



**British Institute of  
International and  
Comparative Law**

# Product Liability Forum Annual Review 2022

Product Liability Forum

## Product Liability Forum : Annual Review 2022

**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
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	Simmons & Simmons LLP
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 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 in that process, and the 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). Duncan Fairgrieve has been a long-standing member of the European Commission Expert Group on Product Liability, and the PLF has also been involved in the ongoing revision of the Product Liability Directive, with Duncan Fairgrieve participating in stakeholder meetings. Mr Mark Beamish, the European Commission official working on the revision participated in a PLF Meeting in March 2022.

## Product Liability Research

Many research projects have been undertaken this year on topics relating to product liability and product safety (see also publications below). Under the auspices of the PLF, an important project has been undertaken to assess the impact of COVID-19 on emergency products in the medical sphere, as well as the acceptability of Covid-19 vaccines. Another ongoing project has focused on the potential liability of online platforms, undertaken with PLF members as well as with foreign colleagues. 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](#)
- Duncan Fairgrieve, [The Uk Races to catch up on COVID-19](#), The Regulatory Review, 30 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).
- An article on the **Covid-19 vaccine supply contracts** published in the leading French law journal, Dalloz : 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.
- 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.

The following PLF seminars have taken place this year:-

**Event on 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.

**Event on 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.

**Event on 10 March 2022 on Reforming the Product Liability Directive,** with Mark Beamish, European Commission official responsible for the reform.

**Event on 11 July 2022 on Access to Justice in Products cases,** with panelists including Professor Rachael Mulheron (Queen Mary University of London) and Sarah Moore (Hausfeld).

## **Public Events**

**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.

**30 June – 1 July 2022. International Class Action Conference in Amsterdam,** in collaboration with the University of Amsterdam and University of Tilburg.

## **Research activities**

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

- 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).
- J-S.Borghetti et al ‘Procurement of Covid-19 vaccines: why were legal liabilities transferred to the public sector?’ *InDret* 2.2021, 364.
- D.Fairgrieve and F.Lichère, ‘Style and Form of Judgments in France : enter the Rapporteur public’ in Maren Heidemann (ed.) *The transformation of private law – Principles of Contract and Tort as European and International Law* (2022, Springer).
- D.Fairgrieve and R.Salim, ‘Collective Redress in Europe : Moving Forward or Treading Water’ (2022) *ICLQ* 465.

### **Miscellaneous research projects**

In addition to the PLF projects mentioned above, we have undertaken a variety of other projects in related areas, including a project on Collective Redress, participating in a 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. The final report was published as *Business and Human Rights: Access to Justice and Effective Remedies* (ELI, November 2022).