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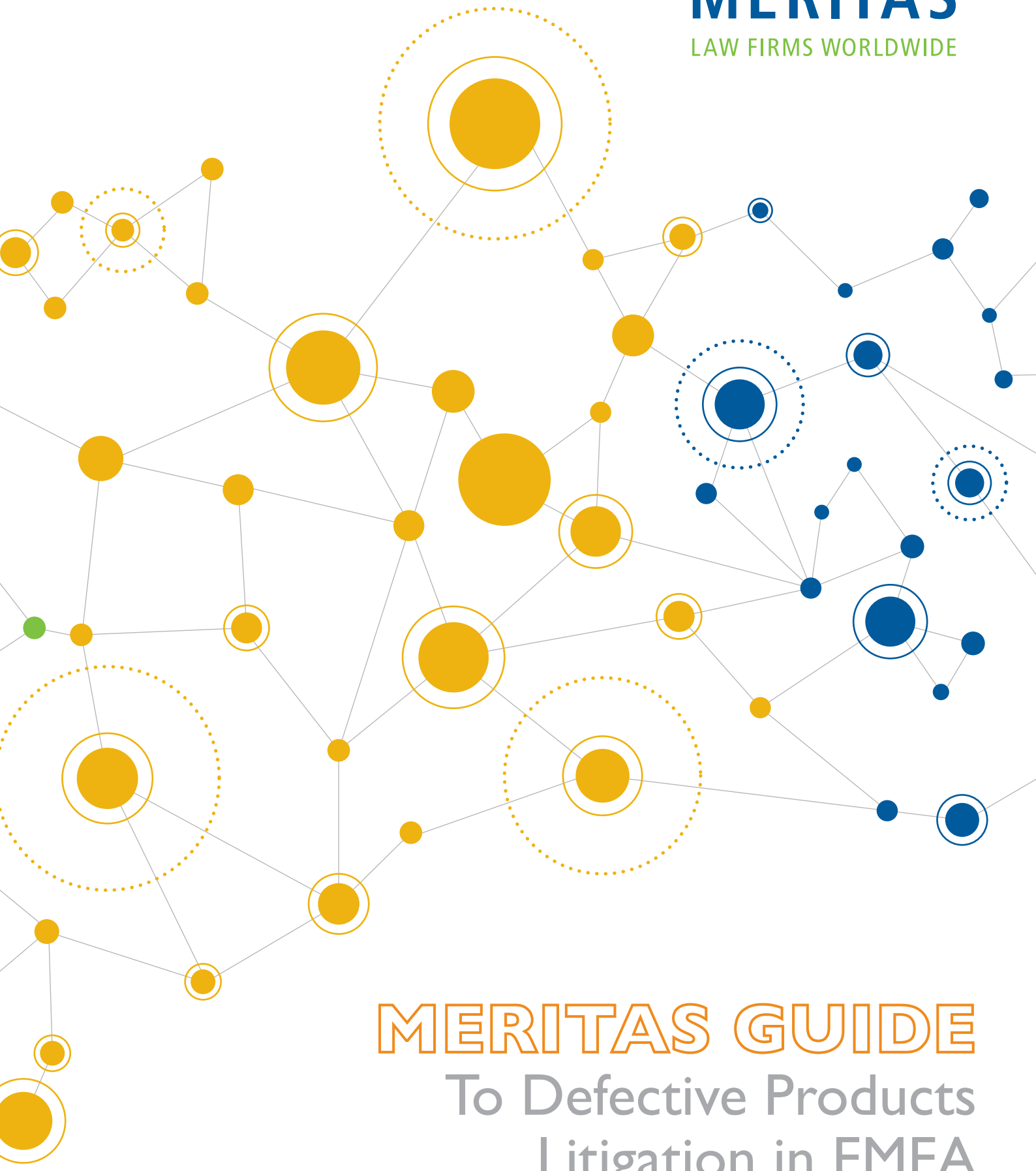

MERITAS GUIDE

To Defective Products Litigation in EMEA

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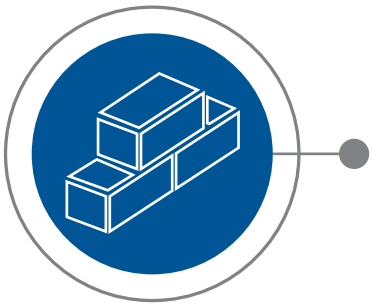

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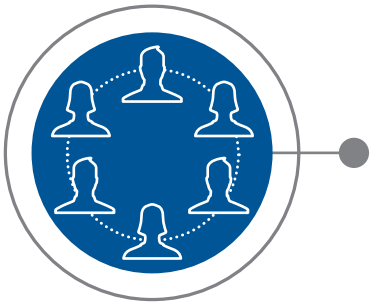

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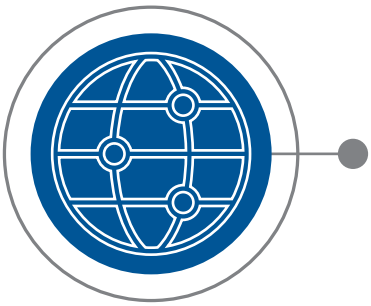

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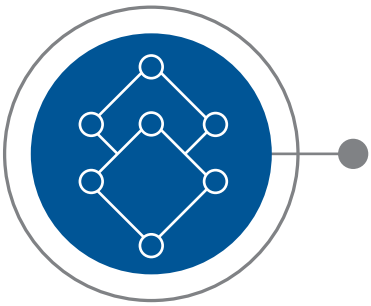

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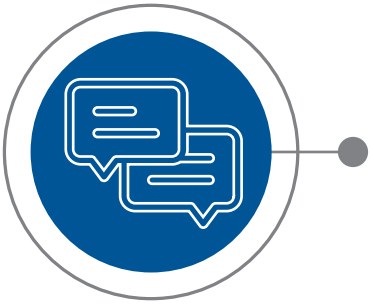

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INTRODUCTION

Key Issues

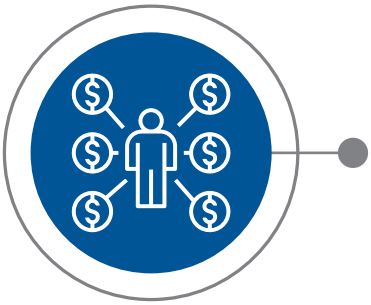
What claims may be brought for liability for defective products?

Who is liable to compensate a claimant for a claim?

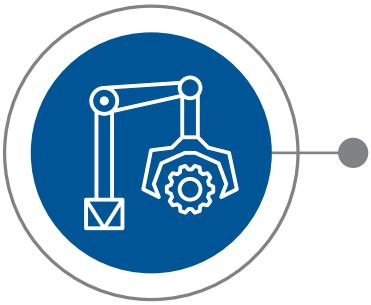
If you manufacture, produce, distribute or sell products **you are responsible** for ensuring they are safe and free from defects that may cause damage or injury. Failure to meet your responsibilities, resulting in damage, injury or death caused by a defect in your product, could have serious consequences including heavy fines and imprisonment, not to mention the loss of business revenue.

Understanding the laws and regulations that concern defective products and the liabilities that may result is therefore vital for any company doing business across Europe, Middle East and Africa.

The trend in many countries has been to **strengthen consumers' levels of protection** in respect of defective products, particularly within the EU.



Is there a difference if you are a consumer or professional buyer of the product?



Can a manufacturer of a defective product limit their liability?

Whilst a consumer may recover damages for losses caused by negligent acts or omissions, there are important differences between jurisdictions as to how principles of fault liability are applied. For example, in civil law jurisdictions, the burden of proof is often reversed once a defect and damage is proved and a defendant must prove that it was not negligent. In contrast, in common law jurisdictions, the burden generally rests on the claimant to prove all aspects of the claim.

The following Meritas guide asks these are other key questions related to defective products litigation and provides answers as they relate to 30 countries across EMEA.

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IRELAND

Contact

Whitney Moore
Dublin, Ireland
www.whitneymoore.ie

COLIN HAYES
Associate
T: +00 353 1611 0000
E: colin.hayes@whitneymoore.ie

1. What claims may be brought for liability for defective products? Is liability based on fault/ negligence, or strict liability, or both?

In Ireland, defective product claims can be made under Statute, Contract, or the Tort of Negligence. Claims will often be brought under all three headings.

Defective product claims can be brought under The Liability for Defective Products Act, 1991 ("the Act"), which implemented Council Directive 83/374 on Liability for Defective Products. The Act supplements rather than replaces the remedies in Contract and Tort. Under the Act a producer/manufacturer shall be liable in damages in tort for damage caused wholly or partly by a defect in its product. Liability under the Act is therefore essentially based not on wrongful conduct by the producer/ manufacturer but on proof of fact that a defect in the product caused the claimant damage. The producer will be strictly liable under the Act unless they can fall within the parameters of one of the defences available under the Act.

Claims concerning the quality of goods purchased under contract are governed by the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act"). This Act implies certain terms into a contract requiring goods to be of "merchantable quality" as well as to be safe and fit for purpose.

A claim may also be brought in the absence of a contract under the tort of negligence.

Manufacturers and suppliers of products may additionally face criminal liability if their product is defective, under the European Communities (General Product Safety) Regulations 2004, which implemented the revised EU General Product Safety Directive.

2. Who is potentially liable to compensate a claimant in such a claim? The manufacturer, the importer, the distributor or the retailer/shop?

Section 2 of the Act provides that a producer shall be liable for damages caused wholly or partly by a defect in the product. Producer has a wide definition under the Act, in that it includes manufacturers and producers of the finished products, component parts or raw materials and producers of agricultural produce. The definition also extends to importers where they bring a product into the EU for supply in the course of business.

In respect of contract, a claim may only be brought by a party or parties to a contract against another party or other parties to a contract.

A claim in negligence can be brought against a party who has breached their duty of care, and where that breach has resulted in damage to the claimant. Those who may be liable in negligence will be anyone who exercised control over the condition or supply of the product.

3. Are there differences if the buyer is a consumer or a professional buyer?

Under the Act an injured person can bring a claim for death or personal injury, loss of, damage to, or destruction of any item of property (other than the defective product itself), so long as the item of property is one intended for private use or consumption and was used by the injured person mainly for his own private use or consumption.

Claimants do not have to be consumers to bring a claim for damages in contract or negligence and such claims therefore have a broader scope than those made solely under the Act.

4. Can the seller or other potentially liable party exclude or limit its liability?

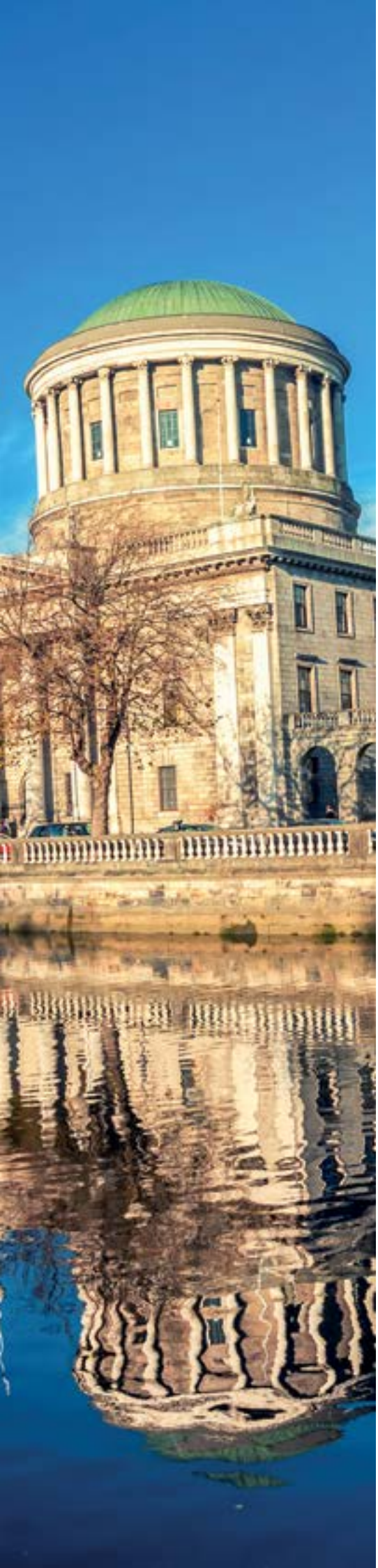
Under the Act, potentially liable parties can avoid liability fully if they are able to prove one of six defences under the Act. The Act prohibits exclusion of liability, so claimants may be able to find redress under the Act where other causes of action are precluded.

In terms of contractual claims, the terms implied by the 1980 Act cannot be excluded or restricted. Other terms which seek to exclude liability in a consumer contract may be regarded as unfair and therefore unenforceable. For example, liability for death or personal injury cannot be excluded or restricted in either consumer or commercial contracts.

Liability may be excluded or limited under the tort of negligence with proof of Contributory negligence on the part of the claimant or liability on the part of a concurrent wrongdoer.

5. What are the rights of the consumer if products are manufactured outside your jurisdiction or the EU?

Generally, a defendant should be sued in the country in which they are domiciled. However, proceedings relating to product liability will often fall within the special rules provided for in Article 7 of the Recast Brussels Regulation, which provides that, in the case of a tort, jurisdiction is granted to courts of the State in which the harmful event occurs. Therefore, if it can be shown that the harmful event caused by a defective product occurred in Ireland, a Non-EU producer may be sued in the Irish courts.



6. What are a manufacturer's and a retailer's liabilities for omitted or delayed recall campaigns?

Under the 2004 Safety Regulations, the Competition and Consumer Protection Commission is empowered to take actions to ensure products on the market are safe, including the power to order recall of products. A person who fails to comply with a direction of the Competition and Consumer Protection Commission with respect to the recall of products is guilty of criminal offence and is liable on summary conviction to a fine not exceeding EUR 3,000, or to imprisonment for a term not exceeding three months, or to both.

7. Is there a specific procedure or are there specific rules of evidence for defective products litigation, or do normal/ summary procedures and rules of evidence apply?

There is no specific procedure or specific rules of evidence for defective products litigation. However when there is Personal Injury claim involved a claimant will have to make an application to the Personal Injuries Assessment Board for compensation before any Court proceedings can be brought. If the claim is not resolved by the Personal Injuries Assessment Board, it will issue an authorization to the Claimant enabling him/her to issue Court proceedings.

8. What kind of pre-action measures are available and what are their limitations? Must you send a warning letter before issuing any proceedings?

In the case of a claim which involves a personal injury the Personal Injuries Assessment Board application, as mentioned above, must be made pre-issue of proceedings. In claims where there is no personal injury claim there is no such pre-action requirement, but unless there is a Statute of Limitations deadline approaching which requires immediate issue of proceedings it would always be advisable to send a pre-action letter to the Defendant Producer.

9. What sort of remedy is generally available to the buyer of a defective product (replacement of the product, repayment of purchase price and other damages)?

The typical remedy under statute and negligence will be Damages and the jurisdictional limits of the court in which the claim is brought will apply.

In contractual claims, the claimant may, under the 1980 Act, be entitled to repayment of the purchase price or replacement of the goods. Damages for breach of contract may be available.

10. What are the costs of defective products litigation? Who ultimately bears such costs? Who is responsible for experts' costs?

The general rule is that "costs follow the event" i.e. the successful party will be awarded its costs and the unsuccessful party will bear the costs. This general rule applies to expert costs also. The Court does however have discretion in this regard and can make a costs order as it sees fit depending on the specific case and conduct of the parties. A successful party could for example be awarded only a portion of its costs if part of its claim was unsuccessful or unnecessary experts or witnesses were relied upon.

11. Who has the burden to prove that a product is defective? Is it always the buyer?

Under the Act the Claimant must prove that the damage was caused by a defect in the product.

In Contract and Negligence the burden of proof is also on the claimant.

12. Is the state of the art defence available?

The Act provides for the "development risks" or "state of the art defence". This defence is available to a defendant where the state of scientific and technical knowledge at the time the product was put into circulation was not such as to enable the defect to be discovered.

Even where this Defence exists, an action in negligence may still be successful due to the duty of care element in placing a product on the market before all the risks were known.

13. What are the deadlines within which a claimant must notify defects and/or commence proceedings? Can such deadlines be frozen or extended?

The Act sets out the relevant limitation period as being 3 years from the date on which the cause of action accrued or the date on which the claimant became aware of the damage, the defect and the identity of the producer

There is also a 10-year limitation from the date on which the producer first put the product into circulation.

The statute of limitations for contractual and negligence claims is 6 years from the date the breach occurred.

In cases where there is a personal injury claim there is a 2 year limitation period from the date the injury occurred. This time period is however extended during the time the claim is submitted to and remains in the Personal Injuries Assessment Board process.

Limitation periods may be extended in cases of a claimant with a disability or fraud by the defendant.

14. What are the rules for bringing a claim in a class/ collective action?

There is no mechanism under Irish procedural rules for a class action and proceedings are generally initiated in the name of single parties. However, claimants may apply to court to unite several actions if they can be conveniently disposed of together by the court and provided that they meet certain limited criteria.

15. What is the average duration of defective products litigation?

The duration of defective products litigation will depend on a number of factors and in particular whether there is a personal injury claim involved. As outlined above in claims involving a personal injury element they can be lengthened by the required Personal Injuries Assessment Board application and assessment. In general however the average duration would be 18 months to 2