

GLOBAL TRENDS

IN PRODUCT LIABILITY LITIGATION AND CLAIMS

OCTOBER 2023



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INTRODUCTION

Growing consumerism, the globalisation of supply chains, the emergence of new technologies, and the need to innovate are driving an increase in global product liability claims. But while in some markets the translation of product liability claims into litigation is a frequent occurrence, in others the majority of claims are being resolved before they make it to court.

These trends in global claims stem from a combination of consumer and regulatory pressures. While modernisation and innovation are increasingly important factors in today's consumer society, at the same time concerns around privacy and environmental preservation are also front of mind for many consumers. Alongside this, the growing body of legislation affording greater consumer protection rights has led to increased awareness of product liability insurance.

One area that has thrown up challenges for regulators and legislators alike is the unprecedented growth of new technology platforms and tools such as artificial intelligence - and particularly the speed at which they are entering the daily lives of consumers and businesses. Although regulators are making a concerted effort to introduce frameworks that will both mitigate the risks to users of this new technology and protect them from harm, many are playing catch-up, and we are likely to continue to see an increase in the number of claims.

The complexity of global supply chains is another significant challenge that was first exposed by the advent of COVID-19 and later exacerbated by Russia's war with Ukraine. From a liability perspective, these challenges are also causing legal and regulatory complications for stakeholders throughout the supply chain - from manufacturers, to suppliers, to importers - as the nature of regulations in many jurisdictions means that everyone in the chain can be held liable if the product, or installation of the product, causes harm.

Whether countries have the most consumer-friendly laws in the world and a mature product liability market to match, or whether they have evolving legislation and a nascent insurance market for these risks, it is clear that this class of business will continue to grow at a rapid pace in the coming years. The rate of growth is also likely to be impacted by new legislation around class actions and third-party funding that will empower consumers seeking to hold manufacturers, suppliers, and importers of products to account.

Global Insurance Law Connect recently asked our members around the world to provide an analysis of their local market as it now stands. The results are presented in our first ever global report on product liability insurance, highlighting the differences in approach across 17 countries and four continents.

Best wishes

Gillian Davidson

Global Insurance Law Connect – Chair

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GLOBAL TRENDS IN PRODUCT LIABILITY

In addition to the updating of the Product Liability Directive in the EU, there are a number of legislative changes relating to product liability – both those implemented in recent years and those expected in the near future – that are likely to have a rolling impact on the incidence of both claims and litigation (see the Appendix for more details).

Some national insurance markets are still relatively under-developed, and product liability coverage often occupies a small niche in the overall product mix, being a relative newcomer to the market. Nonetheless, the global tide of regulatory and legislative change is set to encourage consumers and corporates alike to increasingly hold manufacturers, importers and suppliers to account for the products and services that they provide.

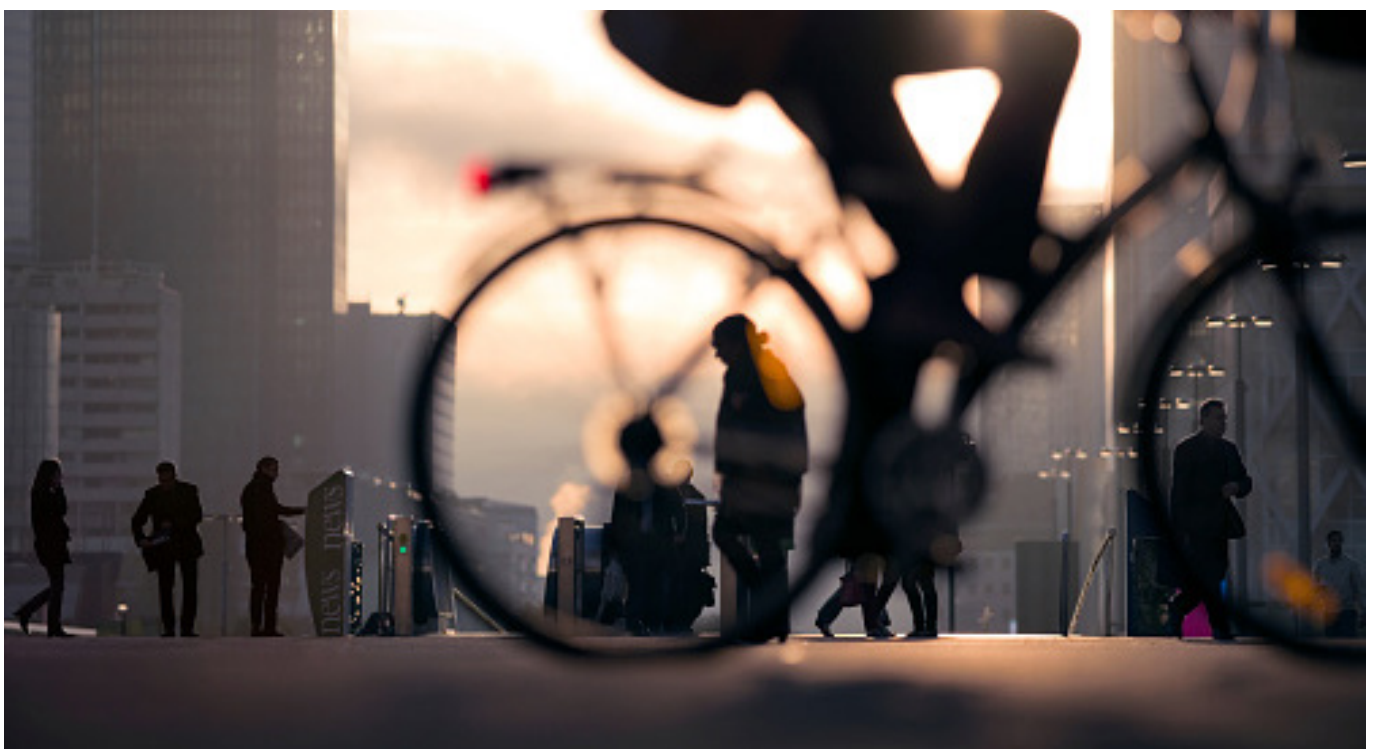
As awareness of product liability issues grows, the market for coverage is expected to grow alongside it. In more developed insurance markets, the strengthening of consumer protections across a range of industry sectors (including the expanded definition of who or what constitutes a consumer in the eyes of regulators) is bringing more businesses into scope for potential product liability claims, driving appetite for coverage.

Globalisation has contributed to a rise in product liability and recall risk, as pricing and supply chain considerations drive companies to source products and components from countries that may have lower

wage costs or material prices, but also weaker regulatory oversight.

While this means lower final product costs and therefore increased profit margins for manufacturers, it can lead to consumers purchasing products that are of lower quality and which deteriorate or fail sooner than expected, resulting in the longer term in greater rates of litigation for defective products.

The scope for product liability claims related to electronics, software, and digital products, including data privacy issues and cybersecurity, is also significantly increasing. While data protection regulations like the EU's General Data Protection Regulation (GDPR) are becoming widespread across multiple geographies, and cyber risks are fast becoming a top-tier board consideration for all types of businesses, the artificial intelligence (AI) space remains largely unregulated and poorly understood. Given the speed at which AI tools have entered the mainstream, issues around product liability for the manufacturers and distributors of those tools would appear to be a concern for the very near future.



REGIONAL PATTERNS ARE VARIABLE

The response from GILC members has highlighted significant differences in the product liability claims experience across the world. The majority of members suggest that consumers now expect higher specification and better-quality goods. At the same time, members note, their clients are also now being better protected by new regulations, which is leading to an uptick in claims.

Proposals for an updated European Union Product Liability Directive, published in September last year, mean that regulators in all EU member states are anticipating the need to revise their own product liability laws in line with the amended EU legislation. This is similar to the situation in Chile, where current amendments to the Consumer Rights Protection Law are expected to drive claims in the future.

Other regional trends include the expansion of product liability insurance market, in countries such as Brazil and India. Here, the growing number of consumers and increasing awareness of coverage is raising expectations of increases in both claims and potential litigation.

However, in several countries, including Finland and the Netherlands, the number of claims remains relatively flat, while in others there has been a significant decline in claims and/or litigation.

Robert Byrd, partner at Byrd & Associates in France: "Actions brought by consumers or consumer protection associations are on the rise. Today's consumer society demands more and more modernity and innovation but also respect for their fundamental rights, for example their right to privacy and environment protection."

João Marcelo Santos, partner at Santos Bevilaqua in Brazil, says the post-pandemic expansion of the consumer market, particularly following the resumption of Brazilian economic growth, means an increase in consumer litigation and liability claims should also be expected.

"The liability coverage market is small and still growing in Brazil. This is particularly true when it relates to product liability, where it generally involves high value-added products and is higher risk," he says.

And with the expansion of the Indian insurance market in recent years, a growing number of product liability claims is to be expected, according to Sakate Khaitan, partner at Khaitan Legal Associates in India.

In Spain, the number of product liability claims decreased during the pandemic, as product damages across all sectors slumped.

However, as Fernando Blanco Gamella, partner at Blanco y Asociados, notes: "The opposite is likely to be observed in two years' time, when the number of litigation cases may grow significantly, and the courts may be overwhelmed by the arrival of new claims."

Both Belgium and China have seen a significant decline in the number of claims.

Sandra Lodewijckx, partner at Lydian in Belgium, says a number of recent changes have been made with the aim of simplifying and expediting court proceedings, but parties still aim to settle at an early stage to avoid costly litigation.

"In most product liability cases, a court expert is appointed early in the dispute. Filing a court expert report to determine the defect and damages is usually an opportunity for the parties to reach an out-of-court settlement," she explains.

In China, meanwhile, based on available official judgments, claims have consistently decreased since 2019, dropping from 39,147 in 2019 to 2,559 so far this year – a trend that is not expected to reverse, according to Li Jiao, partner at Buren in China.

The prevailing judicial guidelines – which apply uniformly across civil claims categories – prioritise mitigating disputes proactively, favouring Alternative Dispute Resolutions (ADRs) over litigation, and employing diverse dispute resolution strategies with the aim of reducing the backlog of cases in courts and enhancing adjudication efficiency.

Meanwhile, several GILC members, including those in the UK, Finland, Italy and Denmark, expect that the emergence and subsequent mass circulation of new technologies will also lead to a growing number of claims.

Allan Kvist-Kristensen, partner at Ark Law in Denmark, says: "Many new areas are developing quickly as a result of the use of technology and AI. Such technology will continue to impact the market. Most recently, we have seen an increase in cyber security related cases, where ransomware attacks have caused damage to a company including to the company's IT infrastructure."

"IN MOST PRODUCT LIABILITY CASES, A COURT EXPERT IS APPOINTED EARLY IN THE DISPUTE. FILING A COURT EXPERT REPORT TO DETERMINE THE DEFECT AND DAMAGES IS USUALLY AN OPPORTUNITY FOR THE PARTIES TO REACH AN OUT-OF-COURT SETTLEMENT."

SANDRA LODEWIJCKX, PARTNER,
LYDIAN

TYPICAL CLAIMS AND CLAIMANTS

In the majority of markets, the typical appellants in product liability disputes are individual consumers of products or services, but in some markets, claims are also being brought by corporates.

Across EU member states, producers, suppliers, and any person importing products into the EU can currently be found liable for defective products, and typical defendants against claims are therefore corporate entities engaged in these activities.

In Belgium, the 2014 Act on Claims for Collective Redress introduced the possibility for consumers to bring collective redress actions, for alleged violations either of an entity's contractual obligations, or of Belgian and EU rules on product liability. Belgium does not have a culture of class actions like that seen in the USA, but this could be subject to future change.

According to Sandra Lodewijckx, partner at Lydian in Belgium: "Since the scope of the Collective Redress Act is rather limited, only a very few collective redress actions have been introduced since the adoption of the Act. If the scope of the Act were to be broadened, one may expect to see an increase in this type of claim in the future."

In France, the concept of class actions was introduced by the French Law No 2014-344 which came into force on 1 October 2014. However, the scope of class actions under the law is limited: actions can only be brought by nationally representative associations, based on an opt-in principle, whereby any claimant who wants to be part of the action must declare their intention to participate.

However, in Denmark, the majority of claimants are either corporate entities or insurance companies filing claims after payment to the insured, while in Norway, product liability appellants are predominantly major insurance companies who have paid out on regular home and contents insurance policies held by consumers.

According to Joachim Mikkelsen Skjelsbæk, partner at Riisa in Norway: "Damages from fires can be very expensive, and insurance companies will from time to time try to recover costs, from producers of electric appliances, for instance.

"Outside of the liability act, product liability is claimed in larger catastrophes like plane or helicopter crashes, but these claims rarely end in litigation."

In England and Wales, collective redress can be accessed through a group litigation order (GLO). To date, there have been just over a hundred GLOs, several of which relate to allegedly defective products, including multiple types of hip replacements and breast implants.

In the Asia-Pacific region, class actions are also a feature of product liability litigation. Although there was a decline in class actions in Australia in 2022 compared with the preceding decade, there has been a rebound in 2023, with actions involving pharmaceuticals, pesticides, chemicals, medical devices, motor vehicles and a range of consumable products. With recent regulatory changes and developments in case

"OUTSIDE OF THE LIABILITY ACT. PRODUCT LIABILITY IS CLAIMED IN LARGER CATASTROPHES LIKE PLANE OR HELICOPTER CRASHES, BUT THESE CLAIMS RARELY END IN LITIGATION."

JOACHIM MIKKELBORG SKJELSBÆK, PARTNER, RIISA



law, the defendants in product liability matters can be broad. A wide spectrum of appellants also exists –from individual consumers and small businesses to large corporates and the Australian Competition and Consumer Commission.

As Kiley Hodges, partner at Sparke Helmore in Australia, comments: "Product liability class actions have been a well-established part of the legal landscape for the last decade aided in part by the increasing role of litigation funders and 'no win no fee' lawyer arrangements."

In New Zealand, typical claims that result in litigation include group actions (such as individual owners of apartments in residential complexes) against developers, contractors, designers, product suppliers and local councils. The greatest number of product liability claims by volume have been in the residential building sector: firstly in the area of compliance with weathertightness under the New Zealand Building Code; and secondly in relation to fire safety – for both internal and external cladding.

In China, the concept of class actions in the area of product liability does not exist in the same way as in the Anglo-American legal system.

However, says Li Jiao, partner at Buren in China: “While product liability cases are common, they usually do not involve insurance companies. Instead, these cases are usually spearheaded by local consumer associations acting for public interests. These associations provide investigative, organisational, and legal support to consumers throughout the litigation process.”

In Brazil, it is common to see representation in litigation provided by associations, NGOs, and other institutions on behalf of the collective or individual homogeneous interests of consumers. These institutions normally use class actions or individual actions representing collective rights. It is also common for the Brazilian Public Prosecutor’s Office to represent the collective rights of consumers, either through litigation, known as public civil actions, or through plea bargains.

Prior to the judicial process, however, the Brazilian Federation entities – the Union, the states and the municipalities – have specialised agencies to mediate between consumers and companies, as well as supervising consumer practices and even issuing fines to transgressing companies.

Patricio Prieto, partner at Prieto Abogados in Chile, comments: “In Chile, on the other hand, class actions in the area of product liability are rare. Consumer class action lawsuits may however be initiated by the Chilean state consumer rights body El Servicio Nacional del Consumidor (SERNAC), consumer associations, or, less commonly, by groups of 50 or more consumers.”

“ WHILE PRODUCT LIABILITY CASES ARE COMMON, THEY USUALLY DO NOT INVOLVE INSURANCE COMPANIES. INSTEAD, THESE CASES ARE USUALLY SPEARHEADED BY LOCAL CONSUMER ASSOCIATIONS ACTING FOR PUBLIC INTERESTS. THESE ASSOCIATIONS PROVIDE INVESTIGATIVE, ORGANISATIONAL, AND LEGAL SUPPORT TO CONSUMERS THROUGHOUT THE LITIGATION PROCESS. ”

LI JIAO, PARTNER, BUREN



CHANGES VARY ACROSS CLASSES OF INSURANCE

Data from GILC members shows that the highest number of product liability insurance claims are in the construction, food and beverage, manufacturing, motoring and property sectors. As the chart opposite indicates, according to members who assigned ratings of low, medium or high for claims activity, the construction, food and beverage, and manufacturing insurance classes are experiencing a high occurrence of claims for more than half of respondents.

Members in Australia, New Zealand and the UK all highlighted that food products continue to give rise to claims, stemming from allegations of the presence of contamination by pathogens and foreign material or undeclared allergens.

According to Rob Coltman, partner at Duncan Cotterill in New Zealand, food and other primary produce are New Zealand's biggest export area and so product liability is a significant insurance need.

"But for the New Zealand market the cover centres on property damage (because of the low incidence of personal injury litigation), while broader cover is required for those engaging with export markets."

Other high-profile areas for product liability claims include pharmaceuticals, medical devices, and motor vehicles. Medical devices such as implants continue to evolve, and these products tend to carry an inherent risk of adverse effects which can ultimately lead to a spike in claims. Notably, France has seen a significant number of product liability disputes driven by pharmaceutical and healthcare products, in addition to chemical products.

The Netherlands has also experienced a number of disputes around medical aids. Daphne Gouweloos, partner at Wij Advocaten in the Netherlands, comments: "There are many disputes about medical aids, such as hip replacements, breast or other implants, MIRAgel implants and pelvic meshes, and medication.

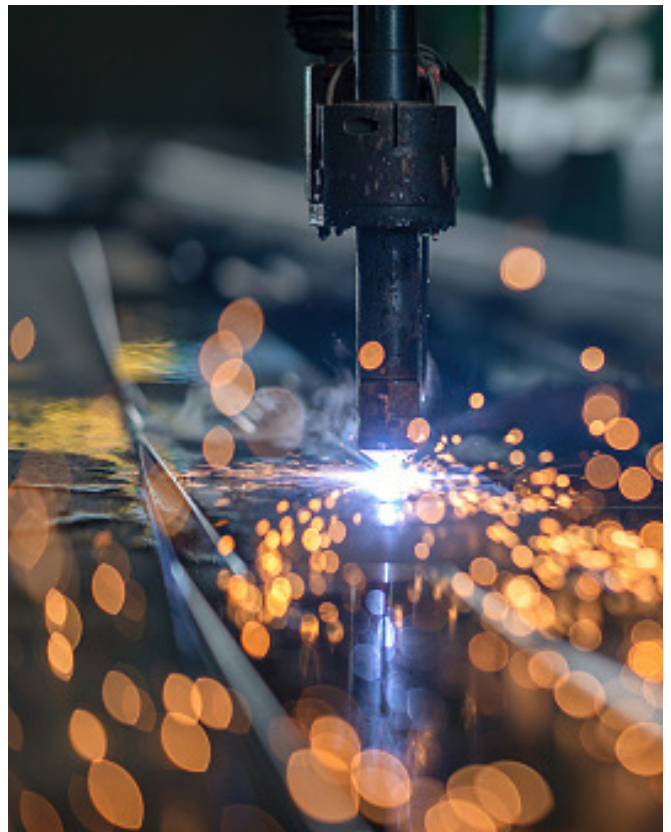
"It is not uncommon for the doctor and/or hospital to be sued instead of the manufacturer. The question then arises whether the doctor should have been allowed to choose this medical aid. The general idea is as follows: if a medical treatment involves the introduction into the patient's body of an item that is 'state of the art' at the time of treatment, the mere fact that the item, by its nature, is deemed no longer suitable for the treatment in question on the basis

of subsequently emerging medical insights does not mean that the use of that item (by the doctor) should be regarded as a failure."

Other drivers of claims may include the changing of various thresholds which have typically acted as a barrier to claims. In addition to the Dutch example above, where there has been a rapid increase in claims in Australia due to a raising of the threshold for what constitutes a consumer claim from \$40,000AUD to \$100,000AUD, Belgium has also seen an increase in product liability claims. This appears to be due in part to consumers being able to claim a proportion of their legal expenses' insurance premiums as tax deductible. With more consumers having taken up the insurance, the threshold to start legal proceedings has decreased.

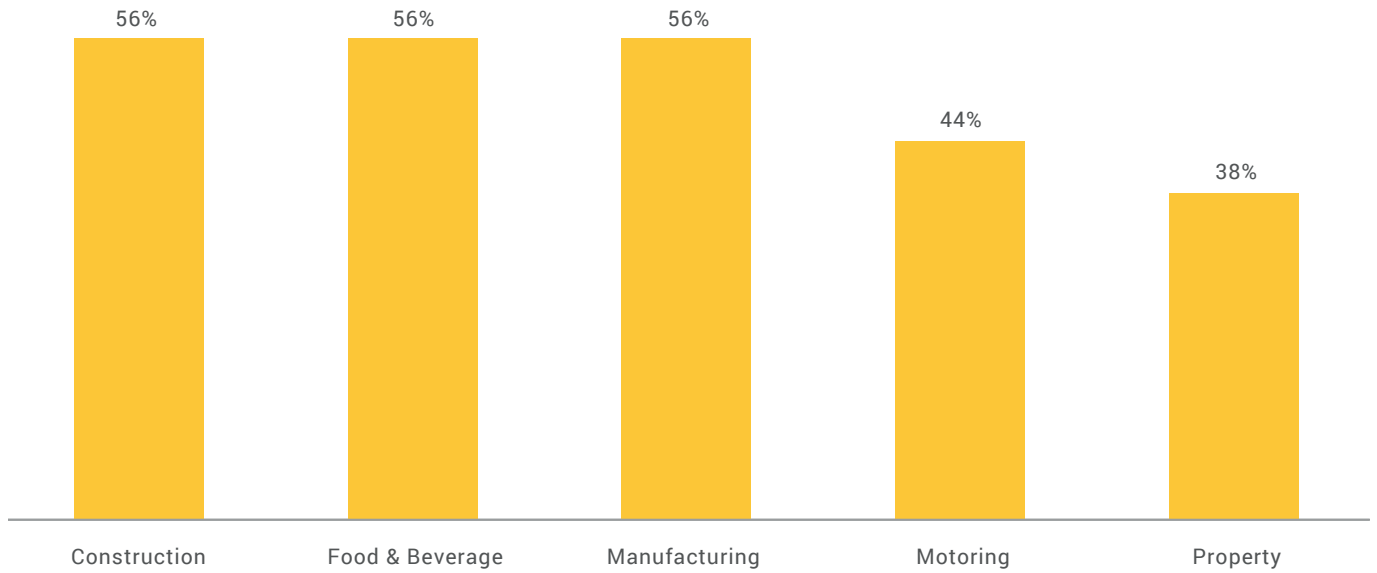
"BUT FOR THE NEW ZEALAND MARKET THE COVER CENTRES ON PROPERTY DAMAGE (BECAUSE OF THE LOW INCIDENCE OF PERSONAL INJURY LITIGATION), WHILE BROADER COVER IS REQUIRED FOR THOSE ENGAGING WITH EXPORT MARKETS."

ROB COLTMAN, PARTNER, DUNCAN COTTERILL



Top five insurance classes of business experiencing high claims activity

% of countries reporting 'high' claims



No of claims:

| | Property | Construction | Aviation | Energy | Mining | Motoring | Manufacturing | AI | Technology | Food & Beverage |
|--------------------|----------|--------------|----------|--------|--------|----------|---------------|-----|------------|-----------------|
| Australia | | Low | | | Low | High | High | | Medium | High |
| Belgium | Low | Medium | Low | Medium | Low | High | High | Low | Medium | High |
| Brazil | Medium | Medium | High | Medium | Low | Low | Medium | Low | Medium | Medium |
| Chile | | | | | | | | | | |
| China | | | | | | | | | | |
| Denmark | Medium | High | Low | Medium | Low | Medium | High | Low | Medium | High |
| Finland | | | | | | | | | | |
| France | High | High | Low | Low | Low | High | High | Low | Medium | Medium |
| India | | | | | | | | | | |
| Italy | Low | Low | Medium | Medium | Low | High | High | Low | High | High |
| Mexico | High | High | High | High | Low | Low | Medium | Low | Medium | High |
| Netherlands | | | | | | | | | | |
| Norway | | | | | | | | | | |
| NZ | High | High | Low | Low | Low | Low | Medium | Low | Medium | High |
| Poland | | | | | | | | | | |
| Spain | Medium | High | Low | Medium | Low | Medium | High | Low | Medium | Medium |
| UK | | | | | | | | | | |

Litigation

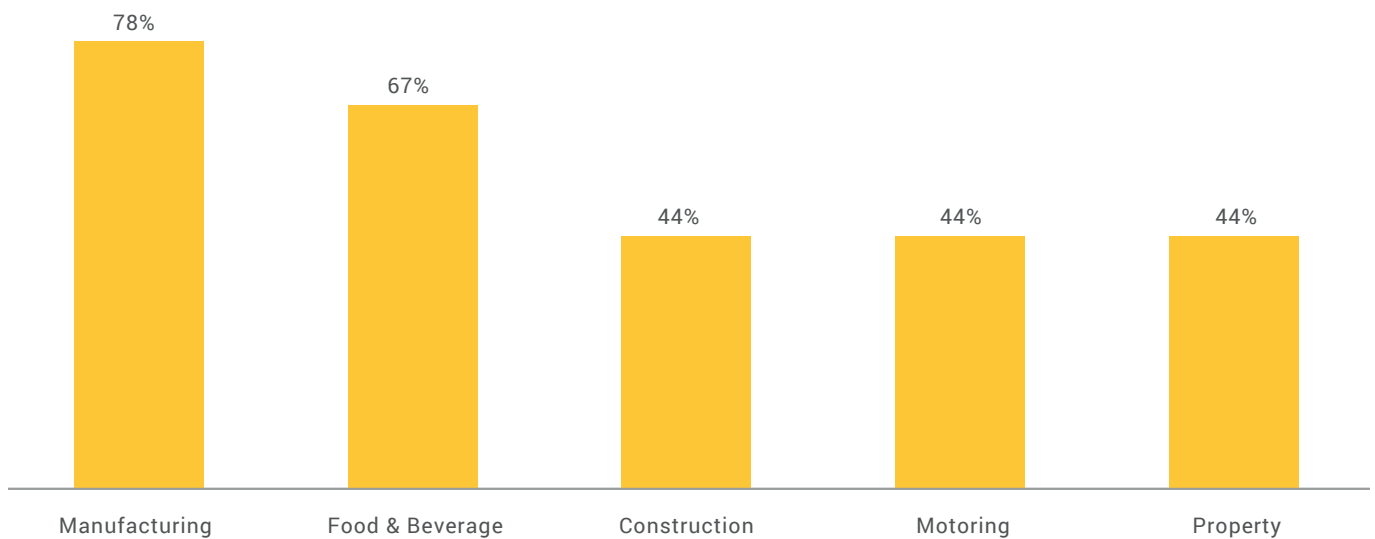
| | Property | Construction | Aviation | Energy | Mining | Motoring | Manufacturing | AI | Technology | Food & Beverage |
|--------------------|----------|--------------|----------|--------|--------|----------|---------------|-----|------------|-----------------|
| Australia | Low | Medium | Low | | Low | High | Low | | Low | Low |
| Belgium | Low | Medium | Low | Medium | Low | High | High | Low | Medium | High |
| Brazil | High | Medium | Low | Low | Medium | Medium | High | Low | High | High |
| Chile | | | | | | | | | | |
| China | Low | Medium | Low | Low | Low | Medium | High | Low | Low | High |
| Denmark | Medium | High | Low | Medium | Low | Medium | High | Low | Medium | Medium |
| Finland | | | | | | | | | | |
| France | High | High | Low | Medium | Low | High | High | Low | Medium | Medium |
| India | | | | | | | | | | |
| Italy | Low | Low | High | High | Low | High | High | Low | High | High |
| Mexico | High | Medium | High | High | Low | Low | High | Low | Medium | Low |
| Netherlands | | | | | | | | | | |
| Norway | | | | | | | | | | |
| NZ | High | High | Low | Low | Low | Low | Medium | Low | Medium | High |
| Poland | | | | | | | | | | |
| Spain | Medium | High | Low | Low | Low | Medium | Medium | Low | Low | High |
| UK | | | | | | | | | | |



SUMMARY AND FUTURE OUTLOOK

Top five insurance classes of business experiencing high litigation activity

% of countries reporting 'high' litigation



In the view of GILC members, globally product liability claims and litigation are likely to increase going forward. As the chart shows, the insurance classes where the highest proportion of members reported high levels of litigation mirror those in the previous chart showing high levels of claims, suggesting that more of these claims are reaching court. In particular, the manufacturing and food and beverage sectors are seeing widespread litigation with nearly 80% of respondents reporting high levels of activity in the former, and around two-thirds in the latter.

In Europe, there are some individual changes by EU member states and non-EU countries which are likely to impact the product liability landscape. Belgium's reforms to its Civil Code have eased the rules for evidence of transactions by consumers, which could make the burden of proof for bringing claims less onerous. Finland is in the process of implementing the incoming EU Directive, but with the European Department for Justice and others pondering the scope of the responsibility for distributors, the increased use of online platforms – and thus their exposure to product liability claims – still needs to be clarified.

“Once the EU Directive has been implemented, that will most likely expand the scope of product liability claims available for users of products,” says Justus Könkkölä, partner at Socrates Attorneys Ltd in Finland.

In the UK, however, a Law Commission programme that included proposed reforms to product liability laws has been suspended. This is expected to cause a significant divergence from EU laws in England

and Wales as the new EU Directive is implemented elsewhere, which may ultimately impact the product liability policies of local producers exporting to EU markets.

A recent bill submitted to Chile's Congress could see an increase in regulatory powers for SERNAC, particularly with regard to levying penalties for product liability breaches which could drive appetite for claims against companies censured by the body – assuming the measures are passed. In Mexico, the recent implementation of a National Code of Civil Procedures, replacing the previous individual state and Federal Codes, is widely expected to have an impact on product liability litigation, as the new rules affect the burden of proof for plaintiffs in civil liability proceedings and class actions.

As Aldo Ocampo, partner at Ocampo 1890 in Mexico, comments: “We believe that there is still much to be written in Mexico about this type of liability and that a more significant judicial decision related to this is to be expected in favour of consumers, which will cause the regulation to be more closely observed.”



The revisions to the EU Product Liability Directive could also greatly expand the scope for claims in several areas – not least in the technology sphere.

If the EU Directive is adopted, the revised text would make it possible to affirm AI as a product that the hardware or software producer is responsible for, while reducing the burden of proof weighing on claimants for damage it has caused. The AI industry is booming but as yet remains largely unregulated. GILC members therefore expect this area to give rise to a large volume of claims in the future.

Giorgio Grasso, partner at BTG Legal in Italy, comments: “We soon expect that a large number of product liability claims will involve systems, machines and vehicles which require AI to function.”

As the automotive industry shifts towards more sustainable electric and autonomous vehicles, questions about the reliability of these vehicles and the current lack of a standard regulatory framework are likely to lead to product liability disputes in future.

As Jakub Pokrzywniak, partner at WKB Lawyers in Poland, notes: “The problem of liability for damages caused by autonomous cars has

been discussed among scholars and practitioners in Poland.”

Developing technologies have also attracted significant attention in the UK, says Jason McNerlin, partner at Beale & Co in the UK.

“Despite legal restrictions on the use of electric scooters, there is widespread use of these products, and continuing reports of allegedly defective batteries causing fires. Lithium-ion batteries have also been considered as responsible for fires arising from motor vehicles, smartphones, and other consumer products. Battery technology will increasingly be an issue in consumer product safety and liability.”

In the UK there is also increasing awareness of the possible risks associated with PFAS or so-called ‘forever chemicals’. These toxic chemicals are of environmental concern, particularly in rivers and other locations where they can accumulate over time, but they have also been used in a wide range of consumer products, and have been the subject of waves of litigation in both the USA and the EU.

Product liability specialists will also be keeping a close eye on the Australian Competition and Consumer Commission (ACCC) Product Safety Priorities for the next 12 months, which can be a good indicator of the future focus of plaintiff firms and their clients. Priorities for 2023-24 include children’s product safety, online marketplace product safety, and maintaining product safety during the transition to a sustainable economy. Other products include those associated with data breaches, construction materials, and industrial adhesives used in electronics and automobiles.

“ DESPITE LEGAL RESTRICTIONS ON THE USE OF ELECTRIC SCOOTERS, THERE IS WIDESPREAD USE OF THESE PRODUCTS, AND CONTINUING REPORTS OF ALLEGEDLY DEFECTIVE BATTERIES CAUSING FIRES. LITHIUM-ION BATTERIES HAVE ALSO BEEN CONSIDERED AS RESPONSIBLE FOR FIRES ARISING FROM MOTOR VEHICLES, SMARTPHONES, AND OTHER CONSUMER PRODUCTS. BATTERY TECHNOLOGY WILL INCREASINGLY BE AN ISSUE IN CONSUMER PRODUCT SAFETY AND LIABILITY.”

JASON MCNERLIN, PARTNER, BEALE & CO

“ WE BELIEVE THAT THERE IS STILL MUCH TO BE WRITTEN IN MEXICO ABOUT THIS TYPE OF LIABILITY AND THAT A MORE SIGNIFICANT JUDICIAL DECISION RELATED TO THIS IS TO BE EXPECTED IN FAVOUR OF CONSUMERS, WHICH WILL CAUSE THE REGULATION TO BE MORE CLOSELY OBSERVED.”

ALDO OCAMPO, PARTNER, OCAMPO 1890

THE RISE OF CLASS ACTIONS

Currently the number of class actions remains relatively low globally. However, with the anticipated growth in opportunities for product liability claims, the number of class actions is also expected to increase. In Europe, class actions have risen sharply in recent years, more than doubling between 2018-2021 (up from 54 to 110). Some 13 per cent of all European class actions come from the Netherlands (according to the [CMS European Class Actions Report 2022](#)).

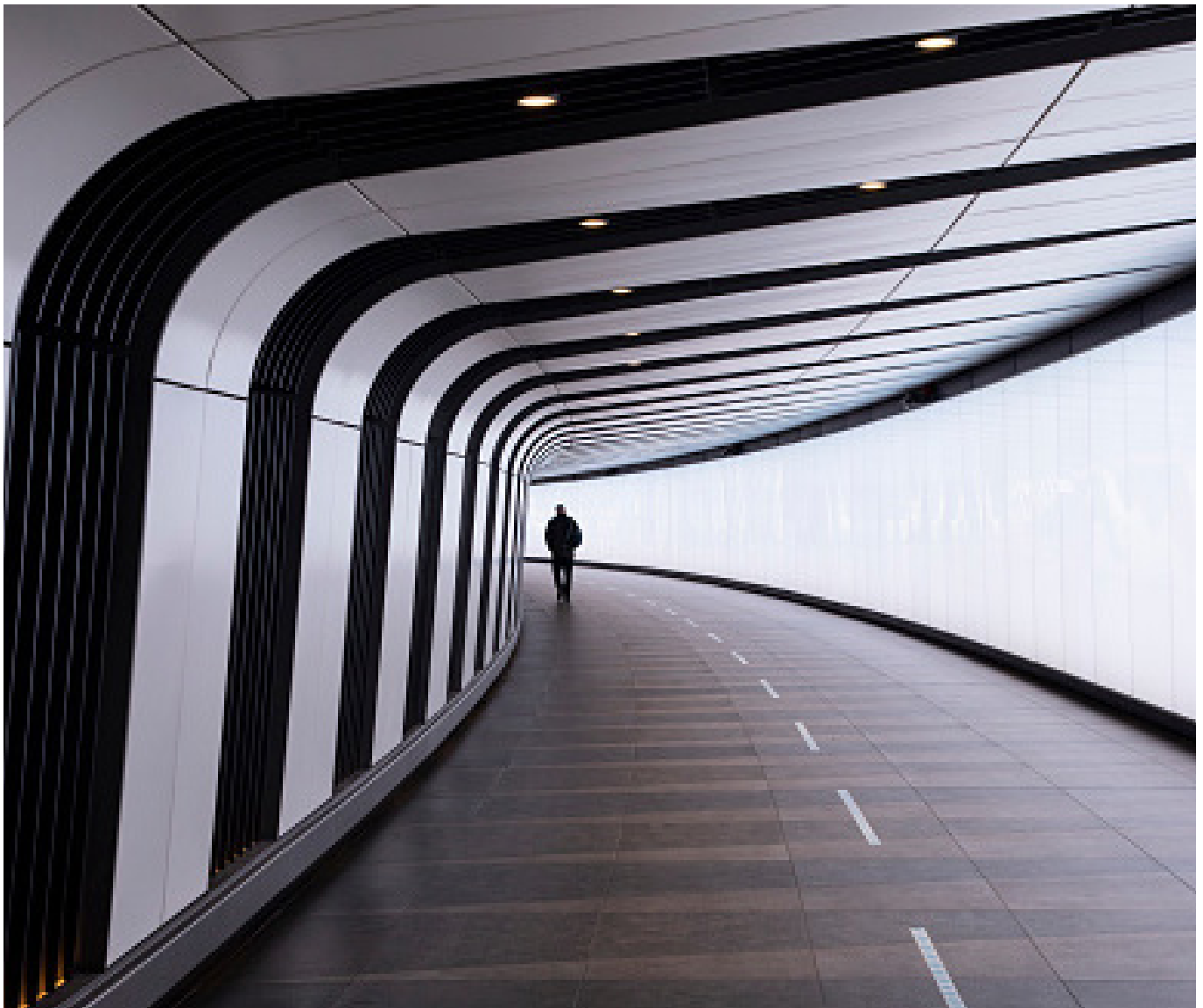
Class actions could also become a major risk for producers in France, despite the small number of class actions currently. A pending reform (Bill n°639) relating to the legal regime of class actions is aimed at opening up the types of claims that can be brought and the types of claimants for such claims – as well as promoting greater publicity for class actions.

In New Zealand, GILC member Duncan Cotterill advise that they are likely to see the further development of class actions for product

liability claims and the rise of third-party funding to underwrite the costs of these claims, increasing the burden on insurers to cover the legal costs of policyholders affected, and driving greater scrutiny of underwriting approaches for product liability risks.

In this rapidly evolving market, driven by significant shifts in consumer behaviour, the emergence of new technologies and their associated risks, and the growth of regulatory and legislative change to product liability laws, insurers will need to be alert to new exposures and opportunities alike.

The pattern of claims against companies involved in the sourcing, manufacture and distribution of a wide range of products is likely to change, and the number of claims that end up going into litigation before a final settlement is reached is likely to increase. Just as supply chains have become globalised, the product liability market is likely to become ever more global in scope.



APPENDIX: LEGAL DEVELOPMENTS AND REGULATORY CHANGES BY COUNTRY

AUSTRALIA

A number of legislative changes were passed in November 2022 to increase penalties for companies that breach Australian competition and consumer laws. These changes include the introduction of penalties for businesses that use unfair contract terms in standard form contracts entered into with consumers and small businesses. The amendments will take effect in November 2023 allowing businesses enough time to change their standard contracts. A small business is defined as one that employs fewer than 100 people or has an annual turnover of <\$10M AUD. The maximum penalties for specific breaches of the Competition and Consumer Act, including the Australian Consumer Law (ACL), have also increased significantly. These penalties are the greater of \$50M AUD, or three times the value of the relevant breach. If the value of the breach cannot be determined, the penalty is 30 % of the company's turnover during the period of the conduct. Maximum penalties for individuals will also increase from \$500K to \$2.5M AUD.

BELGIUM

The Belgian Civil Code is currently being modernised. The reform outlines, among other things, the rules governing obligations and those directing evidence. The new rules on evidence came into force on 1 November 2020. They mainly codify existing and accepted principles established by case law. They also ease the rules of evidence applicable to consumers. Previously, transactions with a consumer exceeding the value of €375 had to be proven by a written contract. The new rules have increased the threshold to €3,500. This means that transactions below this amount can now be proven by any type of evidence. The reform of the law of obligations came into force on 1 January 2023.



BRAZIL

Brazil has yet to experience essential regulatory changes in both product liability/civil liability and liability coverages. There have, however, been discussions around a new insurance law arising from an old bill dating back to 2004.

From a procedural perspective, SUSEP (Superintendência de Seguros Privados: the Brazilian insurance supervisor) changed the procedure it employed to deal with consumer complaints, doing away with an investigation and, if an insurance contract violation was identified, the giving of fines.

Now, the complaints are registered on a [general website](#) managed by the Federal Government where all the insurance complaints are assessed from a risk-based perspective. With this change, the number of fines decreased, and the efficiency of the assessment has increased, given that some complaints do not provide any critical information to the assessor.

CHILE

The current government has just announced the submission to Congress of a bill that grants more powers to SERNAC (Servicio Nacional del Consumidor), especially the power to sanction. The approval of the bill will be slow because the current government does not have a majority in Congress, so it might take some years to become a law. However, if SERNAC's power to penalise claims for liability derived from products is approved, Chile may see an increase in litigation.





CHINA

Over recent years, China has seen significant revisions made to its product liability legal framework. The PRC Civil Code, effective from January 1, 2021, introduced Book Seven: Tort Liability, superseding the earlier Law of Tort Liability. The Product Quality Law was also reworked in 2018 after its previous 2009 iteration. For specific product categories, administration regulations such as Agricultural Product Quality and Safety Law of the PRC (Revised in 2022), and Guidelines on Promoting the Construction of a Quality Assurance System for Exported Electronic Cigarette Products etc. are issued to provide more detailed guidance. The 2023 legislative work plan by the State Council hints at forthcoming regulations implementing the Consumer Rights Protection Law.

Furthermore, the 14th Five-Year-Plan for Modernization of Market Regulation, a principal Directive for China's socio-economic progression, emphasises the need to expedite revisions in industrial product quality and safety oversight. It also seeks to address challenges such as the disproportionate cost of violations compared to the cost of rights protection.

DENMARK

The Danish Product Liability Act has been amended several times. The first was to implement the EU Product Liability Directive (99/34/EC). The second time was when the European Court of Justice overturned section 10 (which states that 'An intermediary shall be directly liable for product liability to injured persons and subsequent intermediaries in the distribution chain') in Case C-402/03 ECLI:EU:C:2006:6 and most recently, to accommodate the new statute of limitations.

FINLAND

The implementation of the forthcoming EU Directive on product liability is in process. The Ministry of Justice are among those considering the appropriateness and scope of the responsibility of distribution service providers. The role of online platforms also still needs to be clarified, and the compatibility of the proposed and existing national rules of procedure must also be assessed.

FRANCE

Relevant laws and regulations have not been amended recently. However, new legislation on class actions is expected to be passed in the near future, as are amendments to the present product liability rules in view of the expected EU Revised Product Liability Directive. A long-awaited bill reforming the French civil liability regime was recently proposed in July 2020.

INDIA

Recently, under the Consumer Protection Act 2019, the term 'Product liability' was expressly defined for the first time in India. By way of this definition, product liability was demarcated for different players across the supply chain. Similarly, the 2019 amendment to Motor Vehicles Act 1988 has introduced the concept of product liability within the automobile sector in India.



ITALY

The Italian regulation on civil liability for defective products is contained in the Consumer Code (Legislative Decree 206/2005), in particular in Articles 102-127, which trace and implement the content of Directive 85/374/EEC. There have been no further relevant interventions by the national legislator, but the increase in the complexity of the products placed on the market necessitates a regulatory intervention on this point, and in fact on 28 September 2022 the European Commission presented a proposal to adapt the current rules.

MEXICO

In June 2023, the National Code of Civil Procedures was issued, which is intended to replace each of the 32-state civil procedural codes and the Federal Code of Civil Procedures. This will certainly have an impact on product liability litigation, as the new code introduces new rules that may affect civil liability proceedings and class actions, the production of evidence and documents, and the plaintiff's burden of proof. The legal landscape is expected to change with this new regulation in civil matters.

THE NETHERLANDS

On 1 January 2020, the Settling of Large-scale Losses or Damage (Class Actions) Act (Wet afwikkeling massaschade in collectieve actie, "WAMCA") came into force. The WAMCA is largely in line with the new Directive (EU) 2020/1828 on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC (OJ L 409).

WAMCA makes it easier for injured parties to recover damages collectively, but without compromising the position of the party being sued. Therefore, WAMCA does not change the substantive law of liability or compensation: if a party had an obligation to pay damages under the law before 1 January 2020, those damages may now also be claimed in a collective action within the meaning of Article 305a of the Dutch Civil Code.



SPAIN

The last regulatory change in Spanish legislation occurred in 2007, when Royal Legislative Decree 1/2007, of November 16 came into force, thus approving the revised text of the General Law for the Defence of Consumers and Users and other complementary laws.

In relation to civil liability arising from damages caused by products, the aforementioned law introduced a series of general law modifications that can be summarised as follows:

1. As a general principle, the manufacturer is liable for the damages caused by the defects of the products that they manufacture or import, understanding a defective product as one that does not offer the safety that could be expected.
2. The supplier of the defective product may be liable as if they were the manufacturer.
3. The injured party seeking reparation for damages will have to prove the defect, the damage, and the causal relationship between the two.

UK

In 2021, the Law Commission (LC) of England & Wales proposed product liability as an idea for law reform in its 14th programme. Specifically, the LC identified 'product liability and emerging technology' for consultation, citing developments with smartphones, medical technology, automated vehicles, 3D printing, and artificial intelligence.

The LC noted that the Construction Product Association's (CPA) regime relates to 'products' that are tangible, but not software or related technological developments.

Some of these aspects of product liability are scheduled to be modernised in the EU.

However, in England & Wales, the LC suspended its 14th programme in 2023. So, it appears likely that local product liability law will in the near future have significant differences from EU law. Any such differences may impose burdens on local producers exporting to EU markets, and will have to be considered by product liability insurers of the businesses involved.

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