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Product liability: more David, less Goliath?

Is there hope on the horizon for product liability claimant lawyers? Sarah Moore, Alexandre Predal & Stuart Warmington examine some promising developments

IN BRIEF

▶ Recent rulings in product liability group actions in both the Netherlands and France may provide hope for greater resource efficiencies for claimants facing deep-pocketed defendants.

With recent rulings in France, litigation afoot in the Netherlands, and obiter comments in the *Lloyd v Google* decision, there may well be reason to hope that the David vs Goliath dynamic that has defined the EU product liability landscape for the last 20 years is in flux, perhaps promising a brighter future for Big Pharma accountability across the EU and the UK. This article looks briefly at those 'points of light'.

First some background: briefly put, the facts are as follows—the Product Liability Directive (Council Directive 85/374/EEC) (PLD) emerged newly minted from the European legislature in 1985 and was thereafter adopted into the domestic laws of all EU nations; in the UK, in the form of the Consumer Protection Act 1987. Nearly 30 years on and the claimant bar in the UK has little to show in terms of successful group actions against Big Pharma under the PLD, or indeed any defendant in relation to medical devices or medicines. The notable exception is *A and Others v National Blood Authority and Others* [2001] EWHC QB 446, a High Court decision in favour of the claimants in 2001. This claimant-friendly precedent was reversed in *Wilkes v DePuy International Limited* [2016] EWHC 3096 (QB), [2016] All ER (D) 121 (Dec) and the Pinnacle Metal-on-Metal hip group litigation (*Gee v Depuy International Ltd* [2018] EWHC 1208 (QB)). The reasons for this woeful claimant scorecard are many, and are more fully enumerated elsewhere (see 'Fairytale of New York: product liability law in the UK', 170 *NLJ* 7913, 4 December 2020, p12). However, a key factor often cited is a perceived 'inequality of arms' between Big Pharma defendants who have access to technical details, specialised experts and extensive funding, versus claimants who, too often, struggle to access funding for their claims. In short, significant claimant group actions are too often run on shoestring budgets against deep-pocketed Big Pharma defendants, or not at all.

Recent developments in product liability group actions in both the Netherlands and France, with whispers of change in the UK, may indicate an increasing readiness to use procedural mechanisms that enable greater resource efficiencies in claimant case management (keeping costs lower) and potentially attract third-party funding (deepening claimant pockets)—perhaps lighting a new way ahead for product liability claimant lawyers in the EU and the UK.

First to France

France offers the claimant product liability lawyer two recent reasons for optimism.

First, in May 2021, the Paris Appeals Court ruled in favour of 2,700 women from across the EU, all of whom had been implanted with defective PIP breast implants. The Parisian court ruled that TÜV, the notified body commissioned to certify the safety of PIP implants, had been negligent in carrying out the safety assessment requirements set out in the Medical Devices Directive (Council Directive 93/42/EEC) (MDD). This ruling is a beacon of hope for all those injured by products that carry a CE mark, wherever they are in the world, for two reasons:

1. This is the first time in which the MDD has been used to hold a notified body, rather than a producer or manufacturer of a product, to account; and
2. the French courts permitted claimants, irrespective of their nationality, to pool their claims into a single consolidated (albeit 'opt in') series of cases in a single jurisdiction with French law applicable.

In this way, the Parisian court's ruling broke new ground—illuminating the viability of actions under the MDD against notified bodies certifying products as safe and demonstrating the potential scale of these actions, such that thousands of women from all around the world were able to join the PIP consolidated group action. The reward for mounting an action on this scale is that commercial funding is more readily available, such that the defendant 'Goliath' TÜV was matched with a consolidated multi-jurisdictional claimant team armed with greater resources than David's slingshot. It is to be anticipated that other claimant teams will endeavour to tread the path now forged by the PIP action to the potential benefit of claimants across the EU, the UK and beyond.

More recently, in January 2022, the Tribunal Judiciaire de Paris certified the first *action de groupe* for those injured as a result of exposure to the drug Depakine, a medication marketed by the French company Sanofi containing sodium valproate, designed to control epileptic seizures. The French collective redress mechanism was first introduced in 2014, and extended to medical liability actions in 2016; however, prior to the Depakine ruling in January 2022, no such *action de groupe* had obtained certification. Certification in France does not deliver access to an 'opt out' mechanism, such that individuals joining the action will still need to register their individual claims; however, the ruling does establish the rebuttable presumption of a causal link between individuals who suffer Depakine exposure in utero and certain pathologies exhibited by individuals born between 1984-2006.

It is likely that Sanofi will appeal the decision; however, in making this ruling, the French courts have demonstrated that they are willing, at first instance, to illuminate a new path to justice for those injured by defective medicines.

On to the Netherlands

Just before Christmas, a team of claimant lawyers in the Netherlands issued a writ against Allergan, a manufacturer of allegedly defective breast implants. The writ cites breach of the PLD and alleges that the implants are causatively linked with a rare form of cancer known as breast implant associated anaplastic large cell lymphoma. The action will encompass all those who have been implanted with Allergan textured breast implants and who have either developed this cancer or are concerned about developing this cancer. So much, so familiar; however, the Dutch Allergan action is the first example of the Dutch 'opt out' mechanism, so often used in collective antitrust proceedings, being used to progress a product liability claim. The gains for claimants are significant in terms of the scale of the claimant group, consequent access to third-party funding, and the ability to more readily match the deep pockets of the Big Pharma Goliath against whom the action is pitched.

It is very early days for the Dutch Allergan action, but the case does cast new light on the viability of using the Dutch 'opt out' mechanism for product liability claims in the Netherlands.

Closer to home

Finally, the November 2021 ruling by the Supreme Court in England on the claim of *Lloyd v Google LLC* [2021] UKSC 50, [2021] All ER (D) 39 (Nov) may offer a flicker of hope for claimant lawyers in the UK, now adrift from our European counterparts. The *Lloyd v Google* decision looked closely at CPR 19.6 and the 'hidden' class action mechanism—enabling parties with the 'same interest' to group together in bringing a claim. While the court found against the claimant in that case, and Mr Lloyd was frustrated in his ambition to prove that CPR 19.6 provided a proper mechanism through which he could seek to litigate on behalf of approximately four million iPhone users, in explaining their decision the justices of the Supreme Court did kindle a flame for product liability lawyers in the UK, noting that the rule offered a route to a common damages claim where the individual damages were easily calculated and non-individuated; or, of more relevance to complex product liability claims, provide a mechanism through which the key issues of (i) liability and (ii) causation and quantum, could be formally bifurcated, such that a claimant group might benefit from an earlier initial decision from the court in respect of liability, with questions of individual causation and quantum to follow. Such an approach falls a long way short of the French *action de groupe*, or the Dutch 'opt out' mechanism; however, it might just give David a chance to get his breath back between bouts and access more substantial resources to engage with a Big Pharma Goliath in round two.

These examples may be nothing more than scattered 'points of light' across the jurisdictions of a troubled continent with currently far more to worry about than a lack of claimant product liability redress. Claimant product liability teams, however, may feel encouraged by these developments, picking out a path ahead to facilitate better access to justice for those harmed by defective medical products across the EU and potentially also the UK. **NLJ**

Sarah Moore, partner, **Alexandre Predal,** associate & **Stuart Warmington**, associate, at Hausfeld LLP (*www.hausfeld.com*).