



# International Product Liability Review

Issue 66

March 2017

# About our Product Litigation and Compliance Practice

Hogan Lovells has the leading international product litigation and compliance practice covering all aspects of product liability, compliance and mass torts. We focus on acting for clients around the world covering all product sectors including food and beverages, pharmaceuticals and medical devices, cars, tobacco, mobile phones, cosmetics, electrical and electronic products, chemicals and hazardous substances, toys and children's products, sporting goods, aircraft and machinery. Hogan Lovells product litigation and product safety lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Hogan Lovells product litigation and compliance practice, please visit our website at [www.hoganlovells.com](http://www.hoganlovells.com) or contact the Product Litigation and Compliance Group Leader, Rod Freeman, at [rod.freeman@hoganlovells.com](mailto:rod.freeman@hoganlovells.com) or any of the lawyers listed on the back page of this publication.

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## About International Product Liability Review

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 litigation and product 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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# Meet the team

We are pleased to introduce two of the authors who have contributed to this edition of *International Product Liability Review*: Shelby Martin (Denver) and Katie Vernon (London).



**Shelby Martin**

**Senior Associate, Denver**

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Shelby Martin is a true litigator with a steadfast goal of solving problems so clients can get back to business.

As a member of Denver's Litigation and Arbitration Group, Shelby devotes her practice to pharmaceutical and medical device litigation and advocacy. She is an accomplished trial lawyer with experience representing one of the nation's largest medical device manufacturers, as well as counselling clients in multidistrict and complex liability litigation. She is highly skilled in her motion practice, in taking and defending depositions, and with case management.

In addition to her regular practice, Shelby maintains a well-established pro bono caseload, focused on civil and human rights, including the representation of indigent clients in immigration proceedings.

See page 2 for Shelby's article "Managing cybersecurity threats: still more questions than answers"



**Katie Vernon**

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Katie is an Associate in the Product Litigation and Compliance team at the Hogan Lovells London office.

Her experience covers a range of industry sectors including consumer products, life sciences, energy, and insurance.

She advises domestic and international clients on disputes involving mass torts, environmental liability, product liability and personal injury. Recent experience includes representing a major energy company in a large group action relating to environmental liability for oil spills and a white goods manufacturer in litigation arising out of defective products.

Katie also advises clients on a range of product safety issues, particularly in relation to the regulation of chemicals in the EU.

See page 34 for Katie's article "Legal advice privilege: new guidance on scope"



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## 2 Managing cybersecurity threats: still more questions than answers

The faster technology advances, the greater the risk for all companies of a cyberattack. Consumer product manufacturers, distributors, and sellers are no exception. However, as Gina Rodriguez and Shelby Martin (Denver) explain, for the moment it's difficult to establish how today's cybersecurity issues fit within the traditional doctrines of product liability law. Leaving legal uncertainties aside, however, there are certain steps that product device businesses can and should take to safeguard their operations and minimise cyber risk.

### EUROPE – EU

## 7 The app challenge: product liability and safety issues

Apps are continuously growing in number, variety and importance all the time. It's a phenomenon that poses increasing product liability and product safety risks for companies and decision-makers. But as this report by Sebastian Polly and Bastienne Stautner (Munich) shows, the existing legal framework is complex, leaving room for a considerable amount of legal uncertainty.

## 10 Product safety reporting in the EU: taking a closer look at recent trends

Anthea Davies and Ellie Pszonka (London) provide an update on trends in the reporting of product safety issues through the EU's RAPEX system. Although we're seeing a "levelling-off" in the number of notifications made to RAPEX overall, trends in some areas (including cars and toys) are continuing to show an increase.

## 13 A pivotal doctrine: supremacy of EU law reconfirmed as a central tenet of EU law

Sarah-Jane Dobson (London) examines a recent decision in the Court of Justice of the European Union which adds to a growing body of case law

reconfirming the broad application of the supremacy of EU law. This case, which focused on whether EU food safety law excludes or limits member state law in the same area, shows how even a gap in EU legislation cannot be filled by national legislation, unless that legislation complies precisely with the relevant EU law on the subject.

## 17 Regulate Frankenstein: the European Parliament calls for new rules for robots

In the fast moving field of robotics and artificial intelligence, where machines are becoming increasingly autonomous, the question of how to guarantee a standard level of safety and security is becoming increasingly important. Falk Schöning (Brussels), Sebastian Polly (Munich) and Rod Freeman (London) look at how the European Parliament is grappling with the social, ethical and safety issues involved.

### EUROPE – FRANCE

## 20 Contract law reform: what's new for French contracts?

Recent reforms to the French Civil Code have introduced significant amendments to contract law. Affecting every stage of contracting, from negotiation, formation and validity to performance, discharge and termination, the reforms were designed to bring greater clarity. However, as Charles-Henri Caron and Hélène de Mesnard (Paris) report, this goal has been missed. Instead, the new legal standards established will need to be further assessed and determined by the French courts.

### EUROPE – ITALY

## 25 Enforcing punitive damages: will the Supreme Court make a U-turn?

Christian Di Mauro (Milan) reports on a recent referral to the Joint Divisions of the Supreme Court which could have far-reaching consequences for both Italian and foreign product manufacturers. The Joint Divisions' response, due later this year, will determine whether or not foreign judgments enforcing

punitive damages can be recognised and enforced by the Italian courts.

## **EUROPE – SPAIN**

### **27 Product liability: qualifying classes of damages and the impact on limitation periods**

Well-founded product liability claims hinge on the proper qualification of legal and factual issues. In his analysis of an important Spanish Supreme Court decision, Manuel Martínez (Madrid) explains why this is so essential to ensuring that the plaintiffs in these actions are not barred from being compensated by the statute of limitations.

## **EUROPE – UK**

### **29 Stick or twist: English courts reaffirm the consequences of changing experts part-way through proceedings**

Matthew Felwick and Lookman Rawat (London) discuss two recent judgments which highlight the risks of changing formally instructed experts, whether the change is initiated by the instructing party or not. Parties should be aware that permission for relying on evidence of a replacement expert may be conditional upon materials prepared by, or recording the opinions of, the original expert.

### **34 Legal advice privilege: new guidance on scope**

Reporting on the impact of a recent High Court decision, Katie Vernon (London) warns that companies carrying out internal investigations should not assume that the involvement of lawyers will automatically mean that records of interviews with employees carried out as part of the investigation are privileged. There are, however, practical steps that can be taken to address the risk that legal advice privilege will not apply.

### **37 Crossing the border: Court of Appeal decision highlights difficulties in classifying borderline products**

A recent Court of Appeal decision focused on questions arising when products sit on the borderline between regulatory regimes. Reporting on the case, Gabor Fellner (London) explains why manufacturers seeking to supply products in the EU should consider, early in the design process, which EU regulatory regime(s) will apply to their products. If products are subject to multiple overlapping regimes, this consideration may involve a detailed assessment of how the requirements of various regimes can be reconciled.

## Overview

You hold in your hands Issue 66 of *International Product Liability Review*, which has been published every quarter for the past 17 years. Over that time, we've touched on many recurring themes relevant to the world of product liability and product safety, and tracked the changes in laws and regulations in Europe and around the world. The world for product manufacturers has changed dramatically since the first issue of this publication was produced in 2000. The rapid development of new technologies, which is transforming virtually every product sector, constantly throws up new legal challenges. It also creates new ways in which product defects can emerge and manifest themselves, which can itself give rise to legal uncertainties. New interrelationships between products create risk. Distinctions between sectorial regulatory regimes become blurred as traditional functionalities of products become less relevant.

The field of cybersecurity is an excellent example of the "new" product liability risks that emerge from these developments. Cybersecurity is no longer simply a privacy issue - cybersecurity must now be an integral part of designing for product safety, where the product in question is controlled or influenced by remote information systems. Some of these challenges are highlighted in our feature article to this issue of *International Product Liability Review* (page 2).

Liability for robotics and other autonomous products is also in the spotlight as technology in those areas develops rapidly. In this issue, we look at how the regulatory regime in Europe is starting to focus on those issues (page 17).

We also explore the question of liability for "apps", which can be considered "products" in their own right, but which can also affect the safety and performance of the devices on which they operate (page 7).

Laws and regulations in the field of product liability and product safety need to adapt. They need to be sufficiently flexible, and enforced sufficiently flexibly, to remain fit for purpose in a world of rapid technological change. This will present ongoing challenges for policy makers, courts, regulators, and economic stakeholders in all sectors. International co-operation and co-ordination is key if the outcomes are to be in the best interests of consumers and businesses. The question of how to achieve that co-ordination and co-operation needs to be high on the policy agenda - an agenda in which all stakeholders should be actively engaged.



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