

European Product Liability Review
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Hogan Lovells has the leading global 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.

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1 Overview

FEATURE

2 Foreign manufacturers' liability in the United States

Christopher Odell (Houston) considers the recent decision of *D'Jamoos v Pilatus Aircraft Ltd* which illustrates the differing approaches currently employed by courts in the US when product manufacturers are sued in jurisdictions where they have no formal presence.

PRODUCT SAFETY - EU

5 Litigation risks and product recalls - lessons to be learned from the Maclaren recall controversy

Rod Freeman (London) reviews the recall of Maclaren baby strollers: an illustration of how problems can materialise for well reputed companies in the event a global approach is not taken to product risks, and of the ultimate cost to the company if they are not managed effectively.

LAW AND PROCEDURE - FRANCE

7 French amicable proceedings relating to healthcare activities

Cécile Derycke and Agnès Roman-Amat (Paris) consider the amicable procedural mechanisms established by the *Kouchner* Act 2002 in order to facilitate the cheaper, quicker and easier compensation of patients who have suffered adverse consequences as a result of healthcare activities.

LAW AND PROCEDURE - UK

12 Peace of mind on the horizon: overdue reform on damages for late payment of claims by insurers

At present under English law in most cases the insured's only remedy against its insurers for losses arising from delayed payment of an insurance claim is interest on the claim. As Germaine Gillen (London) reports, manufacturers and their insurers will read with interest the Law Commission's reform of the law on late payment of insurance claims.

14 Northern Ireland opens the door for plaques claimants

Following a public consultation, the Northern Irish Finance Minister has proposed that the law in Northern Ireland be changed to make pleural plaques a compensable injury. Heather Gagen (London) considers the implications of Northern Ireland's decision to overturn *Rothwell* and the UK-wide litigation landscape for plaques claims.

RECENT CASES - FRANCE

16 *Cour de Cassation's* judgments on asbestos workers' early retirement: for better or for worse?

The French Supreme Court has held that asbestos workers who have opted to take the benefits of early retirement, have no claim to be compensated for the income they agreed to forego. Cécile Derycke and Sylvie Gallage-Alwis (Paris) discuss this decision and the implications of the same Court's ruling that anxiety caused by fear of developing an occupational illness can give rise to a claim for damages.

20 The Erika oil spill: confirmation on appeal that polluters can be held liable for environmental damage

A French Court of Appeal has upheld the 2008 decision of the Paris Criminal Court that polluters can be held liable for environmental damage under criminal law and must pay compensation for such damage in the same way as for personal injury or economic damage. Christine Gateau and Perrine Bertrand (Paris) report on this significant development in environmental and maritime law.

RECENT CASES - NETHERLANDS

22 Appellate Court rules that psychological injury is not compensable under the Netherlands Product Liability Act where no physical injury has been suffered

Klaas Bisschop and Karen Jelsma (Amsterdam) report on an appeal court decision which has denied compensation to claimants who allegedly suffered psychological trauma with no corresponding physical injury. The court has based its decision on an interpretation of "personal injuries" in the national product liability legislation that excludes purely psychological injury.

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RECENT CASES - UK

24 High Court rules that insured breached its policy by agreeing not to pursue claims against third party supplier

Claire Taylor and Jon Gilbert (London) report on the widely publicised "toxic sofa" case in which Zurich was able to decline paying compensation to claimants suffering injuries from Land of Leather sofas, on the basis that its insured retailer had breached its insurance policy by compromising its claim against its supplier.

27 Supreme Court considers implications of "supply" between affiliates in long-running limitations case under the Product Liability Directive

Siobhan Thomson and Hazel Peck (London) discuss the latest decision in the long running case of *Aventis Pasteur SA v O'Byrne*. The Supreme Court has allowed the appeal of the producer (APSA) and set aside the decision of the first instance court that had allowed substitution of the producer for the distributor (APMSD) despite the elapse of more than ten years since the product in question had been put into circulation.

30 Corby Council settles claims by victims of toxic waste

Heather Gagen (London) reports on the settlement of an 11 year long legal battle for compensation of children allegedly injured *in utero* as a result of their mothers' exposure to toxic dust from contaminated land.

INTERNATIONAL REPORTS - US

31 Third party payors are too remote to bring product liability claims for medical costs incurred as a result of physician-patient decisions

Third party payors (TPPs) such as health insurance companies are increasingly filing product liability lawsuits in the US against pharmaceutical manufacturers, seeking to recover health care costs incurred by them in relation to products that were allegedly promoted for off-label uses. As Lauren Colton and Mark Gately (Baltimore) report, manufacturers will therefore welcome recent decisions that have precluded TPPs from bringing such lawsuits based on a lack of standing.

33 US Supreme Court prepares to consider federal preemption issue in generic drugs context

Alison Caplis (Baltimore) considers the implications of the pending Supreme Court decision on whether generic drugs manufacturers should be held liable for inadequate warnings on product labels that mimic those provided by the name brand manufacturers.

Overview

This is a significant issue in the life of *European Product Liability Review*. It marks the first issue published by Hogan Lovells - the new international law firm formed by the merger of the European-based Lovells, and the US-based Hogan & Hartson. The merger creates a unique international law firm, and it creates a unique product liability practice - with an unparalleled combined depth of experience and expertise in product liability issues representing the world's leading product manufacturers and suppliers.

European Product Liability Review has been in publication for nearly a decade, and over that time we have tracked and reported on the increasing globalisation of product liability issues. The creation, through the formation of Hogan Lovells, of the world's first truly global product liability practice will make its mark on this publication moving forward. International product suppliers need to address their business issues with a global mindset, and therefore need to keep up to date on global developments, just as they need to rely on advisers who have the expertise, experience, resources and knowledge to provide reliable support in dealing with those issues.

It is fitting that the feature article in this issue of *European Product Liability Review* focuses on the potential exposure of foreign manufacturers to product liability litigation in the United States (page 2). International forum shopping is alive and well, and litigation risks in the US remain a real challenge for product manufacturers operating in global markets. The decision in *D'Jamoos v Pilatus Aircraft Ltd* shows that, at least sometimes, common sense can prevail for foreign manufacturers in the dangerous waters of the US litigation system.

The globalisation of product liability risks is graphically illustrated by the problems experienced by Maclaren following its product recall announcement in the United States (page 5). The issues that surrounded that recall demonstrate that product safety issues for international companies need to be handled with a carefully formulated international strategy in mind.

The fact that Maclaren's recall announcement led to product liability claims in Europe is an example of the fact that trends that have been commonplace in the United States are starting to become firmly established in Europe.

An equally graphic example of this lies in the revelation in the UK that the law firm representing the claimants in the Ivory Coast toxic waste litigation against Trafigura have claimed some £105 million in costs. This is a staggering claim for costs by a claimants' firm, and unprecedented in the UK legal market. However, it is a sign that the economics of litigation in the UK are changing, and significant rewards can be available for claimants' law firms who are prepared to bring ambitious and novel claims in the UK legal system.

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