



## FOIL UPDATE 14<sup>th</sup> December 2021

# Product Liability Part II

*A review of current issues from the Product Liability Sector Focus Team*

This review, published in three parts, provides an update on a diverse range of topics relevant to those who practise, or have an interest in, product liability law.

We look at topics ranging from the practical (e.g., Brexit, S41 CPA) to the inspirational (genomics, vaccine compensation). We give thanks to guest authors from 39 Essex Chambers, Hawkins, and 1 Chancery Lane. Part I appeared on 18<sup>th</sup> November and is also available on the FOIL members' website and part III will be published next month.

To watch bitesize videos on each of these topics, please visit [Forum of Insurance Lawyers - YouTube](#)

#### **4. Vaccine Compensation Schemes: Will these help the global COVID-19 vaccine roll out?**

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Even a swift glance at the latest statistics shows the disparity in the rate of the COVID-19 vaccine rollout between different countries, raising the question as to why this is. From procurement disputes and supply delays, to a lack of trust within the public, part of the solution to address these reservations is the existence of a local compensation scheme.

The purpose of such a scheme is to assess claims by individuals who experience serious adverse impairments as a result of the vaccine and, upon proof of causation, receive a payment sum in recognition. We have



a well-established and recognised scheme in the UK as a result of the Vaccine Damages Act 1979 and concerns related to the Diphtheria vaccine. However, the vast majority of claims are refused because it can't be proved that the vaccine *caused* any disability experienced by the claimant. In fact, only 941 claims out of 6,352 applications have been successful.

Commentators call for a new bespoke scheme for COVID-19 in the UK. It should allow for compensation based on need (as opposed to a fixed sum), facilitate proving causation, and be more simple, swift and transparent. The UK scheme will sit amongst other no-fault compensation schemes across the globe, and now a scheme linked to the COVAX facility led by WHO, to ensure everyone has access to a vaccine. It is the first scheme of its kind, being open to 92 countries who have received a vaccine through the COVAX facility.

The COVAX scheme has a number of elements common to other such schemes such as rules on administration and funding; an eligibility criterion (serious bodily injury); elements of due process and decision making (a panel of 5 nurses); a required standard of proof (where the vaccine is the most probably cause of the injury on the balance of probabilities); rules on the compensation award based on each country, and restrictions on litigation rights once the payment is received.

As with any scheme, criticisms such as access to and knowledge of the scheme in low- and middle-income countries, and the hurdle of filling out of paperwork and providing evidence, can be expected. Despite this, the promoters of the Covax scheme must be applauded for their determination in getting this off the ground, and any initiative to promote a more positive uptake of the vaccine is welcomed to give a more open future.

## 5. User fault vs product fault: The case that nobody saw coming

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As a Chartered Mechanical Engineer, I investigate incidents to establish 'what went wrong', and it is certainly true that no two cases are the same. One of the more unusual cases I have investigated, is that of a collapsible picnic table. The claimant had suffered from a head injury and fractured wrist when the picnic table she was sat on, collapsed from underneath her, causing her to fall backwards. She was making a claim against the UK distributor for pain, suffering, headaches and memory loss.



When I went to examine the table in the claimant's home, I found that she had been working as a Psychic and used the table for her psychic readings with customers. The claimant explained that she liked to use a collapsible table because she didn't have much space in her living room, and it was useful to be able to fold the table away. At the time of the collapse, she had been sat on one corner of the table, getting ready for one of her readings. Upon examination, the table was made of plastic parts with an aluminium frame, and on the corner the claimant had been sat on, the legs had buckled and deformed inwards, and a hinge had started to tear.

These types of products rely on being erected properly, and an even weight distribution. When something goes wrong with one of these elements, it is either a user fault or a product fault. In this example, the damage to the table was consistent with overloading. It needed to be considered whether the materials were strong enough to hold a user's weight, or was the user above the maximum weight the table was designed to hold. It would be fair to say the claimant was a larger individual, however upon inspection of the instructions, there had been no maximum weight limit specified. With regard to weight, all that the instructions said was that the table was "suitable for children and *gentle adults*"!

As a technical expert, it wasn't my role to determine what a 'gentle adult' was, and neither party wished to argue what should fall into this definition, so the case ended up settling in favour of the claimant. This is an example of a case where it started to look like a user or product fault, but concluded over a specification within the instructions. This case is a reminder to always keep an open mind, and in the case of product failures, always read the instructions!

## 6. An introduction to product liability developments in the US and the effects of social inflation

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Product liability law in the US is a blend of Federal, State and Common Law. Against this background, the outcomes of product liability claims are unpredictable. The basis for proving a defect is the risk utility test, which requires a jury to "weigh the risks in the product against the ability of the manufacturer to reduce the risks".



Developments brought about by social inflation (steeply rising insurance rates due to social factors) have resulted in large awards becoming routine in product liability claims. The number of verdicts or settlements exceeding \$50million has increased almost threefold in last 10 years. Social inflation risk has a double effect on insurance: it both increases the

effective marginal cost to the insurer, since the policy has a higher probability of becoming nuclear (exceeding \$10million), and it increases the amount of statutory reserves required to satisfy the risk-based capital requirement. Social inflation also imposes a fundamental challenge to the supply of insurance, as it questions the traditional assumption that the mapping from an event to the point of pay out remains stable from the time of underwriting to the time of the actual pay out.

The influence of the younger generation on jury outcomes has arguably contributed to larger awards, as large corporations are targeted for their deep pockets. This has led to large corporate risks often paying significantly more than other risks. Corporations can manage their exposure through detailed and transparent information sharing to determine where key exposure risks lie. Liability insurance risks can then be offset against other lines of business that may not be reinsured.

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