Fairytale of New York: product liability law in the UK

IN BRIEF

- A recent *'forum non conveniens'* judgment in New York describes the UK as a hostile jurisdiction for claimants seeking to hold Big Pharma to account.
- Many lawyers in the UK will recognise the accuracy of that description and the systemic issues that have prevented claimants being more successful against Big Pharma in the UK.
- In the context of a global pandemic and an under-resourced NHS, UK litigators must find new ways to hold Big Pharma to account within the UK court system.

Now more than ever before, it is crucial that UK litigators find new ways to hold Big Pharma to account, argues Sarah Moore

In the dog days of this year's lockdown spring, when the 'new normal' still felt abnormal, a quiet revolution was beginning in the world of UK product liability. On 18 March 2020, a New York court ruled that a British woman, Mrs Fletcher, could litigate her product liability claim against New York-registered defendants, Estee Lauder Inc and Clinique Laboratories LLC, in New York, despite the fact that the mainstay of her exposure to the defendants' allegedly cancer-giving products took place in the UK, not in the US (*Fletcher v Avon Prods Inc* 2020 NY Slip Op 30883, Supreme Court, New York County: Docket Number: Index No 190045/2019, *bit.ly/362bBrr*).

In denying the defendants' motion to have Mrs Fletcher's claim sent back to her native England, Justice Mendez described the courts of England and Wales as a challenging environment within which to hold Big Pharma to account. He ruled that compelling the claimant to litigate in England would impose a 'hardship' upon her, with reference to the fact that for product liability claimants in the UK, there is limited access to contingency fees; there are no jury trials; and the disclosure process is costly and limited.

According to Justice Mendez, these factors have created an environment in which 'there are no barristers or solicitors willing to proceed against a manufacturer or a seller'.

A vicious cycle

Justice Mendez's comments may trigger something of an existential crisis for those of us in the UK who have brought, and continue to bring, product liability claims under the Consumer Protection Act 1987 (Directive 85/374/EEC, the Product Liability Directive).

However, many will recognise the difficulties described with reference to the long list of failed claimant group actions in the UK. Recent examples include the Pinnacle metal-on-metal hip litigation in 2018 (*Gee v Depuy International Ltd* [2018] EWHC 1208 (QB)), and the failed Seroxat claims in 2019 in which costs were awarded against the claimants on an indemnity basis (*Bailey and others v Glaxosmithkline UK Ltd* [2019] EWHC 1167 (QB)). More historic examples include the discontinuation of the Primodos group action in 1982 (*H v Schering Chemicals Ltd* [1983] 1 WLR 143), and the failed sodium valproate/Epilim group action in 2007 (*Multiple Claimants v Sanifo-Synthelabo Ltd* [2007] EWHC 1860 (QB)).

This is in stark contrast with the successes achieved by plaintiff groups in the US involving medications such as Vioxx and Seroxat, and medical devices such as Pinnacle hips.

Of course, a subset of cases against Big Pharma in the UK do settle confidentially before they ever make it to court. Such settlements may encourage possible funding of product liability litigation in the UK, but they regrettably do very little to shift the negative precedent law that traps UK claimants in a vicious cycle in which third-party funders feel unable to invest in litigation where the precedents are negative and limited in scope, which in turn renders claimant solicitors less able to bring new cases and make new precedents.

Moral dilemmas

In July 2020, the publication of the long-awaited *Independent Medicines and Medical Devices Safety Report* (*bit.ly/2KG1Wif*) confirmed the challenges product liability claimants meet in the UK. Chair of the review Baroness Cumberlege readily acknowledged that 'litigation has not served the patient groups we have met well'. She has called for 'an effective redress mechanism for those who suffer avoidable harm or unforeseen drug or device injury'.

Such is her concern about the efficacy of the UK courts in providing justice for those harmed by drugs and devices, that she has proposed the creation of a product liability-specific Redress Agency, 'as a stand-alone redress mechanism' to offer claimants an 'alternative dispute mechanism' beyond the UK courts. Regrettably, she does not set out in any detail how this Redress Agency might be funded. It should be noted that in other jurisdictions, such schemes are principally underwritten by state funding (see p214 of the report).

In the context of a global pandemic, an unprecedented economic downturn and our NHS stretched to breaking point, is it really the best that we can do as lawyers to advocate that claimants seek redress through extra-judicial schemes likely to be underwritten principally by HM Treasury? Surely, there is a moral dilemma posed by the fact that our NHS is left to foot the bill for the harms caused by Big Pharma in the UK on one hand, while the manufacturers of pharmaceutical products continue to post record profits on the other?

While the New York forum judgment in Mrs Fletcher's case may provide a glimmer of hope for UK claimants that they may not be constrained to the jurisdiction of the UK courts, and can perhaps anticipate the happier, fairytale endings enjoyed by their US plaintiff counterparts, such cases are likely to form the exception rather than prove to be the rule.

More than ever before, UK product liability lawyers need to redouble their efforts to hold Big Pharma to account *within* the UK court system—whether by taking strategic singleton cases forward to help shift negative product liability precedents, or finding alternative routes to fund group actions. NLJ

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