus Pilgerstorfer QC, Dr Peter Feldschreiber, Jeff Bucholtz of King & Spalding (Washington DC), Pr. Jean-Sebastian Borghetti, Paris II, John Wilkinson (formerly MHRA) and Pr. Eleonora Rajneri (University of Piemontonti Orientale).

## Public Events

**16 May 2019. Merricks v MasterCard: Collective Actions Reinvigorated.** This event analysed the decision of the Court of Appeal overturning the Competition Appeals Tribunal's decision in the collective proceedings *Merricks v MasterCard*. While the judgment does not solve all of the

problems with the collective proceedings regime, it can be expected to breathe new life into a regime, which has yet to prove its worth in practice. In the Chair was Dr Liza Lovdahl-Gormsen, British Institute of International and Comparative Law. Speakers included Professor Rachael Mulheron, Queen Mary University of London; Noel Dilworth, Henderson Chambers; Tristan Jones, Blackstone Chambers; and Anthony Maton, Hausfeld.

**3 March 2020. Bringing Claims for Mass Data-Breaches.** In the Chair, Diana Wallis. Speakers included Adam Rose, Mishcons; Brian Johnston, Mason Hayes & Curran; Neil Purslow, Therium and Kimela Shah, Oxera Consulting.

**8 April 2020. Webinar on Force Majeure and Hardship in Commercial Contracts : cross-border and comparative perspectives.** Speakers includes Alice Decramer, Signature Litigation Paris; Nicole Langlois, XXIV Old Buildings, and Tom Sullivan Shook Hardy Bacon.

**29 June 2020. Webinar on Virtual Justice in France, UK & US : Status & Challenges of Remote Hearings & Trials.** Speakers included Patrick Coupeaud and Christian Wiest, Judges at the Paris Commercial Court (Tribunal de Commerce de Paris), Andrew Chamberlin, Ellis & Winters LLP, US, Mrs Justice Cockerill, Ian Denham, Barrister, Outer Temple Chambers, London, Simon Ellis, Hugh James, UK, Fiona Gillett and Aleks Valkov, Stewarts, UK, Tripp Haston, Bradley LLP, US, Amy Sherry Fischer, Foliart Huff Ottaway & Bottom, and Elodie Valette, White & Case Paris

### Research activities

A number of books, journal articles and book chapters have been published recently :-

- Duncan Fairgrieve and Richard Goldberg, *Product Liability* (Oxford University Press, 3<sup>rd</sup> Edition, 2020), 1112 pages (<http://ukcatalogue.oup.com/product/9780199679232.do>)
- Duncan Fairgrieve, Peter Feldschreiber, Geraint Howells and Marcus Pilgerstorfer, “Products in a Pandemic : Liability for Medical Products and the Fight against Covid-19” (2020) *European Journal of Risk Regulation*, forthcoming.
- Duncan Fairgrieve and Nicole Langlois, “Frustration and Hardship in Commercial Contracts : A Comparative Law Perspective” (2020) *Jersey and Guernsey Law Review*, forthcoming.
- Duncan Fairgrieve, Joe Tomlinson, Jake Rylatt, “Panel Size Determination in the UK Supreme Court : A Critical and Empirical Analysis” (2020) 39 *Civil Justice Quarterly* 144.
- Duncan Fairgrieve, “Product Liability in the United Kingdom” *EuCML Journal of European Consumer and Market Law*, 4/2019, page 170.
- Duncan Fairgrieve and Eleonora Rajneri, “Is Software a Product under the PL Directive? Member State & Academic Perspectives” *IWRZ* 1/2019, page 24.
- Duncan Fairgrieve, “Reforming the European Product Liability Directive : Plus ça Change, Plus c’est la Même Chose?” (2019) *JPIL* 35.
- S.Taylor, M.Dyson and D.Fairgrieve, “Regards comparatifs sur les projets français et belges de réforme de la responsabilité civile : la perspective du droit anglais » in B.Dubuisson (ed) *La Réforme du Droit de la Responsabilité en France et en Belgique* (Larcier, 2020).
- Duncan Fairgrieve and Dan Squires QC, *Negligence Liability of Public Authorities* (Oxford University Press, 2nd edition, OUP, 2019) 950 pages.

### **Miscellaneous research projects**

In addition to the PLF projects mentioned above, we have undertaken a variety of other projects in related areas, including projects on product safety and Collective Redress :-

- Duncan Fairgrieve and Fulya Teomete undertook European Commission funded work for Implementation Report of the General Product Safety Directive with Civic Consulting.
- We have continued our work on Collective Redress, running a series of events (see above) and continuing the research project with the European Law Institute and the EU Fundamental Rights Agency. This project is entitled *Business and Human Rights: Access to Justice and Effective Remedies*, with project reporters Diana Wallis (ELI) and Jonas Grimheden (FRA). The aim of the project is to identify a range of draft EU regulatory and/or soft law options intended to increase access to remedies and ensure corporate human rights compliance and thus greater corporate social responsibility.