



**British Institute of
International and
Comparative Law**

Product Liability Forum Annual Review 2021

Product Liability Forum

Product Liability Forum : Annual Review 2021

Director: Duncan Fairgrieve

<http://www.biiicl.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
Hausfeld LLP	Henderson Chambers
Herbert Smith Freehills LLP	Hogan Lovells LLP
Kennedys LLP	Leigh Day
Mason Hayes & Curran LLP	McCann FitzGerald
Serjeants' Inn Chambers	Shook Hardy & Bacon LLP
Signature Litigation	Taylor Wessing LLP
12 King's Bench Walk	
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 4th (2011) and 5th (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 took place during 2019. The Commission has recently announced its intention to revise the Directive, and Duncan Fairgrieve has participated in recent stakeholder meetings.

Product Liability Research

Many research projects have been undertaken this year on topics relating to product liability and product safety (see also publications below). In particular, Duncan Fairgrieve completed last year a major research project resulting in the publication of the book, *Product Liability* (Oxford University Press, 3rd Edition, 2020), 1112 pages.

Under the auspices of the PLF, an important project has been undertaken this year to assess the impact of COVID-19 on emergency products in the medical sphere. This is a topical theme concerning important public health considerations, and involving the analysis of the law and regulation of products such as ventilators, medicines, medical devices, vaccines and related health products. A linked research project concerned the acceptability of Covid-19 vaccines. There have been a number of research outputs in respect of these projects, including :-

- Duncan Fairgrieve et al, **Response to Government Consultation** on modification of medicine licensing rules to support the rollout of COVID-19 Vaccines.
- **Briefing paper on bespoke compensatory scheme for possible adverse effects caused by a Covid-19 vaccine** : The paper can be downloaded [here](#)
- **Letter to the Editor, The Times**, 7 Dec 2020 concerning UK Government decision to extend the vaccine damages payment scheme, co-signed by Prof. Duncan Fairgrieve (BIICL), Prof. Geraint Howells and Prof. Søren Holm (School of Social Sciences, University of Manchester), Dr Samantha Vanderslott (Oxford Vaccine Group and Oxford Martin School, University of Oxford) and Dr Claas Kirchhelle (University College Dublin; Oxford Martin School University of Oxford).
- Duncan Fairgrieve, **The Uk Races to catch up on COVID-19**, The Regulatory Review, 30 April 2020.
- Duncan Fairgrieve, Geraint Howells and Marcus Pilgerstorfer, Responding to COVID-19 product risks: should Government focus on the manufacturer or the patient?, BIICL COVID-19 blog, 24 April 2020.
- **An article on Covid-19 vaccines & compensation** and entitled "In favour of a bespoke Covid-19 vaccines compensation scheme" was published in The Lancet on 3 February 2021 co-authored by Prof. Duncan Fairgrieve (BIICL), Prof. Geraint Howells and Prof. Søren Holm (School of Social Sciences, University of Manchester), Dr Samantha Vanderslott (Oxford Vaccine Group and Oxford Martin School, University of Oxford) and Dr Claas Kirchhelle (University College Dublin; Oxford Martin School University of Oxford).

- Professor Fairgrieve is also heading up an international research project on vaccine compensation schemes bringing together leading academic and practitioner experts from around the globe as well as representatives of WHO / COVAX vaccine programme.

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>

Product Safety Reform

In June 2021, the PLF made a submission to the UK Call for Evidence / Product Safety Review. This is part of the UK Government's ongoing review of regulatory and legislative reform in this area. Assisted by a working group of PLF members, as well as a network of international experts, we made a detailed submission on Product Safety & Product Liability issues. This paper included a comparative law section in the Appendix covering Australia, Canada, Hong Kong, Japan, Malaysia, and United States.

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 2020 / 2021, we have welcomed many guest speakers from the UK and abroad, including the following distinguished speakers:

- **public sector and the judiciary** : Anthony Brown, GAVI, The Vaccine Alliance ; Mrs Justice Cockerill; Patrick Coupeaud and Christian Wiest, Judges at the Paris Commercial Court (Tribunal de Commerce de Paris); John Wilkinson (formerly MHRA).
- **academia** : Prof. Christoph Busch, University of Osnabruck; Prof. Catherine Sharkey, New York University School of Law; Dr Samantha Vanderslott, Oxford Vaccines Group, University of Oxford; Dr Claas Kirchhelle, University of Oxford; Prof. Geraint Howells, University of Manchester; Prof. Søren Holm, Professor of Bioethics, University of Manchester; Rhonson Salim, Aston Law School; Prof. Maria José Azar-Baud, Université de Paris Sud; Prof. Ianika Tzankova, Tilburg University Netherlands; Prof. Jean-Sébastien Borghetti, Université Paris II (Panthéon-Assas); Prof. Samuel Dahan, Queens University Canada, Cornell Law School; Prof. Richard Goldberg, Durham Law School; Prof. Sam F.

- Halabi, University of Missouri and O'Neill Institute for National and Global Health Law, Georgetown University; Prof. Geraint Howells, NUI Galway and University of Manchester; Dr. Jennifer Keelan, University of Toronto; Prof. Eleonora Rajneri, University of Piementonti Orientale; Prof. Marco Rizzi, University of Western Australia; Prof. Normann Witzleb, The Chinese University of Hong Kong.
- **distinguished foreign colleagues** : Jeff Bucholtz of King & Spalding; Andrew Chamberlin, Ellis & Winters LLP, US; Alice Decramer, Signature Litigation Paris; Tom Sullivan, Shook Hardy Bacon; Tripp Haston, Bradley LLP; Amy Sherry Fischer, Foliart Huff Ottaway & Bottom; and Elodie Valette, White & Case Paris.

The following PLF seminars have taken place this year:-

4 May 2020 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 Piementonti Orientale).

22 September 2020 on the Cumberlege report and the impact on Product Liability litigation. Speakers included : Dr Sonia MacLeod, University of Oxford; Boz Michalowska, Leigh Day and David Body; Cécile Burgess, Addleshaw Goddard ; Aliyah Akram, 12 King's Bench Walk.

7 December 2020 on Compensation Schemes for COVID-19 vaccines: UK, comparative and international perspectives. Speakers included : Dr Samantha Vanderslott, Oxford Vaccines Group, University of Oxford; Dr Claas Kirchhelle, University of Oxford; Prof. Geraint Howells, University of Manchester; Prof. Søren Holm, Professor of Bioethics, University of Manchester; Adam Heppinstall, Henderson Chambers; Prof. Samuel Dahan, Queen's University Canada / Cornell Law School and Anthony Brown, GAVI, The Vaccine Alliance.

11 May 2021 on Applying Product Liability rules to online platforms. Speakers included : Prof. Christoph Busch, University of Osnabruck; Prof. Catherine Sharkey, New York University School of Law; Prof. Geraint Howells, NUI Galway and Visiting Professor of Commercial Law, University of Manchester.

Public Events

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

29 June 2020. 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, 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; Dr. Vanessa Wettner, WilmerHale Frankfurt.

3 February 2021. The Representative Actions Directive - a class action for Europe? Speakers included : Matthew Felwick and Valerie Kenyon, Hogan Lovells; Augusta Maciuleviciute, BEUC, Brussels; Neil Purslow, Therium Capital Management Ltd; Rhonson Salim, Aston Law School.

8 June 2021. Damages Claims for Mass Data Breaches: UK and European Perspectives. In the Chair was Anya Proops QC, 11 KBW. Speakers included Prof. Maria José Azar-Baud, Université de Paris Sud; French avocat; Adam Rose, Mishcon de Reya LLP; Prof. Ianika Tzankova, Tilburg University Netherlands; Birkway, Amsterdam; and Dr. Vanessa Wettner, WilmerHale Frankfurt.

6 July 2021. Covid-19 Vaccine Injury Compensation Schemes: Comparative Perspectives. Speakers included Prof. Jean-Sébastien Borghetti, Université Paris II (Panthéon-Assas); Prof. Samuel Dahan, Queens University Canada, Cornell Law School; Prof. Richard Goldberg, Durham Law School; Prof. Sam F. Halabi, University of Missouri and O'Neill Institute for National and Global Health Law, Georgetown University; Prof. Geraint Howells, NUI Galway and University of Manchester; Alex Forrest, Chubb; Dr. Jennifer Keelan, University of Toronto; Prof. Eleonora Rajneri, University of Piementonti Orientale; Prof. Marco Rizzi, University of Western Australia; Prof. Normann Witzleb, The Chinese University of Hong Kong.

Research activities

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

- Duncan Fairgrieve, Peter Feldschreiber, Geraint Howells and Marcus Pilgerstorfer QC, “Products in a Pandemic : Liability for Medical Products and the Fight against Covid-19” (2020) *European Journal of Risk Regulation*, 1 – 39.
- D.Fairgrieve et al, “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, “L’impact de la force majeure dans le common law?” *La Semaine Juridique, Entreprise et Affaires*, N° 30 - 23 July 2020, page 519.
- Duncan Fairgrieve and Nicole Langlois, “Frustration and Hardship in Commercial Contracts : A Comparative Law Perspective” (2020) *Jersey and Guernsey Law Review*.
- Duncan Fairgrieve, “Criminal and Civil Liability” in P.Cane, H.Hofmann, E.Ip and P.Lindseth *Oxford Handbook of Comparative Administrative Law* (OUP, 2020).
- Marta Santos Silva, Duncan Fairgrieve, Piotr Machnikowski, Jean-Sebastien Borghetti, Anne Keirese, Pedro Del Olmo, Eleonora Rajneri, Christoph Schmon, Vibe Ulfbeck, Vera Vallone and Hebert Zech, « Relevance of Risk-benefit for Assessing Defectiveness of a Product: A Comparative Study of Thirteen European Legal Systems” *European Review of Private Law* 1-2021 [91–132].
- Jean-Sebastien Borghetti, Duncan Fairgrieve, and Eleonora Rajneri, "La clause d'indemnisation contenue dans le contrat conclu entre la Commission européenne et AstraZeneca" *Dalloz* 2021.972.
- Duncan Fairgrieve, Søren Holm, Geraint Howells, Claas Kirchhelle, Samantha Vanderslott, “In favour of a bespoke COVID-19 vaccines compensation scheme” *The Lancet (Infectious Diseases)* 2021, [https://doi.org/10.1016/S1473-3099\(21\)00065-7](https://doi.org/10.1016/S1473-3099(21)00065-7).

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.