



**British Institute of  
International and  
Comparative Law**

# Product Liability Forum Annual Review 2019

Product Liability Forum

## Product Liability Forum : Annual Review 2019

**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	Bristows LLP
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
Matheson	McCann FitzGerald
Outer Temple Chambers	Serjeants’ Inn Chambers
Shook Hardy & Bacon LLP	Tripp Haston, Bradley, Arant, Boulton, Cummings LLP
Duniya Okada	Marcus Pilgerstorfer, 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 2018 & 2019, and work has been progressing on the drafting of the Guidance.

## **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.biicl.org/plf/database>

## **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 2018 / 2019, we have welcomed many guest speakers from the UK and abroad, including the following distinguished speakers:

- **public sector and the judiciary** : John Wilkinson, Head of Devices, MHRA; 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 Rachael Mulheron, Queen Mary University of London; Alexandra Sinclair, Public Law Project ; Dr Joe Tomlinson, Public Law Project; Professor Eleonora Rajneri, University of Eastern Piedmont; Dr. Veronika Efremova, Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH; Professor Dr Herbert Zech, University of Basel; Dr. Neda Zdraveva, Associate Professor, "Iustinianus Primus Law Faculty" of the Ss. Cyril and Methodius University in Skopje, Macedonia.
- **distinguished foreign colleagues** : Maître Solenn Le Tutour, SRLT Avocats, Paris; Professor Eleonora Rajneri, University of Eastern Piedmont.

The following PLF seminars have taken place this year:-

**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.

**16 October 2018. PLF Seminar on the decision in *Gee v Depuy*.** This event brought together domestic & international speakers to consider the important decision of Andrews J in the High Court in *Gee v Depuy International Ltd*. Speakers included Professor Eleonora Rajneri, University of Eastern Piedmont; Mark Chesher, Addleshaw Goddard LLP; and Gerard McDermott QC.

**30 January 2019. PLF event on the topic of “Is the Product Liability Directive Fit for Purpose: the Challenges of New technology.”** This event brought together domestic & international speakers to consider the challenges posed by new technology to the PLD. Speakers included Professor Dr Herbert Zech, University of Basel, a specialist in new technology and product liability issues and a European Commission Expert; Michaela Herron, Bristows; Rod Freeman, Cooley LLP; John Wilkinson, Head of Devices, MHRA; and Alex Forrest, Chubb Insurance.

**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.

## **Public Events**

**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.

**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.

## Research activities

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

- 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.
- 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.
- Duncan Fairgrieve, “Compensation for Vaccine Damage in the United Kingdom” (2018) 19 JDSAM page 87.
- Russell Weaver, Duncan Fairgrieve and Steve Friedland, (eds), *Administrative Law, Administrative Structures, and Administrative Decisionmaking* (2019, Carolina Academic Press).
- Duncan Fairgrieve and Dan Squires QC, *Negligence Liability of Public Authorities* (Oxford University Press, 2nd edition, OUP, 2019) 950 pages  
<https://global.oup.com/academic/product/the-negligence-liability-of-public-authorities-9780199692552?cc=gb&lang=en>

## 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 launching a new 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).