

Nightmare Scenarios – Can the UK expect US style product liability claims?

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History of the Product Liability Directive up until 1999

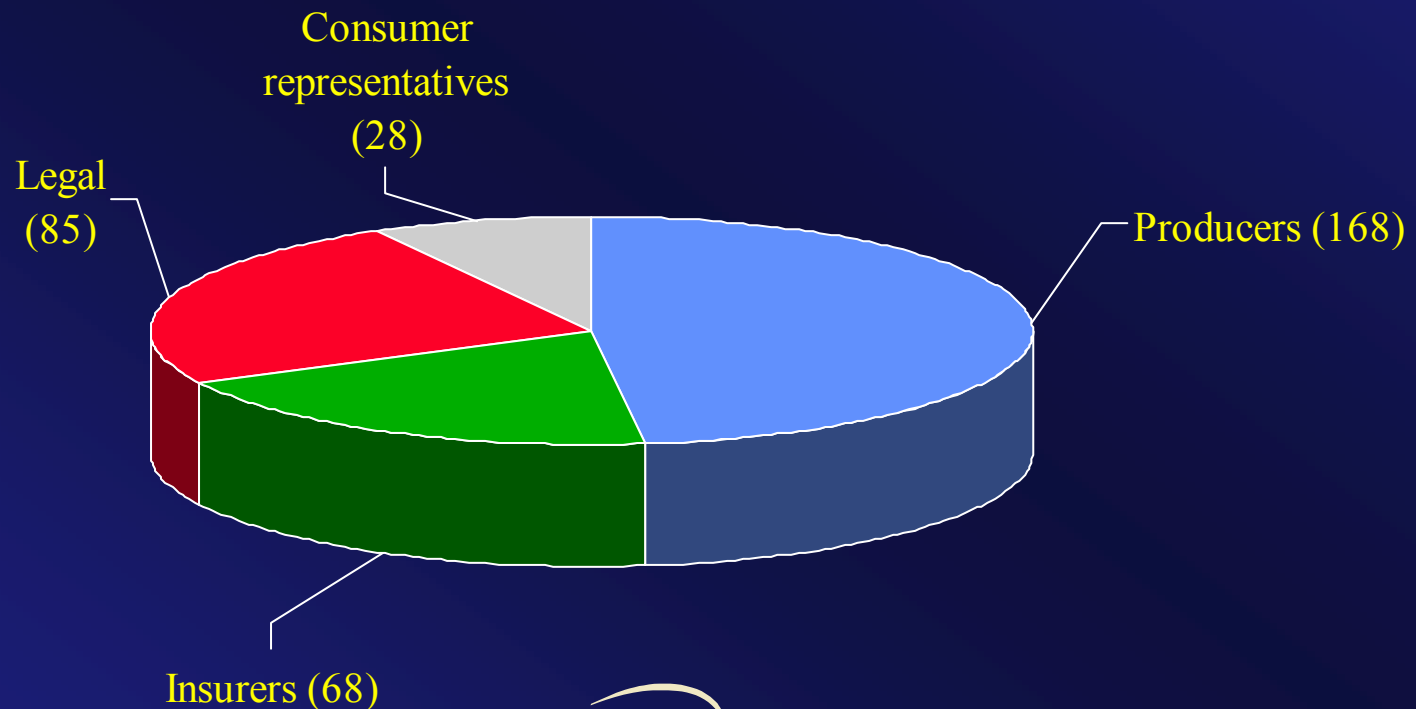
- ❖ The Product Liability Directive (Directive 85/374/EEC) introduced into the EU in March 1985.
- ❖ Implemented into national law by virtue of the Consumer Protection Act 1987.
- ❖ A flood of product liability claims were anticipated. These failed to materialise.
- ❖ Only one reported case brought under the Directive – *Relph v Yamaha Motor Company Limited & Others* (1996).

History of the Directive between 1999 and 2002

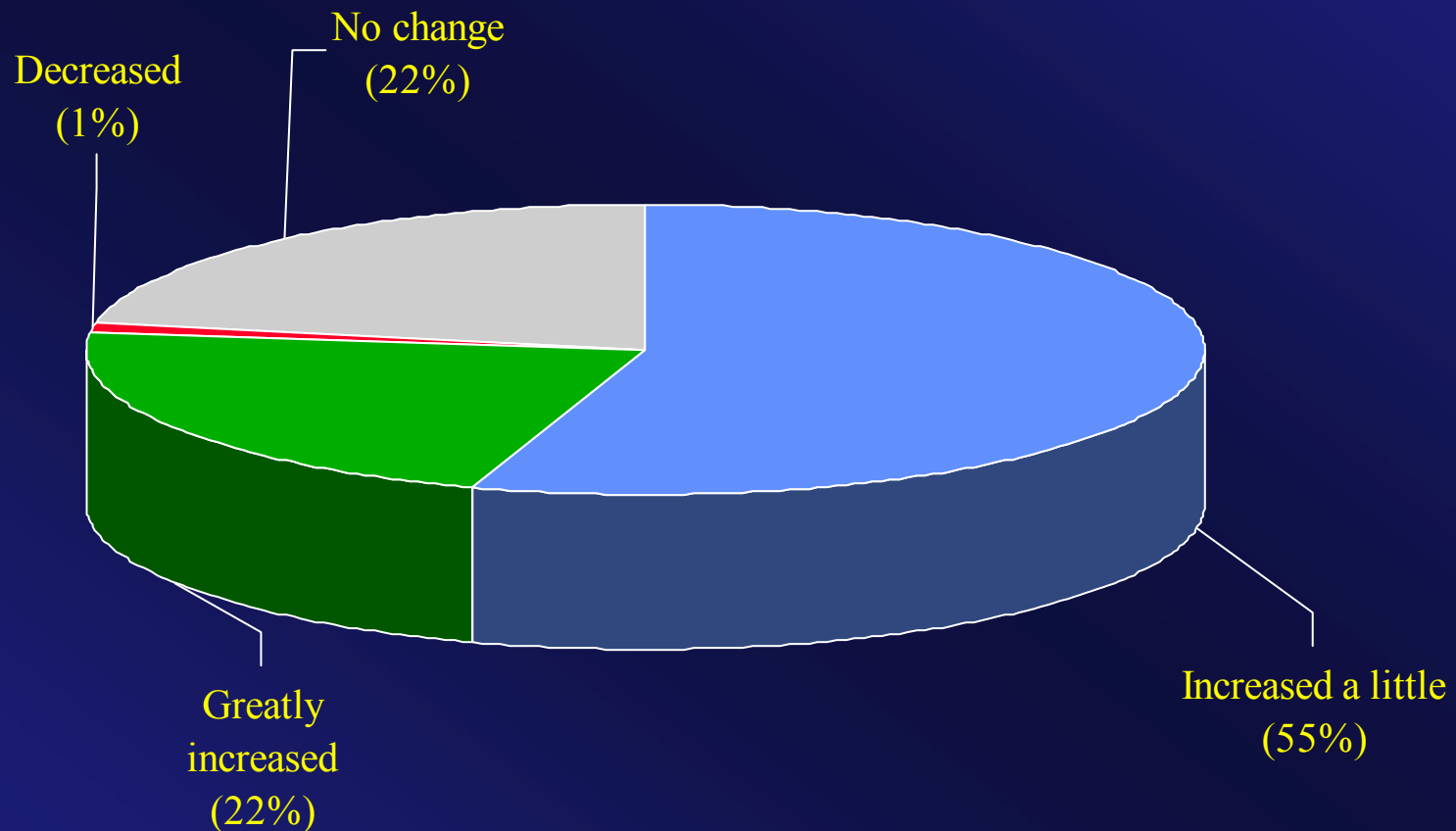
Year	Name	Brief Description
1999	Richardson -v- LRC Products	A case of the defective condom. Established the principle that the claimant has to specify the nature of the alleged defect with sufficient particularity for its potential cause to be identified.
2000	Foster -v- Biosil	The case of a defective breast implant. Reiterated principles set out in <i>Richardson</i> .
2000	Abouzaid -v- Mothercare (UK) Ltd	A Court of Appeal decision, involving a defective childcare accessory known as a “Cozy Toes”.
2001	A & Others -v- National Blood Authority & Others	The most significant case yet under the Directive, in which a series of claimants brought proceedings under the Consumer Protection Act 1987 against the National Blood Authority, in connection with transfused blood infected by the hepatitis C virus.
2002	Bogle & Others -v- McDonald Restaurants Ltd	The hot drinks litigation which was successfully defended by McDonalds. This was the first instance of a group action reaching trial and being successfully defended.
2002	XYZ & Others -v- Schering Healthcare Ltd & Others	The oral contraceptive pill group action litigation. Again, this was successfully defended by the manufacturers.

The EC Report on the Product Liability Directive

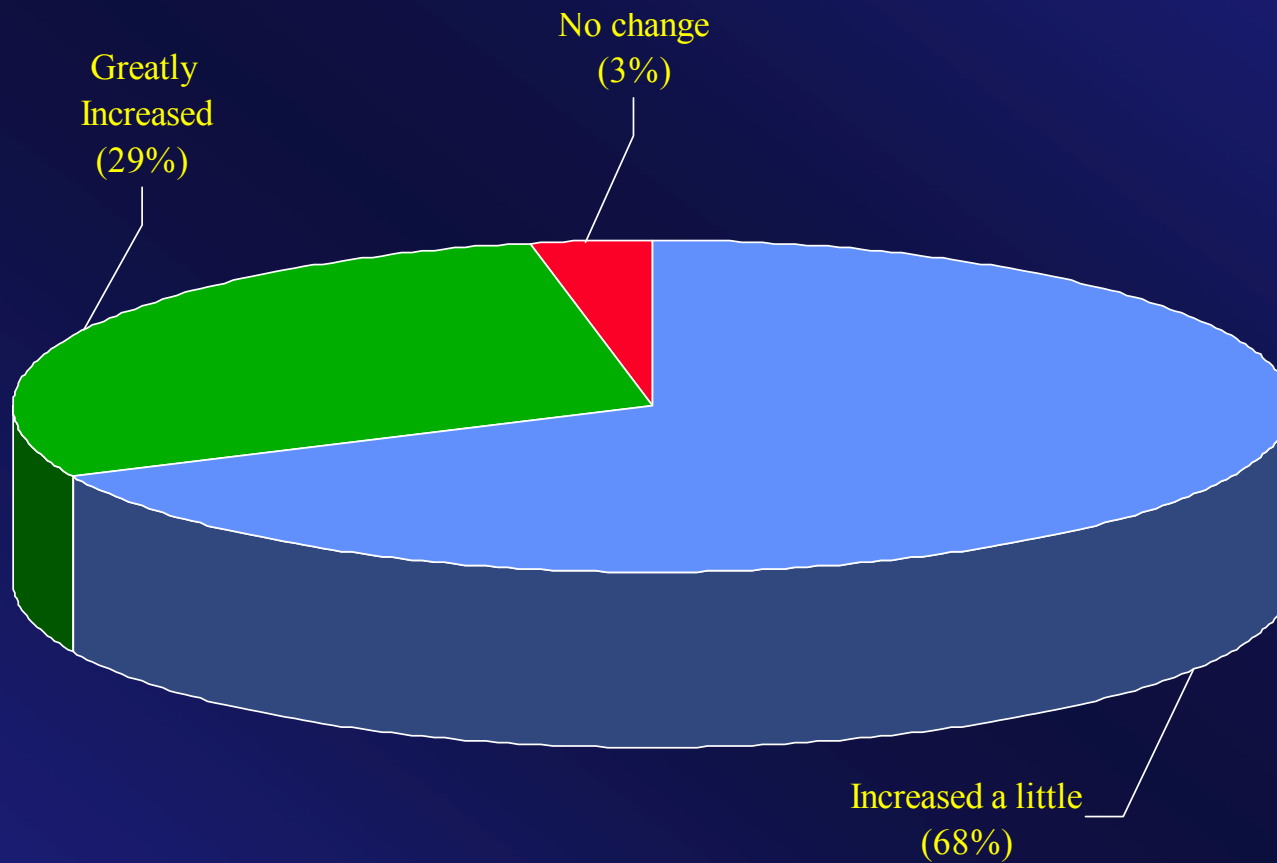
- ❖ Nearly 350 participants provided detailed responses to questions raised in relation to the operation of the Directive.
- ❖ The participants came from four categories.



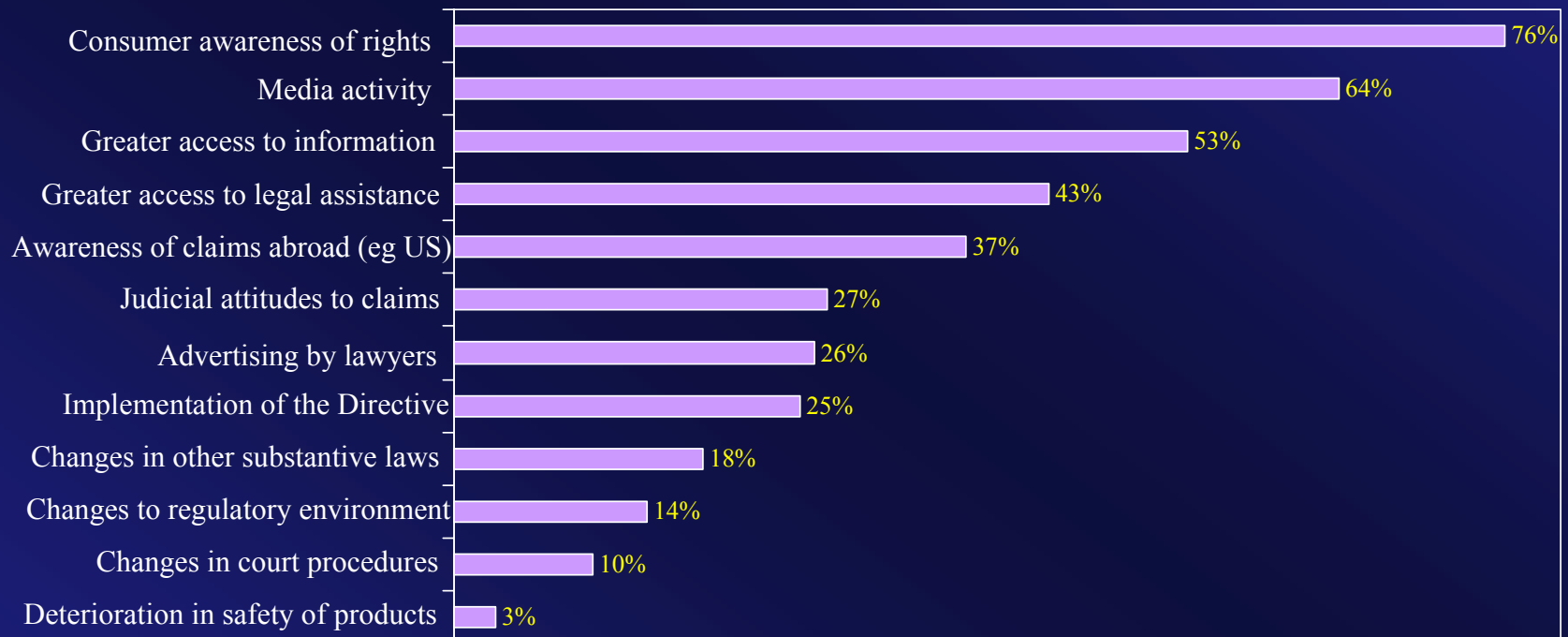
Extent to which the number of product liability claims changed in the last ten years



The View from Insurers



“Major Factors” which have contributed to an increase in product liability claims



Predicting future claims

EMF RADIATION

Potential claims in relation to extremely low frequency radio waves and microwave fields (telecom masts, mobile phones, etc).

FOOD SAFETY

Food products causing obesity within the US/UK population.

ALCOHOL CLAIMS

Liability issues arising out of the use of alcohol and, in particular, the manner in which it is advertised.



EMF Radiation

1. The history of EMF/mobile phone litigation can be traced back to 1979. Epidemiological study in Denver, USA sought to establish link between exposure to EMF power lines and childhood cancer.
2. Independent enquiry set up by DOH in 2000. That enquiry reported no proven link between use of mobile phones and cancers.
3. That being said, Sir William Stewart and his team concluded that:

“In line with our precautionary approach, at this time, we believe that the widespread use of mobile phones by children for non-essential calls should be discouraged.”

4. Again, as recently as January 2005,

“I don't think we can put our hands on our hearts and say mobile phones are safe.”



EMF Radiation (cont)

1. The main obstacle in mobile phone litigation succeeding – the lack of any categoric evidence demonstrating an obvious causative link.
2. A similar position exists in the US. In October 2002 a series of mobile phone claims were dismissed by Baltimore Judge Catherine Blake. Despite constant rumblings of pending litigation, there is no substantive US mobile phone litigation in existence at present (as far as I am aware).

EMF Radiation (cont)

1. To summarise, litigation arising out of the use of mobile phones remains distinctly possible.
2. Swiss Re have concluded that it must be expected that at some time in the future, Claimants may begin to win suits dealing with EMF litigation.
3. Vodafone continues to make financial provision within its accounts in relation to possible litigation in the US/UK. Indeed, it can't even build a transmitting tower on its Sydney office block because of insurers' objections!

Food Safety

1. The US phenomenon of social engineering through litigation, and the need to take on big business.
2. The McDonalds lawsuit in 2002 – *Perlman v McDonalds Corporation*
3. A possible litigation road map – the complaint might have avoided dismissal had it alleged that the Defendant manufactured food in such a way that the consumer could not have appreciated the harm posed by it. This is the so called “McFrankenstein” creation – i.e. food that, through processing, has lost its presumed healthy character.
4. Would a reasonable consumer know of such changes? If the Plaintiff could establish that the dangers of McDonalds products were not commonly well known, then McDonalds would be under a duty to inform its customers of those dangers. In *Perlman* the Plaintiffs were unable to successfully meet this test.
5. The science generally does not support arguments as to the “addictiveness” of certain foods.
6. The real danger to the food industry comes from activists looking to rely upon consumer protection statutes in the US which empower consumers to bring lawsuits based on unfair/deceptive commercial practices.



Alcohol Health Liability

1. July 2003, a group of 12 Claimants bring claims against drinks manufacturers for failing to warn them of the dangers of alcohol. By February 2004 those claims have been dropped.
2. US lawyers adopt a more lateral approach focusing on drinks advertising, with particular reference to the marketing of products to underage youths.
3. Current litigation systematically alleges that the drinks companies violate industry/enforced marketing codes and use website designs, magazine and radio ads, television spots and promotions to target underage youths and children.
4. Advertising and jury trials. The perceived effect of advertising.
5. Outcome of current litigation still uncertain. Claimant's chances of success would be materially improved if
 - State/Federal Government become Plaintiffs
 - Courts permit the aggregation of Plaintiffs into classes so large as to threaten a Defendant firm with bankruptcy.



Differences between UK/US

1. Jury trials
2. The adverse costs rule
3. Contingency fees

Further obstacles preventing US style product liability claims in the UK

1. Burden of proof
2. The development risks defence
3. 10 year long stop limitation period

Nanotechnology

1. Major new approach in industrial production techniques – structures and tailor made particles a few millionths of a millimetre in size.
2. Potential commercial uses are huge, but if such particles are inhaled, there is concern that harmful consequences could ensue.

Is Nanotechnology the New Asbestos?

Aspect	Nanotechnology	Asbestos
Manufacturer known	✓	✓
Defined substance	No	✓
Worldwide dissemination	✓	✓
Wide range of use	✓	✓
Acutely toxic	No	No
Persistent	In some cases	✓
Long-term effect	Conceivable	✓
Risks	Unknown	Cancer
Claims series potential	✓	✓
Loss accumulation potential	✓	✓
Agent analytically provable	✓	✓

How can Insurers seek to manage these uncertainties?

1. Reliance upon “claim series clauses”
2. Avoidance of the “stacking of limits” – strictly “claims made” cover, loss definitions and exact descriptions of the circumstances under which a loss may be said to have occurred.
3. Fear of claims