

# International Product Liability Review

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Issue 56

## Contents

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Overview	1
Feature – Innovation in the automotive industry	2
Asia - India	6
Europe – EU	10
Europe – France	17
Europe – Germany	19
Europe – Spain	21
Europe – UK	23
North America – Canada	27
North America – US	33

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## About our Product Litigation, Compliance and Mass Torts Practice

Hogan Lovells has the leading international product liability practice covering all aspects of product liability, compliance and mass torts. We have experience of acting for clients around the world in respect of a wide range of products 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 liability 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, compliance and mass torts practice, please visit our website at [www.hoganlovells.com](http://www.hoganlovells.com) or contact the Product Liability Group Leader, Thomas Rouhette, at [thomas.rouhette@hoganlovells.com](mailto:thomas.rouhette@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 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 – INNOVATION IN THE AUTOMOTIVE INDUSTRY

#### 2 **Connected vehicles in the US: recently published analysis of technology readiness and policy issues**

The National Highway Traffic Safety Administration recently published an analysis of the technology readiness and policy issues associated with "vehicle-to-vehicle" technology. Jacqueline S. Glassman (Washington) explains how this seeks to support ongoing deployment of connected and autonomous vehicle technology while calming concerns about liability, privacy and security.

#### 4 **Driverless cars: liability and insurance issues emerging from innovations in the automotive industry**

Following the recent announcement by the UK government that the testing of driverless cars will be permitted on UK roads in 2015, manufacturers, insurers and policy-makers need to focus on how the emerging risks of this technology can best be addressed. Helen Chapman and Gabor Fellner (London) explore some of the issues facing players in the automotive and insurance industries, including the predicted wholesale review of the current liability regime.

#### ASIA – INDIA

#### 6 **Product liability laws in India: a summary**

With no specific statute in India dealing exclusively with product liability, product liability claims can be brought under a number of statutes, each of which either deals with a product category or a specific aspect of product liability. Rohit Kochhar and Chandrasekhar Tampi (Kochhar & Co, New Delhi, India) provide a summary of the current legal landscape and highlight a number of anticipated developments, including the introduction of a national standard to ensure standardisation and broader acceptability of Indian goods, both in India and abroad.

#### EUROPE – EU

#### 10 **Summary of the European Commission Joint Research Centre's report on the labelling and reporting scheme for nanoparticles in consumer products in the EU**

Danyal Arnold (London) assesses a report published earlier this year by the European Commission's Joint Research Centre which summarised the current regulation of nanoparticles in the EU. The report concluded that there are benefits in creating an EU register of nanomaterials or creating further labelling requirements, but a number of obstacles remain before this can be achieved.

#### 13 **The new Tobacco Products Directive: identifying the key provisions**

Whilst the new Tobacco Products Directive ("TPD2") is currently subject to legal challenge, if EU member states are required to implement it in its current form, the reforms it introduces will require tobacco and e-cigarette manufacturers and importers in the EU to make major changes to the way they operate. Zen Cho and Dervla Simm (London) summarise the key changes introduced by TPD2 in areas including emissions, ingredients, packaging and e-cigarettes.

#### EUROPE – FRANCE

#### 17 **How does the new French class action law fit into the EU framework?**

Christine Gateau and Alpha Diallo (Paris) summarise key features of the EU recommendation of common principles for injunctive and compensatory collective redress mechanisms and highlight the similarities and differences between these principles and the Consumer Law (which introduced class actions into French law). Although the French class action system is largely in line with the recently issued EU recommendation, future developments in French legislation may have a significant impact in this area.

## In this issue...

**EUROPE – GERMANY****19 Germany appeals to the European Court of Justice to keep national limit values for heavy metals in toys**

After the European General Court dismissed an action brought against the European Commission over its new Toy Safety Directive, the Federal Republic of Germany filed an appeal with the European Court of Justice. Dr Carolin Konzal and Nicole Böck (Munich) explain the consequences for manufacturers, importers and distributors active in the German market.

**EUROPE – SPAIN****21 Manufacturer liability for defective products sold in a batch**

A recent Regional Court judgment examined manufacturer liability for a defective product that has been acquired as part of a batch. Guillermo Meilán (Madrid) reviews the significance of this decision, including its impact on the burden of proof in product liability cases of this type.

**EUROPE – UK****23 Misrepresentation: The risks of providing product information produced by third parties to consumers without adequate disclaimers**

Anthea Davies and Samantha Tharle (London) comment on a recent Court of Appeal decision that considered the liability of clinicians who had provided prospective patients with brochures that had been produced by the manufacturers of a product and which were found to have contained false statements. The judgment is a useful reminder for suppliers of the risks of providing information from third-party manufacturers to consumers.

**25 Services dependency in mesothelioma claims: recent judgment examines quantum and accelerated receipt discounts**

Following a recent decision in the High Court, employers with potential liabilities for asbestos exposure should be aware of the scope for the quantum in such claims to escalate. Natalie Beeraje (London) summarises this judgment and assesses its impact.

**NORTH AMERICA – CANADA****27 Access to justice via pre-certification summary trial in proposed class action: evidence of a culture shift?**

In a recent decision in the Supreme Court of British Columbia, a proposed consumer class action against pharmaceutical manufacturers was dismissed summarily against two of the defendants, prior to the matter being certified as a class action. As Siobhan Sams (Harper Grey LLP, Vancouver) explains, the decision is of interest in part because the Court applied principles of proportionality and efficiency in favour of the manufacturers (rather than the consumers, as is more usually the case), and in part because of the volume and complexity of the material with which the Court saw fit to grapple in a summary trial.

**NORTH AMERICA – US****33 Brand-name drug manufacturers can be liable for injuries caused by generic products**

Lauren Colton (Baltimore) and Lindsay Goldberg (US Dept. of Health and Human Services) comment on a recent decision by the Supreme Court of Alabama confirming the liability of brand-name manufacturers for injuries caused by generic products and the likely impact of the ruling on other cases in this area.

## Overview

Significant risks for product manufacturers arise when the commercialisation of technology moves ahead of regulation. Where safety regulation exists, whilst it may sometimes be burdensome for manufacturers, it helps set a benchmark for what is an acceptable approach to "safety" in respect of the product category. Where industry is moving ahead of the regulatory authorities, there is the ever-present risk that regulations will eventually "catch up", and if/when that happens, more regulations can deliver surprises to industry. Companies are at risk that years of investment may be wasted or compromised because their technology is no longer fit for the market. In this issue of *International Product Liability Review*, we report on developments in two areas where this phenomenon currently exists.

The commercialisation of various types of nanotechnology has been moving ahead at an extraordinary pace in many industries for more than a decade. However, we see the regulatory policy makers continue to grapple with how the use of such technology should be regulated. Whilst the response of the regulators to date has, in most cases, been relatively permissive, it is clear that we have some distance to go before the regulatory position is settled. In this issue we report on the recent publication of an important report that continues this discussion [page 10].

Our feature in this issue of *International Product Liability Review* is on the development of new technologies in the automotive industry [page 2]. The emergence of the concept of the "connected car" and the imminent testing of "driverless" vehicles on the roads in various countries around the world creates interesting compliance and liability issues, the implications of which often go well beyond the automotive industry. Again, both the technologies and the issues raised by their application are already well beyond the scope of current rules, and companies need broad and creative thinking in order to be effective in managing the challenges in this exciting area.

This issue of *International Product Liability Review* also includes an overview of the current state of the product liability regime in India, as well as some insights into some imminent developments in this important market [page 6]. This is another example, following an international trend we have discussed often in this

publication, of a legal regime that is starting to witness an awakening in terms of product liability and product safety regulation. Given the size and importance of this Indian market, these are trends that product suppliers will need to watch carefully. The fact that the regulatory developments in this jurisdiction do not appear to be closely following the lead of the more developed regimes in Europe and North America will inevitably lead to greater costs and other complications for industry as these changes start to bite over time.

In Spain, an interesting decision of the Regional Court of Navarra highlights the strict approach taken in many European countries to the application of product liability principles [page 21]. In this case, perhaps controversially from a European law perspective, the Court applied a reversal of the burden of proof when one product in a "batch" had a defect which was not present in the other products in the same batch.



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