



**British Institute of
International and
Comparative Law**

Product Liability Forum Annual Review 2018

Product Liability Forum

Product Liability Forum : Annual Review 2018

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:

Arnold & Porter LLP	Arthur Cox
BLM	Burness Paull LLP
Freshfields Bruckhaus Deringer LLP	Geldards LLP
Henderson Chambers	Herbert Smith Freehills LLP
Hogan Lovells LLP	Kennedys LLP
Leigh Day	McCann FitzGerald
Outer Temple Chambers	Serjeants’ Inn Chambers.
Shook Hardy & Bacon LLP	Tripp Haston, Bradley, Arant, Boult,

	Cummings LLP
Gerard McDermott QC, Outer Temple Chambers	Duniya Okada
Marcus Pilgerstorfer, 11 KBW	

Honorary Members:

Professor Richard Goldberg
Professor Geraint Howells
Professor Mark Mildred
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 acknowledge 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 Expert Group on Product Liability

Duncan Fairgrieve was appointed in May 2018 to the European Commission's Expert Group on Product Liability, 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. The inaugural meeting took place on 8 June 18.

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 all judgments under the European Product Liability Directive in all the Member States. 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 all 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.biiicl.org/plf/database>

The PLF Database is now considered as an essential reference point for information on comparative product liability law. The Database has been drawn upon extensively in academic work, such as the leading commentary *The Law of Product Liability*, edited by Geraint Howells, and published by Butterworths (2nd edition, 2007).

Forum Events

Over the past year, a number of seminars 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 2017 / 2018, we have welcomed many guest speakers from the UK and abroad, including distinguished speakers from :

- **public sector and the judiciary** : Hans Ingels, DG for Internal Market, Industry, Entrepreneurship and SMEs, European Commission ; Professor Sir Alasdair

- Breckenridge (formerly Chairman of MHRA); Jonas Grimheden, European Union Agency for Fundamental Rights ; Michel Nussbaumer, European Bank for Reconstruction and Development (EBRD).
- **academia** : Professor Jane Stapleton, Christ's College, Cambridge ; Dr Matt Dyson, Corpus Christi College, Oxford; Diana Wallis, European Law Institute ; Professor Rachael Mulheron, Queen Mary University of London ; Dr. Veronika Efremova, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH; Dr. Neda Zdraveva, Associate Professor, "Iustinianus Primus Law Faculty" of the Ss. Cyril and Methodius University in Skopje, Macedonia
 - **distinguished foreign colleagues** : Christian Busca, EY Law, Milan; Tripp Haston, Partner and Co-Chair, Life Sciences Team, Bradley LLP; Maître Solenn Le Tutour, SRLT Avocats, Paris; Mark Behrens, Shook Hardy Bacon.

The following Forum seminars have taken place this year:-

15 February 2017. PLF Seminar on the High Court judgment of *Wilkes v DePuy*. The seminar covered a variety of themes relating to this topic, including issues such as risk-benefit analysis, relevance of avoidability, standards, regulatory compliance and learned intermediaries with Mr Justice Stuart-Smith in the Chair, and including speakers Dr Matt Dyson, Corpus Christi College, Oxford; Malcolm Sheehan QC, Henderson Chambers; Professor Jane Stapleton, Christ's College, Cambridge.

14 June 2017. PLF Seminar with the European Commission on Reviewing the Product Liability Directive. The seminar focussed on the Commission's current review of the Product Liability Directive, which includes a formal evaluation designed to examine the key features of the Directive -defect, product, defences etc- to determine whether they "are still fit for purpose", as well as whether the Directive is adapted to advances in technology. Speakers included Hans Ingels, DG for Internal Market, Industry, Entrepreneurship and SMEs, European Commission, who is leading the review of the Product Liability Directive, Christian Busca, EY Law, Milan; Mark Behrens, Shook Hardy Bacon; Rod Freeman, Coolley LLP; Marcus Pilgerstorfer, 11 KBW.

26 September 2017. PLF Seminar with IADC on Global Products Regulation : Towards Fragmentation. This evening event was run jointly with the IADC, which is an organisation bringing together counsel from the US and around the world. The seminar focussed on current litigation & regulatory patterns across the globe, taking products liability as a thematic example, to examine the recent trends, including Brexit-related topics. Speakers included Nathan Tavares of Outer Temple Chambers, who will address the topic of Brexit and Product Liability in the UK; Professor Sir Alasdair Breckenridge (formerly Chairman of MHRA) and Dr Peter Feldschreiber (formerly of MHRA, and barrister), who will look at the impact of Brexit on Medicines Regulation; Tripp Haston, Partner and Co-Chair, Life Sciences Team, Bradley LLP, & Donald (Fritz) Zimmer, King & Spalding LLP, two leading US litigators on products liability and mass torts issues.

26 March 2018. PLF Seminar on Funding Product Liability & Group Claims. This event brought together funders & international speakers to consider the topical issue of the funding of product liability and group litigation across Europe and beyond. Speakers included Susan Dunn, Harbour Litigation Funding; Joanna Fulton, Burness Paull LLP; Maître Solenn Le Tutour, SRLT Avocats, Paris; Boz Michalowska, Leigh Day.

Public Events

Collective redress procedures in human rights claims against businesses. 8 November 2017. This event was run jointly with the European Union Agency for Fundamental Rights and the European Law Institute focussing on the role of collective claims in business and human rights litigation, examining the recent developments in this sphere and covering substantive law, procedural issues and practical topics such as funding and costs. It is part of BIICL's ongoing projects on collective redress as well as business and human rights. The event was chaired by Diana Wallis, European Law Institute. Speakers included Deba Das, Freshfields Bruckhaus Deringer; Jonas Grimheden, European Union Agency for Fundamental Rights; Daniel Leader, Leigh Day; and Professor Rachael Mulheron, Queen Mary University of London.

17 May 2018. Collective Redress in the EU, Central & South East Europe. This event took the recent developments at an EU level in respect of Collective Redress mechanisms as the context for examining the development of mechanisms for resolving mass disputes in the regions of Central Europe and South East Europe. This event was organised jointly with the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe - Legal Reform. In the chair was Michel Nussbaumer, European Bank for Reconstruction and Development (EBRD). Speakers included Andrew Austin, Partner, Freshfields Bruckhaus Deringer; Dr. Veronika Efremova, Senior Project Manager, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Open Regional Fund for South East Europe - Legal Reform; Dr. Neda Zdraveva, Associate Professor, "Iustinianus Primus Law Faculty" of the Ss. Cyril and Methodius University in Skopje, Macedonia; and Rhonson Salim, British Institute of International and Comparative Law; The Open University.

Research activities

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

- D.Fairgrieve et al, "Product Liability Directive" in P.Macnikowski, *European Product Liability : An Analysis of the State of the Art in the Era of New Technologies* (Intersentia, 2017).

- R.Weaver, S.Friedland, A.Raynouard and D.Fairgrieve, *Cybersurveillance in a Post-Snowden World : Balancing the fight against Terrorism against Fundamental Rights* (Carolina Academic Press, 2017).
- Duncan Fairgrieve and Marcus Pilgerstorfer, “European Product Liability after *Boston Scientific* : an Assessment of the Court’s Judgment on Defect, Damage and Causation” [2017] EBLR 879.
- Eleonora Rajneri, Jean-Sébastien Borghetti, Duncan Fairgrieve and Peter Rott, “Remedies for Damage Caused by Vaccines: A Comparative Study of Four European Legal Systems” (2018) *European Review of Private Law* 57 – 96.

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 Personal Injury and Collective Redress :-

- a high-profile project for the Ministry of Justice on the discount rate in personal injury awards, along with Dr Jean-Pierre Gauci, which was published as Duncan Fairgrieve and Jean-Pierre Gauci, *Briefing Note on the Discount Rate applying to Quantum in Personal Injury Cases : Comparative Perspectives* (Report published by Ministry of Justice). In the Government’s position paper on the topic, reference was made on several occasions to the BIICL study <https://www.gov.uk/government/consultations/personal-injury-discount-rate-how-it-should-be-set-in-future>. The Report was also referenced in several places by the Justice Select Committee in its Review of the proposed legislation : <https://publications.parliament.uk/pa/cm201719/cmselect/cmjust/374/37402.htm>
- We have continued our work on Collective Redress, running a series of events (see above) and undertaking two major research projects for the Collective Redress project, with **(i)** the German public body, the Gesellschaft für internationale Zusammenarbeit (GIZ) for the undertaking of comparative law research in relation to a selection of six key European Member States (Belgium, France, Germany, the Netherlands, Sweden and England / Wales) on the topic of Collective redress mechanisms in light of the European Commission Recommendation; and **(ii)** taking part in a consortium, in a European Commission project aimed at evaluating the Collective Redress mechanisms in light of the implementation of the Commission’s 2013 Recommendation on Collective Redress. The resultant report was published on the European Commission’s website, and [is available here](#).