ICLG

The International Comparative Legal Guide to:

Product Liability 2018

16th Edition

A practical cross-border insight into product liability work

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EDITORIAL

Welcome to the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of product liability.

It is divided into two main sections:

Seven general chapters. These chapters are designed to provide readers with an overview of key issues affecting product liability law, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in product liability laws and regulations in 23 jurisdictions.

All chapters are written by leading product liability lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Adela Williams and Tom Fox of Arnold & Porter for their invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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PREFACE

I'm delighted to have been asked to introduce the sixteenth edition of *The International Comparative Legal Guide to: Product Liability*.

The guide continues to be an ideal reference point with seven excellent general chapters covering significant developments in European, Asian and US law. This edition also has a special focus on product recalls, a practical guide around costs issues and considerations in the context of group actions in England & Wales and finally commentary on liability and insurance matters in the context of driverless cars.

As always, the bulk of the edition remains the enormously helpful country question and answer section, covering 23 jurisdictions, new to the guide this year being Albania and Kosovo.

I frequently have cause to make reference to the guide for matters concerning product liability all over the world and will continue to do so as the guide remains a thoroughly informative and comprehensive publication.

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1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

In Ireland, liability for defective products falls under four main headings:

- Statute.
- Tort.
- Contract.
- Criminal.

Statute

The principal product liability statute in Ireland is the Liability for Defective Products Act 1991 ("the 1991 Act"), which was enacted to implement EC Directive 85/374. The 1991 Act supplements, rather than replaces, the pre-existing remedies in tort and contract (see below). S.2(1) of the Act provides for strict liability, making a producer:

> "*[L]iable in damages in tort for damage caused wholly or partly by a defect in his product*."

It is worth noting that the 1991 Act covers only dangerous, defective products. Products which are safe, but shoddy, do not fall within its scope.

Tort

Manufacturers, repairers, installers, suppliers and others may be sued in tort for reasonably foreseeable damage caused to those to whom they owe a duty of care. As opposed to liability under the 1991 Act, liability in tort is fault-based.

For an action to lie in tort, there must be:

- a duty of care owed by the producer or manufacturer of the product;
- a breach of that duty of care; and
- a causal relationship between the breach and the damage caused to the user of the product.

Unlike under the 1991 Act, a plaintiff suing in tort may, in certain circumstances, succeed in a negligence action for non-dangerous defects.

Contract

Contracts for the sale of goods are covered in Ireland by the Sale of Goods Act 1893 ("the 1893 Act") and the Sale of Goods and Supply of Services Act 1980 ("the 1980 Act"). S.10 of the 1980 Act operates to add an implied condition to contracts for the sale of goods: that the goods are of "merchantable quality" where a seller sells them in the course of business. This means that the goods must be:

> "*[F]it for the purpose or purposes for which goods of that kind are commonly bought and durable as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances*."

Contractual liability under the 1980 Act is strict. It must be borne in mind, however, that the principle of privity of contract applies, which often makes it difficult for an injured party to sue the manufacturer of a product in contract, since his contract is likely to be with the retailer of the product.

Criminal Liability

The principal legislation imposing criminal liability in the area of product liability is the European Communities (General Product Safety) Regulations 2004, as amended, ("the 2004 Regulations") which implemented EC Directive 2001/95. The 2004 Regulations make it an offence to place unsafe products on the market and specify the duties of producers and distributors in this regard.

Under the 2004 Regulations, the Competition and Consumer Protection Commission ("**CCPC**") is given the authority to ensure that only safe products are placed on the market. There is also a duty on producers and distributors to inform the CCPC where they know, or ought to know, that a product which has been placed on the market by them is incompatible with safety requirements. The CCPC has also been given the power to order a product recall, as set out in question 1.5 below.

In May 2016, the Irish government published a draft Corporate Manslaughter Bill. This draft bill includes the separate indictable offences of "corporate manslaughter" and "grossly negligent management causing death". The Bill is based on the Law Reform Commission Report on Corporate Killing dated October 2005 which recommended that a new offence of corporate manslaughter be created. The Bill is currently at the initial parliamentary review stage.

Criminal liability is fault-based and must be proven beyond reasonable doubt.

1.2 Does the state operate any schemes of compensation for particular products?

This has been known to happen in Ireland in circumstances where some organ of the State may have a liability. The National Treasury Management Agency (the "**NTMA**") manages personal injury and property damage claims against the State. When performing these

functions, the NTMA is known as the State Claims Agency (the "**SCA**"). Whilst this particular case was excluded from the SCA's remit, the most notable instance was the Hepatitis C Compensation Tribunal, which was set up in 1997 to compensate women who had become infected with Hepatitis C having been transfused with infected blood during pregnancy. More recently, the 'Surgical Symphysiotomy *Ex-gratia* Payment Scheme' was set up in 2014 to compensate women who underwent historical symphysiotomy procedures in the State. There is also a scheme to compensate haemophiliac plaintiffs of contaminated blood products. Such schemes are *ad hoc*, rather than statutorily required.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Statute

As stated above, S.2(1) of the 1991 Act makes the "producer" of the defective product liable in damages caused wholly or partly by the defect in his product. In this regard, S.2(2) of the Act defines "producer" as:

- the manufacturer or producer of a finished product;
- the manufacturer or producer of any raw material, or the manufacturer or producer of a component part of a product;
- in the case of products of the soil, of stock-farming and of fisheries and game, which have undergone initial processing, the person who carried out such processing;
- any person who, by putting his name, trademark or other distinguishing feature on the product or using his name or any such mark or feature in relation to the product, has held himself out to be the producer of the product;
- any person who has imported the product into a Member State from a place outside the European Communities in order, in the course of any business of his, to supply it to another; or
- the supplier of the product where the manufacturer of the product cannot be identified through the plaintiff taking reasonable steps to establish his identity and where the supplier fails to identify the manufacturer of the product within a reasonable amount of time of a request being made.

Tort

Under the law of tort, the test to be applied is whether a particular individual, e.g. the manufacturer, retailer, supplier or importer, owes a duty of care towards the injured party. If such a duty is owed and has been breached, that person is capable of having responsibility.

It is clear that the manufacturer of a product will owe a duty of care to all those who may foreseeably be injured or damaged by his product. The same will apply to retailers, suppliers and importers, though the scope of their duty will typically be narrower than that of manufacturers, extending to, for example, a duty to ensure that their stock is not out-of-date. In practice, a plaintiff will not be required to choose which of a number of possible defendants to sue, and any or all potential tortfeasors are likely to be sued.

Contract

Under the 1893 Act and the 1980 Act, the seller will, subject to certain conditions and exemptions, have a contractual responsibility to the buyer in respect of faults or defects.

Criminal

In terms of the criminal law, the 2004 Regulations make a "producer" who places or attempts to place an unsafe product on the market guilty of an offence. The 2004 Regulations define a "producer" as:

- the manufacturer of a product and any other person presenting himself as the manufacturer by affixing to the product his name, trademark or other distinctive mark, or the person who reconditions the product;
- the manufacturer's representative, when the manufacturer is not established in the Community or, if there is no representative established in the Community, the importer of the product; or
- other professionals in the supply chain, in so far as their activities may affect the safety properties of a product placed on the market.

The 2004 Regulations also make distributors who supply or attempt to supply a dangerous product, which they know, or it is reasonable to presume that they should know, is dangerous, guilty of an offence. In this regard, a "distributor" is defined as any professional in the supply chain whose activity does not affect the safety properties of the product.

1.4 May a regulatory authority be found liable in respect of a defective/faulty product? If so, in what circumstances?

In principle, a regulatory authority could be found liable in tort in respect of a defective / faulty product where the requisite elements of the claim (as outlined in response to question 1.3 above) are established. For example, such a claim might arise on the basis that the regulatory body had knowledge of a defective/faulty product but failed to order the producer of the product to take appropriate action, such as ordering the producer to issue a product recall, for example, and in circumstances where the defective/faulty product has then caused harm to the claimant. However, in practice, such claims are difficult to establish against regulatory authorities and the claimant will need to show something akin to "bad faith" on the part of the regulatory authority concerned.

1.5 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

Under S.9 of the 2004 Regulations, the CCPC is given the power to "*take all reasonable measures*" to ensure that products placed on the market are safe, including issuing a direction ensuring "*the immediate withdrawal of [a] product from the marketplace, its recall from consumers and its destruction in suitable conditions*". Under S.9(2) of the 2004 Regulations, in taking this, or any other measure under the Regulations, the CCPC must act "*in a manner proportional to the seriousness of the risk and taking due account of the precautionary principle*".

A person who fails to comply with a direction of the CCPC with respect to the recall of products is guilty of a criminal offence and is liable on summary conviction to a fine not exceeding €3,000, or to imprisonment for a term not exceeding three months, or to both.

In addition, the common law duty of care imposed by the law of tort (see above) may extend to a product recall depending on the circumstances of the particular case. Thus, a failure to recall in particular circumstances may be a breach of such duty, giving rise to a civil action.

1.6 Do criminal sanctions apply to the supply of defective products?

Yes, under the 2004 Regulations, "producers", or "distributors", as defined, may be made criminally liable where unsafe products have been placed on the market. Please see questions 1.1 and 1.3 above for details.

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

As a general principle, it is for the injured party to prove the defect to the product and the damage caused. This is stated in S.4 of the 1991 Act and is a general rule of the laws of contract and tort.

In tort and contract, the standard of proof is "*on the balance of probabilities*", while in criminal cases, the guilt of the accused must be proved "*beyond reasonable doubt*".

In certain circumstances, particularly in tort, the doctrine of *res ipsa loquitur* can be applied to, in effect, reverse the burden of proof and place the onus on the defendant to disprove an allegation of negligence. Since the 1991 Act operates a system of strict liability and is thus unconcerned with the negligence or otherwise of the defendant, *res ipsa loquitur* will have no such application in the context of a claim relying solely on the provisions of the 1991 Act. However, for this reason, in practice, claims will seldom, if ever, be brought relying solely on the provisions of the 1991 Act.

In criminal cases, it is for the prosecution to prove the guilt of the accused. Under the 2004 Regulations, the prosecutor in such offences is the CCPC.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure? Is it necessary to prove that the product to which the claimant was exposed has actually malfunctioned and caused injury, or is it sufficient that all the products or the batch to which the claimant was exposed carry an increased, but unpredictable, risk of malfunction?

S.4 of the 1991 Act provides that the injured person must prove the damage, the defect and the causal relationship between the two.

In general, wrongful exposure to an increased risk of injury will not, in itself, provide a claimant with a cause of action. The causal relationship to a concrete loss or injury must be proven. If a claimant cannot prove, on the balance of probabilities, that an injury would not have occurred without exposure to the product in question, he/she has not discharged the civil burden of proof on causation.

However, the CJEU judgment *C-503/13 and C-504/13, Boston Scientific Medizintechnik GmbH v AOK Sachsen-Anhalt – and Others* has the potential to expand the scope of liability beyond what was previously understood. This case held that where it is found that products belonging to the same group or forming part of the same production series have a potential defect, such a product may be classified as defective without there being any need to establish that the particular product in question has such a defect. This is a significant decision and it remains to be seen how it will be interpreted by the Irish courts, whether they will apply the decision only in cases of high-risk product groups (such as implanted medical devices as in the *Boston Scientific* case) or whether they will take a broader approach.

As stated above, where the claimant encounters problems in proving a causal relationship, the doctrine of *res ipsa locquitur* may be of assistance.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

As stated above, under S.2(3) of the 1991 Act, where the producer of a product cannot be identified through the plaintiff taking reasonable steps, the supplier of the product may be treated as its producer unless he informs the plaintiff of the identity of the producer, or of the person who supplied him with the product, "within a reasonable time" of such a request being made.

In terms of the law of tort, it would be usual, in circumstances where a plaintiff cannot, with absolute certainty, identify the producer of a defective product, that the plaintiff would institute proceedings against all parties whom he reasonably suspects could have been responsible for its manufacture. Notices of Indemnity and Contribution may be served by each of the defendants on their co-defendants and ultimate liability (or an apportionment thereof), if any, will be decided by a court at trial of the issue.

Market share liability has not, to date, been applied by the Irish courts in product liability cases.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

As in other Member States, Ireland's membership of the European Union has necessitated the introduction of regulations in many industries stipulating specific information and warnings which must be provided to consumers as to the nature, ingredients/contents and safety of products. Failure to comply with these regulations can have consequences for product manufacturers and distributors. Such consequences vary depending on the provisions of the individual regulations.

Specific statutory requirements aside, however, the issue of whether warnings must be provided to consumers falls within the question of compliance with the standard of reasonable care under the Irish law of tort. It should be noted that an increased level of awareness in society of product safety, and increased expectations on the provision of product information, have made it more likely in recent times that the absence of an express warning in respect of a danger attaching to a product will be deemed to constitute negligence.

As further evidence of the pro-consumer approach within this jurisdiction, the relevance of intermediate examination has been consistently undermined by the law over the years. Formerly, it was not considered negligent to allow a potentially dangerous product into circulation if the danger could reasonably be discovered by way of intermediate examination by the consumer or a middleman in the chain of distribution. However, S.34(2)(f) of the Civil Liability Act

1961 provides that, while the possibility of intermediate examination may be taken into account as a factor in determining negligence, it is no longer conclusive. Whether the release of the product is seen as negligent will, therefore, depend on all of the circumstances.

While the concept of a "learned intermediary" has not yet received specific judicial examination in Ireland, it is likely that the fact that an examining intermediary has some expertise in the composition and safety of the product could be pleaded to the benefit of the manufacturer in arguing that the release was not negligent in all the circumstances.

As regards criminal law, S.6 of the 2004 Regulations provides that a producer must provide consumers with "*all relevant information*" relating to a product which it has put on the market to "*enable [the consumer] to assess the risks inherent in the product throughout the normal or reasonably foreseeable period of its use, where such risks are not immediately obvious without adequate warnings and to take precautions against those risks*". In addition, powers are granted to the CCPC under S.9 of the 2004 Regulations to issue a direction that a particular product be marked with a risk warning.

3 Defences and Estoppel

3.1 What defences, if any, are available?

Under S.6 of the 1991 Act, a Producer is freed from liability under the Act if he proves:

- that he did not put the product into circulation;
- that it is probable that the defect causing the damage came into being after the product was put into circulation by him;
- that the product was not manufactured for a profit-making sale;
- that the product was neither manufactured nor distributed in the course of his business;
- that the defect is due to compliance of the product with mandatory regulations issued by the public authorities;
- that the state of scientific and technical knowledge at the time when the product was put into circulation was not such as to enable the defect to be discovered ("State of the Art" Defence); or
- in the case of a manufacturer of a component of the final product, that the defect is attributable to the design of the product or to the instructions given by the product manufacturer.

Furthermore, if the damage was caused partly by a defect in the product, and partly by the fault of the injured person, or a person for whom the injured person was responsible, the provisions of the Civil Liability Act 1961 in relation to contributory negligence apply (see below).

Tort

Contributory Negligence

In Ireland, this defence is regulated by the Civil Liability Act, 1961 ("the 1961 Act"), which provides, with some exceptions, that where the plaintiff is partly at fault, damages will be reduced in proportion to that fault. It has been held that the fault necessary is to be equated with blameworthiness and not to the extent of the causative factors moving from each side. Equally, a plaintiff will be responsible for the acts of a person for whom he is vicariously liable (imputed contributory negligence). Finally, failure by a plaintiff to mitigate damage is also considered to be contributory negligence.

Voluntary Assumption of Risk (Volenti Non Fit Injuria)

This defence is regulated by S.34(1)(b) of the 1961 Act. A defendant may escape liability in two cases:

- where he shows that by contract he is not liable (though the contract will be construed strictly against the party claiming the benefit of the exception); or
- where he shows that, before the act, the plaintiff agreed to waive his legal rights in respect of it.

In both cases, the burden of proof is on the defendant to prove that the defence applies. In practice, this defence is difficult to prove.

Contract

To have a workable contract, the basic rules of contract formation must be complied with, i.e. there must be an offer, acceptance and consideration. The absence of these essential elements can act as a defence to an action in contract. Likewise, mistake, misrepresentation and duress will affect the validity of a contract. Furthermore, "illegal" contracts are invalid or, in some cases, may have the offending provision severed. Inadequate capacity to contract may also affect the validity of a contract.

Criminal

Under S.5 of the 2004 Regulations, a product shall be deemed safe if it conforms with any specific rules of the law of the State laying down the health and safety requirements which the product must satisfy in order to be marketed, or with voluntary Irish standards transposing European standards. However, notwithstanding this, the CCPC may take "*appropriate measures*" to impose restrictions on a product being placed on the market, or to require its withdrawal or recall, where there is evidence that, despite such conformity, the product is dangerous.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

Yes (see question 3.1 above), under the provisions of the 1991 Act. Where the defence is raised by a manufacturer, the burden of proof lies with the manufacturer to prove the state of scientific and technical knowledge at the relevant time, and that the fault/defect was not discoverable.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Yes, under S.6 of the 1991 Act, where this compliance can be shown to be the cause of the defect itself, this will be a defence to any cause of action based upon the 1991 Act. It may not necessarily, however, be a defence to a cause of action based upon breach of duty or breach of contract.

With respect to criminal law, please see question 3.1 above. While compliance with regulatory and statutory requirements will, *prima facie*, be taken to show that the product is safe, the CCPC is given the power, under the 2004 Regulations, to take "*appropriate measures*" where there is evidence that the product is, nonetheless, dangerous.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Provided they arise in separate proceedings brought by a different claimant, findings on issues of fact, as opposed to issues of law, are of no precedent value and are not binding in a court. Issues of fault, defect and capability of a product to cause damage are issues of fact and unless the parties, of their own volition, or the court, by order, consolidates two or more claims into one set of proceedings, findings of fact will not be binding in respect of other claimants.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Yes, in such circumstances where a defendant wishes to claim an indemnity or contribution against a person who is not a party to the proceedings, they may apply to join that person as a third party to the proceedings. This third party procedure can be availed of where the plaintiff's claim against the defendant coincides to some extent with a similar claim by the defendant as against the third party. If a defendant wishes to join a third party to the proceedings, they must take steps to do so "*as soon as is reasonably possible*", and there is extensive case law in relation to what is considered to be a reasonable timeframe.

Assuming the plaintiff's claim against the third party would not be statute-barred at the time the application is being made to join a third party, the plaintiff can indicate that they wish the third party to be joined to the proceedings as a co-defendant. If the plaintiff does take this step, it is open to the existing defendant to serve a Notice of Indemnity or Contribution on the "new defendant" which would be similar in its effect to a Third Party Notice.

If a defendant fails to bring third party proceedings as soon as is reasonably possible, such a defendant may still bring separate proceedings for contribution. However, the court has discretion to refuse such an order for contribution, particularly if it considers that such proceedings would impose an unnecessary and unreasonable burden of costs on the proposed contributor.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

Yes, it is open to a defendant to plead a defence of contributory negligence against a plaintiff, i.e. that the plaintiff's own actions or negligence caused, or contributed to, the damage which he or she suffered. If accepted by the court, the plea of contributory negligence will reduce any damages awarded to the plaintiff by a percentage in proportion to the percentage fault deemed to have been involved on the part of the plaintiff. For more information, please see question 3.1 above.

4 Procedure

4.1 In the case of court proceedings, is the trial by a judge or a jury?

In civil cases for product liability, cases are heard by a judge, sitting without a jury.

As regards criminal liability, since the 2004 Regulations provide for summary prosecution only, it is not open to the accused to opt for a trial by jury. These cases will, therefore, also be heard by a judge sitting without a jury.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

The court has an inherent jurisdiction to hear from such parties as it sees fit. In addition, under new Superior Court rules (the Rules of the Superior Courts (Conduct of Trials) 2016 (SI 254 of 2016)), which recently came into effect, a judge may, either where requested to by the parties or of his own accord, make various directions as to expert evidence, including the appointment of a single joint expert.

Alternatively, the court may appoint a separate person, known as an "assessor" to "*assist the court in understanding or clarifying a matter, or evidence in relation to a matter*". An assessor can be asked to prepare a written report in relation to the subject matter of a dispute. However, as is also the case with parties consulted under the court's inherent jurisdiction, the assessor is there merely to assist the judge make a determination and the findings of any written report are not binding.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

There is no mechanism under Irish procedural rules for a class action. Thus, litigation is conducted by individual named parties. There is a tendency in Irish multi-party litigation to take one or more test cases, whereby a small number of cases are selected from the group and progressed to trial. However, in the absence of agreement (see question 3.1 above), these cases are not binding on the parties in other cases.

Order 18 of the Rules of the Superior Courts provides that a plaintiff may apply to court to unite in the same action several causes of action if they can be conveniently disposed of together by the court and they meet certain limited criteria. Order 49 of the Rules of the Superior Courts provides that causes or matters pending in the High Court may be consolidated by order of the court on the application of any party.

The Law Reform Commission published a Consultation Paper in 2005 on Multi-Party Litigation and has recommended the introduction of a procedure to be called a Multi-Party Action ("**MPA**"). The private multi-party litigation would operate as a flexible tool to deal collectively with cases that are sufficiently similar and should be introduced by way of Rules of court. The

MPA procedure should operate on the basis of an opt-in system whereby individual litigants will be included in the group only where they decide to join the group action. This is different to the US class action approach. A single legal representative would be nominated by the MPA members to deal with the common issue arising within the MPA.

On 11 June 2013, the European Commission published a Recommendation calling on all Member States to adopt collective redress systems for both injunctive and compensatory relief. Although Member States are encouraged to implement the principles set out in the Regulations, the Recommendation is not binding. The Recommendation deals with "mass harm situations" where by two or more persons (natural or legal) claim to have suffered harm from the same illegal activity carried out by another person (natural or legal) in breach of EU rights. The Recommendation, which may form the basis for future implementing legislation, addresses a number of issues in collective redress, including: standing to bring a representative action; funding; cross-border disputes; ADR; damages; and legal costs and lawyer fees.

As of yet, however, there have been no steps taken by the Irish legislature to implement the recommendations of either the Law Reform Commission or the European Commission in this regard.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

No. Representative and consumer associations will generally lack the necessary *locus standi* to bring such actions.

4.5 How long does it normally take to get to trial?

Following the enactment of the Personal Injuries Assessment Board Act 2003, any party wishing to bring personal injury proceedings must first submit their claim to the Personal Injuries Assessment Board (save for certain exceptions). This Personal Injuries Assessment Board is an independent body set up by the government to assess the level of compensation payable to those who have suffered personal injuries. If the respondent to a claim notifies the Personal Injuries Assessment Board that they intend to rely upon legal issues to defend their position, the Personal Injuries Assessment Board will serve the claimant with an Authorisation, thereby enabling the claimant to issue proceedings before the courts.

The length of time between service of proceedings and the actual hearing of the matter depends to a large extent on how quickly the procedural steps and delivery of pleadings are complied with by both parties. In a straightforward product liability personal injuries action, with no interlocutory applications, a hearing date might be obtained within one year. In reality, however, most matters are not heard for a period of 18 months to two years from service of proceedings. In more complex cases or cases where procedural time limits have not been complied with and/or a number of interlocutory applications (for example, for discovery, particulars or interrogatories) have been made, it is not unusual for a case not to be heard for three years or more.

The Commercial Court, which is a division of the Irish High Court dealing with commercial disputes with a value in excess of €1 million, has procedures to streamline litigation and can lead to a much speedier conclusion of cases (although it does not apply to personal injury litigation).

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

Yes. Orders 25 and 34 of the Rules of the Superior Courts provide for the preliminary trial of an issue of law where such is deemed expedient by the court for the saving of costs and/or time.

4.7 What appeal options are available?

First instance rulings in all civil cases may be appealed to a higher court. Following the commencement of the Court of Appeal Act 2014, decisions of the High Court may be appealed to the recently established Court of Appeal.

In limited circumstances, decisions of the Court of Appeal and High Court may be appealed to the Supreme Court. The Supreme Court will hear such appeals only if it raises a matter of general public importance or is necessary in the interests of justice.

Directions of the CCPC under the 2004 Regulations with respect to product recall or any other measures adopted may be appealed to the Circuit Court within 21 days of receipt of the direction. An appeal to the High Court on foot of the decision of the Circuit Court on the direction may be appealed to the High Court on a question of law only.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

As noted at question 4.2 above, recent changes to the Superior Court Rules allow the court to appoint an expert, known as an "assessor", to assist it in considering technical issues.

The overall objective behind the new Superior Court Rules regarding evidence is to ensure that expert evidence is presented to the court in an efficient manner. Accordingly, these rules allow the court to make various directions in respect of the nature and extent of the evidence to be heard in the proceedings. For example, the rules provide that in commercial, competition, chancery or non-jury cases, expert evidence must be restricted to that which is "*reasonably required to enable the Court to determine the proceedings*".

The parties are also free to appoint their own experts to put forward their opinion as evidence at trial. Such experts are, however, entitled to be questioned on their evidence by the judge, and, indeed, cross-examined by the opposing party.

General evidentiary principles apply to their evidence, so that, e.g., it must be relevant to the issues at hand and within their field of expertise.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Experts are not required to present themselves for pre-trial deposition.

In High Court personal injury actions, there is an obligation on the parties under SI 391/1998 to exchange all written expert reports (but not statements of fact witnesses) in advance of the hearing of the action. In other cases, it is for the parties to decide between them whether to voluntarily exchange expert reports and/or witness statements.

4.10 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

As a general rule, discovery of documentary evidence may only be sought by either party once pleadings have closed, i.e. once a defence has been delivered by the defendant. Discovery may be sought by a party to the proceedings against any other party to the proceedings, against third parties or against non-parties, subject to proof of relevance and necessity.

Discovery should be sought firstly on a voluntary basis and, if voluntary discovery is refused, it can then be sought by way of motion if necessary. Discovery relates to all documentation in the power, possession or procurement of a party to the proceedings (or non-party) which may enable the other party to advance their case.

Discovery prior to the institution of proceedings will only be granted in very exceptional circumstances, e.g., Norwich Pharmacal Orders.

4.11 Are alternative methods of dispute resolution required to be pursued first or available as an alternative to litigation e.g. mediation, arbitration?

There has been significant growth in the use of mediation generally in Ireland in recent years. Either party can suggest mediation as a means of attempting to resolve the dispute. Order 56A of the Rules of the Superior courts, as inserted by SI 502/2010, allows the High Court, either on the application of any of the parties to a dispute or on its own motion, to invite the parties to use an ADR process to resolve the proceedings. In this context, an ADR process is mediation, conciliation or other dispute resolution process approved by the court, but does not include arbitration. If a party refuses or fails to partake in an ADR process without good reason, the court can take this into account when deciding any issue of costs (although it has not imposed such costs penalties to date). The recent case of *Atlantic Shellfish Ltd & anor v Cork County Council & ors* [2015] IECA 283 held that the court should only invite the parties to consider mediation if it considers it appropriate having regard to "*all of the circumstances of the case*" (for example, the nature and potential expense of the proposed form of ADR or whether the issues in dispute are amenable to ADR).

The Mediation Act 2017, effective from 1 January 2018, has introduced a statutory obligation on solicitors to (i) advise clients about the benefits of mediation prior to commencing proceedings, and (ii) make a statutory declaration confirming such advice has been given. If the originating document is not accompanied by the declaration, the court is empowered to adjourn the proceedings to facilitate compliance.

In the case of personal injuries claims, S.15, 17 and 18 of the Civil Liability and Courts Act 2004 (the "2004 Act") may also be invoked. Under S.15 of the 2004 Act, the court may, at the request of any party to a personal injuries action prior to trial, direct that the parties to the action hold a mediation conference to discuss and attempt to settle the action. There has previously been a successful appeal against such a direction, on the basis that mediation would not have actually assisted in reaching a settlement, which is a statutory pre-condition for a S.15 order (*Ryan v Walls Construction Ltd* [2015] IECA 214). Under a S.15 mediation, a nominated chairperson or a court-appointed one will report on the mediation conference and note any settlement made to the court. Where one party fails to attend, the court will take this into account when making a final award for costs.

Pursuant to S.32 of the Arbitration Act 2010, the High Court and Circuit Court can adjourn civil proceedings to allow the parties to consider whether the dispute before the court is capable of being resolved by arbitration.

4.12 In what factual circumstances can persons that are not domiciled in your jurisdiction, be brought within the jurisdiction of your courts either as a defendant or as a claimant?

As a Member State of the European Union, Ireland is subject to the rules of jurisdiction as provided for by the recast Brussels Regulation (Regulation (EU) 1215/2012) (the "Recast Brussels Regulation"). The Recast Brussels Regulation took effect from 15 January 2015. Previously, the relevant jurisdictional rules were found in EC Regulation 44/2001 (the "Brussels Regulation").

As with the previous Brussels Regulation, the general rule under the Recast Brussels Regulation is that a defendant to proceedings having an international element should be sued in his state of domicile, although there are certain exceptions and alternative grounds on which the court may have jurisdiction.

The most obvious circumstance in which a party which is not domiciled in Ireland can be brought before the Irish courts is where the parties have submitted to the exclusive jurisdiction of the Irish courts. The Recast Brussels Regulation provides that, subject to certain formalities and specified exceptions, a court in a Member State will have jurisdiction to hear a dispute where there is a jurisdiction agreement in favour of that court, even if none of the parties to the jurisdiction agreement is domiciled in a Member State.

Absent an exclusive jurisdiction clause in favour of the Irish courts, parties domiciled in a Member State other than Ireland can nonetheless be sued in Ireland in certain circumstances. Although Article 4 of the Recast Brussels Regulation provides that a party "*shall*" be sued in his country of domicile, 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 foreign producer may be sued in the Irish courts.

Further, the provisions in relation to exclusive jurisdiction agreements do not apply to consumers, who must be sued in the courts of the Member State in which they are domiciled. The jurisdiction rules relating to consumer contracts are set out in Articles 17 to 19 of the Recast Brussels Regulation. Where a cause of action in a contractual dispute relates to product liability, a consumer is entitled to bring the suit in the jurisdiction in which the producer is domiciled or in the country in which the consumer is domiciled. A foreign producer can thus be subject to the jurisdiction of the Irish courts where a consumer using his product is domiciled in Ireland.

Special jurisdiction rules apply where a party is domiciled in a Third State (Non-Member State). Articles 33 and 34 of the Recast Brussels Regulation give discretion to Member State courts to stay proceedings in favour of proceedings pending before the courts of a Third State, subject to satisfying certain conditions. However, a degree of uncertainty remains where the provisions of Articles 33 and 34 are not met. Following the decisions of the *European Court of Justice in Owusu v Jackson (Case C-281/02)* and *Group Josi Reinsurance Co SA v Universal General Insurance Co Ltd* (Case C-412/98), which were made under the previous Brussels Regulation, once an action comes within the scope of the Recast Brussels Regulation, a national court cannot decline jurisdiction on

the ground of *forum non conveniens*. It is arguable that, save as provided for in Articles 33 and 34, *Owusu* and *Group Josi* continue to apply. Given this uncertainty, it is likely that Articles 33 and 34 will be the subject of further clarification.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Statute

Under S.7(1) of the 1991 Act, a limitation period of three years applies to proceedings for the recovery of damages under this Act. The limitation period runs for three years from the date on which the cause of action accrued. The limitation period under the 1991 Act has been reduced to two years in one respect following the enactment of the 2004 Act and the subsequent decision of the Irish High Court in *O'hAonghusa v DCC PLC & Others* [2011] IEHC 300. Where the limitation period runs from the date on which the plaintiff became aware of, or should reasonably have become aware of, the damage, the action must be brought within two years of this date. This is due to the "knowledge" provisions of the Statute of Limitations (Amendment) Act 1991 being amended by the 2004 Act.

Interestingly, S.7(2)(a) of the 1991 Act provides for a "long stop" provision, which extinguishes the rights conferred on the injured party pursuant to the 1991 Act on the expiry of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.

Tort and Contract

In actions in tort or contract, the various time limits within which proceedings must be instituted are laid down in the Statute of Limitations 1957 and the Statute of Limitations (Amendment) Acts 1991 and 2000.

In an action for tort, these provisions set a general time limit of six years from the date on which the cause of action accrued − that is, the date on which the negligent act occurred.

In an action claiming damages for negligence, nuisance or breach of duty where the plaintiff claims damages for personal injuries, the limitation period is shorter. This was formerly three years from the date of accrual of the action or the date on which he became aware of the accrual of the action, whichever is later (i.e. the date of discoverability is relevant). However, the Civil Liability and Courts Act 2004 reduced the limitation period for personal injuries actions to two years for dates of accrual/knowledge on or after 31 March 2005.

In contract, there is a limitation period of six years from the date of the accrual of the action. This is the date on which the breach of contract occurred, not when the damage is suffered.

The courts have the discretion to strike out proceedings where there has been an inordinate and inexcusable delay or want of prosecution on the part of the plaintiff and the defendant has suffered prejudice as a result of this, so as to make it unfair to allow the case to proceed.

In December 2011, the Law Reform Commission published a report and draft bill on the limitation of actions in respect of all claims (except those relating to land). The report recommends a uniform basic limitation period for 'common law actions', which would include actions in tort and contract, of two years, to run from the date that the claimant knew or ought to have known of the cause of action. 'Knowledge' includes both actual and constructive knowledge. The report recommends the introduction of a uniform ultimate limitation period of 15 years to run from the date of the act or omission giving rise to the cause of action. It also recommends that this period should apply to personal injuries actions, and that there should be a statutory discretion to extend or disapply the ultimate limitation period. These proposals have not yet been implemented.

Criminal

As regards criminal sanctions, the 2004 Regulations do not provide for a period within which prosecutions must be brought. However, the general period applicable to summary offences is six months.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the Court have a discretion to disapply time limits?

There are special limitation rules concerning persons who are under a disability:

- infants;
- persons of unsound mind;
- convicts subject to the operation of the Forfeiture Act, 1870, in whose cases no administrator or curator has been appointed under that Act; and
- plaintiffs of sexual abuse, committed while they were under age, or suffering from consequent psychological injury that impaired them from bringing an action.

Furthermore, in proceedings in which the 1991 Act is pleaded, the 'Long Stop Date' of 10 years from the date the product is put into circulation by the producer would apply as per S.7(2)(a) of the 1991 Act.

Fraud on the part of the defendant may also prolong limitation periods.

No proceedings are maintainable in respect of any cause of action which has survived against the estate of a deceased person unless the proceedings were commenced within the correct limitation period and were pending at the date of his death; or that the proceedings were commenced within the correct limitation period or within two years after his death, whichever period first expires.

The court does not have discretion to disapply time limits statutorily imposed.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

In accordance with S.71(1) of the Statute of Limitations 1957, where there has been concealment or fraud, the limitation period does not begin to run until the plaintiff has discovered the fraud or could, with reasonable diligence, have discovered it. Therefore, issues of concealment or fraud may prolong limitation periods.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

In Ireland, damages are usually by lump sum payment, rather than by annuity or smaller payment over a period of time. Damages are awarded to place the injured party back in the position he would have been in had the wrong not occurred.

There are two main categories of damages, special and general damages. Special damages or out-of-pocket expenses compensate for actual pecuniary loss suffered in the past and to be suffered in

the future, for example, loss of earnings. These are not recoverable unless proven, or agreed between the parties. This type of damages is usually formulated on the basis of actual expense and liabilities incurred up to the date of trial and future loss, the estimated anticipated loss being usually based on actuarial evidence.

General damages compensate for non-pecuniary loss both present and future, such as pain and suffering or loss of life expectation. General damages can be divided into two figures, one representing pain and suffering up to the trial, and another figure for pain and suffering in the future. However, some lower courts will not make this division and simply award a single global figure. The award of damages is at the discretion of the judge, considering all the evidence and medical reports, which are comparatively high in Ireland by European standards.

In exceptional circumstances, exemplary/punitive or aggravated damages may also be awarded.

Under S.54(1)(b) of the Personal Injuries Assessment Board Act 2003, one of the principal functions of the Personal Injuries Assessment Board is to prepare and publish a document known as the Book of Quantum, containing general guidelines as to the amounts that may be awarded or assessed in respect of specified types of injury.

S.22 of the 2004 Act states that the court shall, in assessing damages in a personal injuries action, have regard to the Book of Quantum. S.22(2) does allow the court to take other matters into account when assessing damages in a personal injuries action.

The Civil Liability (Amendment) Act 2017 has amended the Civil Liability Acts 1961 and 1964 to provide for the award of damages by way of periodic payments order in certain circumstances where a plaintiff has suffered catastrophic injuries. A 'catastrophic injury' is defined as a personal injury which is of such severity that it results in a permanent disability to the person requiring the person to receive life-long care and assistance in all activities of daily living or a substantial part thereof.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

Statute

S.1(1) of the 1991 Act defines "damage" as:

- death or personal injury; or
- loss of, damage to, or destruction of any item of property other than the defective product itself,

provided that the item of property:

- is of a type ordinarily intended for private use or consumption; and
- was used by the injured person mainly for his own private use or consumption.

It is interesting to note that this definition excludes damage to the product itself, preferring to leave such claims to the law of tort. It should also be noted that the final line of the definition above excludes damage to property used in the course of a trade, business or profession.

"Damage" under the 1991 Act includes damage for pain and suffering caused by the defective product.

Tort and Contract

The laws of tort and contract allow an injured party to claim damages for death or personal injury caused by the defective product, as well as for pain and suffering (both physical and mental), damage to property and, in contrast to the 1991 Act, for damage to the product itself.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

There is no Irish precedent for the court to allow damages to be recovered in such circumstances and it is of significance that the Supreme Court has disallowed the recovery of damages in what have been referred to as asbestos "worried well" cases – i.e. cases where claimants sued for damages for mental distress in respect of an apprehension of injury or illness arising from having come in contact with asbestos in the past, where there was no evidence of actual injury or illness.

However, given the *Boston Scientific* decision (discussed at question 2.2), it is possible that the broad definitions of "damage" and "defect" applied by the CJEU will be used to argue that the costs of medical monitoring are recoverable, particularly in cases of implanted medical devices.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages may be awarded in exceptional circumstances. This would include, e.g., circumstances where there has been a deliberate and conscious violation of rights. In Ireland, awards of punitive damages tend to be in fractions of the general damage award, rather than in multiples.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

No. The ordinary jurisdictional rules of the courts apply. There is no upper limit on the amount of damages which can be awarded by the High Court against a single manufacturer.

However, S.3 of the 1991 Act does provide for a *minimum* threshold of damages, stating that the provisions of the Act will apply only where damage exceeding €444.41 in value has been suffered by the injured party. This provision was clearly motivated by a fear that the strict liability provisions of the Act might release a rush of trivial claims.

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

Claims can be settled at any time, prior to and during a court hearing. Where a plaintiff is a minor or is under a disability, leave of the court is required before an action is settled.

The District Court Rules provide for the lodgement of money in satisfaction of a plaintiff's action, with or without acknowledging liability. Where the plaintiff is a minor or under a disability, a Notice of Motion must be filed and served seeking to have their acceptance approved by a judge. Similarly, a minor or a person under a disability seeking leave to accept a lodgement or tender offer in the Circuit Court will have to make an application by way of Notice of Motion and grounding Affidavit. The acceptance of a lodgement or tender offer in the High Court, by or on behalf of an infant or a person of unsound mind suing either alone or in conjunction with other parties, as governed by Order 22, rule 10(1)

Rules of the Superior Courts, must be approved by the High Court. This approval is sought by an *ex parte* application on Motion grounded on Affidavit.

As there is no provision for group or class actions in this jurisdiction, no specific rules apply.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

The Social Welfare and Pensions Act 2013, which commenced with effect from 1 August 2014, introduced the Recovery of Certain Benefits and Assistance Scheme (the "**Scheme**"). The Scheme requires a "compensator", being the party paying compensation to a plaintiff, to reimburse the Department of Social Protection for certain Specified Benefits, e.g. illness benefit or disability allowance, which were paid to the plaintiff by the Department in respect of the injury being compensated. The compensator is the party responsible for ensuring compliance with the Scheme.

Some private insurance companies can seek to be reimbursed when fees paid by them are later recovered by the plaintiffs in a court award or settlement.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

Yes. The general rule is that "costs follow the event". The judge has full discretion in this matter, however. Costs will include lawyer costs, court fees and incidental expenses, necessarily incurred in the prosecution or defence of the action.

In criminal prosecutions, under the 2004 Regulations, the CCPC will recover the costs of a successful prosecution from the convicted party, including the costs of investigations and detention of products, unless, under S.21 of the 2004 Regulations, the court is satisfied that there are "*special and substantial reasons*" for not ordering the recovery of these costs.

7.2 Is public funding, e.g. legal aid, available?

There exists a civil legal aid scheme in Ireland, but limited funding would only very rarely be made available for personal injuries actions.

7.3 If so, are there any restrictions on the availability of public funding?

Yes. The applicant must satisfy financial criteria, i.e. a means test, must have reasonable grounds for proceeding with the litigation as a matter of law, and must be reasonably likely to succeed in the litigation. In practice, nearly all personal injury actions are run without the benefit of legal aid.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

The practice of charging contingency fees is illegal in Ireland, as it is considered to be champerty, i.e. aiding a claimant to litigate without good cause and taking a share of the profits. An exception relates to recovery of a debt or a liquidated demand.

However, the lack of a comprehensive civil legal aid scheme has meant that many solicitors now operate on a "no win no fee" basis, in other words, the client will not be charged a professional fee unless the claim is successful. This is deemed to be acceptable practice (and indeed, in the personal injury sphere, is widespread), and in fact reduces the pressure on the Government to provide a more comprehensive Legal Aid scheme.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Both maintenance and champerty are prohibited by law and this has prevented the development of third party funding of litigation in Ireland. Maintenance is the agitation of litigation by furnishing aid to a party in order that he or she might bring or defend a claim without just cause. In this regard it should be noted that a charitable motive is a good defence to an action for maintenance.

Champerty occurs when there is, additionally, an agreement that the person funding such aid shall receive a share of what is recovered in the action brought or the promise of remuneration over and above ordinary costs. A person who assists another to maintain or defend proceedings without having a *bona fide* interest acts unlawfully and contrary to public policy and cannot enforce such an agreement.

7.6 In advance of the case proceeding to trial, does the Court exercise any control over the costs to be incurred by the parties so that they are proportionate to the value of the claim?

No. However, if at the conclusion of proceedings an order is made allowing one party to recover their legal costs from another, the party who has been ordered to pay can require that the costs be "taxed" (i.e., reviewed and independently adjudicated upon by a "Taxing Master").

In deciding whether or not to make a court order, particularly in the discovery process, a court may consider the proportionality of the costs of fulfilling that order.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in your jurisdiction.

The Competition and Consumer Protection Act 2014 created the newly formed CCPC. On 31 October 2014, the new agency took over the product safety role of the former National Consumer Agency under the 2004 Regulations, including the responsibility for taking prosecutions and ordering product recalls. The CCPC has a broad mandate for conducting market surveillance in relation to the safety of products under various EU Directives.

The *Boston Scientific* CJEU decision, as discussed at questions 2.2 and 6.3, is significant, although its implications are yet to be explored by the Irish courts.

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