

**International Product Liability Review**  
(incorporating European Product Liability Review)  
Issue 43 - June 2011



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Hogan Lovells has the leading product liability practice covering all aspects of product safety as well as civil and criminal liability. We have experience of acting for clients in respect of a wide range of products including food, pharmaceuticals, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, toys, sporting goods, blood products, aircraft and trains. Hogan Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells' product liability practice, please visit our website at [www.hoganlovells.com](http://www.hoganlovells.com) or contact the Product Liability Group Leader, John Meltzer, at [john.meltzer@hoganlovells.com](mailto:john.meltzer@hoganlovells.com) or any of the lawyers listed on the back page of this publication.

In December 2000, Lovells (as it then was) launched its quarterly *European Product Liability Review*, the only regular publication dedicated to reporting on product liability and product safety developments in Europe for international product suppliers, and others interested in international product issues. Over the next ten years, this unique publication featured hundreds of articles, from authors across our network, covering issues in Europe and, increasingly, further afield. Reflecting the growing globalisation of product risks, and following the creation of Hogan Lovells through the combination of Lovells with Hogan & Hartson in May 2010, the publication was renamed *International Product Liability Review* in March 2011.

Hogan Lovells' *International Product Liability Review* continues to be the only regular publication dedicated to reporting on global developments in product liability and product safety regulation. It is distributed worldwide free of charge to our clients and others interested in international product issues. If you would like additional copies of this publication, please return the form enclosed with this edition, or contact a member of the editorial team by e-mail:

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## In this issue...

### 1 Overview

#### FEATURE - IMPROVING THE GPSD AND RAPEX

#### 2 Safer products for European consumers: European Parliament adopts controversial resolution on the revision of the General Product Safety Directive and market surveillance

In the context of the anticipated revision to the General Product Safety Directive, the European Parliament, through its adoption of a non-legislative resolution, has voiced its suggestions for improving product safety in the EU. If implemented, we can expect an extension of the scope of products covered by the Directive, more emphasis on risk assessment and traceability, and increased market surveillance. Claire Taylor and Maggie Sewell (London) report.

#### 4 The European Commission's 2010 report on the operation of the RAPEX system and new guidelines: "good effort, but room for improvement"

Sonia Pérez (Madrid) discusses the Commission's findings in its 2010 RAPEX Report. While the RAPEX system is operating successfully, there is still much work to be done - by both the Commission and member states - in order to ensure that only safe consumer goods are placed on the market.

#### EUROPE - EU

#### 6 European Commission aims to reduce obstacles to the free movement of judicial decisions: a new Brussels Regulation

The European Commission has published proposals to amend the Brussels Regulation on Jurisdiction and Enforcement of Judgments. As Valerie Kenyon and Maggie Sewell (London) report, while the aim may be to increase the free movement of judgments in the EU, the proposals are likely to spark controversy.

#### 8 Updated guidance on treatment of "articles" under REACH

In an attempt to dispel diverging views amongst member states, the European Commission - through its recently updated REACH guidance document - has made clear its opinion that the 0.1% threshold for notification of Substances of Very High Concern in articles applies to the article as a whole; and not to its individual parts. Sebastian Lach and Hannah Falkenhausen (Munich) report.

#### EUROPE - FRANCE

#### 10 The French Agency for Food, Environmental and Occupational Health & Safety (ANSES): one year in review

Christine Gateau and Perrine Bertrand (Paris) take a look at some of ANSES' principal activities since its creation in January 2010, and comment on its position amongst the other key French authorities.

#### EUROPE - ITALY

#### 12 Smokers' class action declared non-admissible

Francesca Rolla and Filippo Chiaves (Milan) report on the decision of the Civil Court of Rome which reinforces the trend in Italian tobacco litigation by dismissing a class action filed against a major tobacco manufacturer for alleged damages caused by passive smoking.

#### EUROPE - NETHERLANDS

#### 14 Standard of defectiveness for product liability claims based on tort

Machteld Hiemstra (Amsterdam) analyses a recent decision of the Dutch Supreme Court in which it was held that in a tort-based product liability claim it was enough for the claimant to prove that the manufacturer had introduced a single product to the market that was defective and that caused the claimant's injury.

#### EUROPE - SPAIN

#### 16 Quantifying damages for personal injury caused by defective medicinal products

Due to the lack of any applicable legislation or clear judicial guidance, Spanish courts are increasingly turning towards the scale of damages mandatorily applied in road accident claims in assessing the amount of damages due to persons injured as a result of defective medicinal products. Cristina Redondo (Madrid) takes a look at how the scale applies, and how it has been considered by the courts in medicinal product claims.

## EUROPE - UK

### 18 **The rock of uncertainty: causation in "single exposure" mesothelioma claims**

In a much anticipated judgment, the Supreme Court has unanimously ruled that the special principles of causation developed in *Fairchild*, permitting a claimant to show only that the defendant materially increased the risk of his developing mesothelioma, apply also to "single exposure" cases. Heather Gagen (London) analyses the Court's decision.

### 21 **Court rules in asbestos litigation that a claimant may be owed a duty of care by his employer's parent company**

In a somewhat controversial decision of the High Court, a parent company has been held to owe a direct duty of care to a claimant who contracted mesothelioma as a consequence of exposure to asbestos while employed by one of its subsidiaries. Valerie Kenyon and Edward Hickman (London) report.

### 23 **Litigation privilege: the dominant purpose of an expert's report must be for the provision or obtaining of advice about litigation**

Richard Lewis (London) takes a look at a recent decision of the High Court that will be of interest to anyone instructing an expert in the context of anticipated litigation. As the Court has confirmed, unless the dominant purpose of such instruction is to obtain advice about actual or anticipated litigation, it will not benefit from litigation privilege.

### 25 **Supreme Court rules that experts have no immunity from suit**

A ruling of the Supreme Court confirms that, like advocates, experts no longer have immunity from suit in the event that their negligence causes loss to their client. Nicholas Cheffings, Nicholas Heaton and Charlie Clarke-Jervoise (London) report.

### 27 **Court of Appeal rules on question of concurrent liability for pure economic loss**

The Court of Appeal has recently pulled together the strands of decades' worth of conflicting authority, ruling that whilst in principle a building contractor can owe his client a concurrent duty in tort for economic loss (as opposed to personal injury) occasioned by a defect in the building, such a claim will be made out only where it is evident that the contractor "assumed responsibility" to the client so as to give

rise to such a duty. Siobhan Thomson and Sarah Sutton (London) note the relevance of the Court's findings for product manufacturers.

## NORTH AMERICA - US

### 29 ***Matrixx Initiatives, Inc. v. Siracusano*: the importance of disclosing adverse event reports (even when not statistically significant in number)**

Lauren Colton and Lindsay Goldberg (Baltimore) report on a decision of the US Supreme Court in which it was held that a lack of statistical significance of adverse event reports did not necessarily preclude those reports from being material to a reasonable investor. The decision may have similar implications for future product liability claims.

## NORTH AMERICA - CANADA

### 31 **Consumer Product Safety Act introduces new incident reporting and document retention requirements**

Health Canada has published guidance documents relating to the record-keeping and mandatory incident reporting obligations that are imposed on product suppliers under the new - and long awaited - Canada Consumer Product Safety Act, which comes into force on 20 June 2011. Siobhan Thomson (London) outlines the key elements of the new obligations.

## ASIA PACIFIC - HONG KONG

### 33 **Court of First Instance rules on level of damages in dependency claims: benefits received by dependants do not reduce the damages award**

A decision of the Court of First Instance has ruled, contrary to common law principles, that in a dependency claim benefits received by the dependents as a result of a deceased's death will not reduce the amount of damages payable to them and that, without "striking evidence" to prove otherwise, a deceased will be taken as having contributed 75% of his earnings to his dependents. Danny Leung and Jon Gilbert (Hong Kong) report.

## Overview

The action of the European Parliament in adopting its resolution on product safety in March 2011 (page 2) has injected a new impetus into the process of reform that was already under way within the European Commission. It might be overstating the position to suggest that the Parliament's intervention was "welcomed" by the Commission, and certainly some of the more controversial aspects of the Parliament's resolution will create new challenges for the Commission as it seeks to give effect to them. But what is clear is that the focus on product safety issues generally amongst the EU lawmakers has never been more intense. The current process of reform will not be over soon, and product manufacturers should expect a long period of incremental change on many fronts, coupled with broader policy initiatives unfolding over the next two to three years. Of central importance will be the reform of the General Product Safety Directive, and in particular the implementation of the Parliament's desire that it be brought into alignment with the "New Legislative Framework", which will mean a significant expansion of the scope of the General Product Safety Directive in at least a number of respects. Naturally, the developments will be followed closely in subsequent issues of *International Product Liability Review*.

The recent decision of the English High Court in finding a parent company liable for injuries caused to an employee of one of its subsidiaries is significant (page 21). English courts have traditionally guarded carefully the principle of corporate separateness, and have resisted attempts to "pierce the corporate veil" in liability cases, and other attempts to achieve a similar result. However, in *Chandler v Cape*, the court looked at the extent to which the parent company was involved in the management of the subsidiary and was aware of the activities of the subsidiary. Whilst on its face there was nothing necessarily very remarkable about the level of involvement of the parent company in the activities of its wholly-owned subsidiary, the court decided that the level of control and involvement was sufficient to give rise to a duty of care on the part of the parent company to persons employed by the subsidiary. As is so often the case in English courts, this decision, which appears to be pushing against long-established legal principles, arises in the context of asbestos. We have often, in our publication, warned of the dangers of courts straining to deliver justice to the parties in the context of the asbestos tragedy, and this case may stand as yet another example. There is nothing in the judgment that suggests the principles the court applied are in any way limited to the asbestos context, and so there is no reason to expect that they could not equally be applied to, for example, a parent company whose subsidiary markets a dangerous product. The case is likely to be considered by the Court of Appeal, and businesses will be watching carefully to see if that will take the opportunity to set a new precedent on this question with potentially far-reaching implications.

Over in North America, finally the Canadian Consumer Product Safety Act comes into force (page 31). For international product manufacturers, this is yet another piece in the increasingly complex jigsaw of onerous product safety laws that are being introduced around the world. Developments such as these are challenging for product manufacturers and suppliers, because they invariably necessitate changes in the way in which a given company conducts its activities, manages its risks and maintains its records. In a global market, in which reforms are being implemented in many countries around the world, with differences in approach being the norm, product manufacturers and suppliers need to respond with more comprehensive and robust compliance programmes, as well as systems to enable them to keep abreast of the changing regulatory environment. In that respect, *International Product Liability Review* will continue to play its role in reporting on the key developments, and providing insight into how product manufacturers can effectively and efficiently respond to them.

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