

International Product Liability Review

Issue 55

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About our Product Litigation, Compliance and Mass Torts Practice

Hogan Lovells has the leading international product litigation 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 or contact the Product Liability Group Leader, Thomas Rouhette, at thomas.rouhette@hoganlovells.com or any of the lawyers listed on the back page of this publication.

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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1 Overview

FEATURE – PROGRESS OF REFORM OF EUROPEAN PRODUCT SAFETY REGULATIONS

3 The new "Product Safety and Market Surveillance Package": recent developments

With the objective of bringing the EU product safety framework into line with the New Legislative Framework ("NLF") for the Marketing of Products, the Product Safety and Market Surveillance Package is moving closer to its anticipated implementation in 2015. As the new regime takes shape, Rod Freeman and Anthea Davies (London) summarise its impact on manufacturers and other supply chain operators.

9 New Directives in the EU Official Journal as part of the Alignment Package

Vera Wichers (London) reports on the recent publication in the EU Official Journal of a number of new directives covering low voltage electrical equipment, electromagnetic compatibility and radio equipment, among other areas. Forming part of the European Commission's "Alignment Package", these new directives include a number of significant changes that will affect manufacturers, importers, distributors, and the authorised representatives of these parties.

EUROPE

13 Recent judgment by European Court of Human Rights challenges existing statute of limitations long-stops

A recent judgment by the European Court of Human Rights in an asbestos-related claim held that, because of the long incubation or latency periods associated with such cases, a 10-year long-stop under Swiss Federal law violated the European Convention of Human

Rights (ECHR). As Ina Brock and Sebastian Polly (Munich) explain, by challenging and jeopardising existing long-stops, this judgment could lead to new liability risks; in particular, plaintiffs might try to transfer the decision to other industries or products potentially associated with long incubation or latency periods.

16 The new "Blue Guide" on the implementation of EU product rules: a much-needed update

Zen Cho and Gabor Fellner (London) comment on the recent publication of a new version of the "Blue Guide". Reflecting developments in the EU product safety regime during the 14 years since the original version was published, this "New Blue Guide" introduces important changes across a number of areas, including supply chains, the obligations of economic operators, traceability obligations, accreditation and market surveillance.

EUROPE – FRANCE

21 Airborne fine particles: likely to be a new source of litigation for manufacturers?

The presence of fine particles in the atmosphere has been the subject of debate for some time. Recently, however, there has been a proliferation of scientific studies on this issue. Sylvie Gallage-Alwis and Estelle Isik (Paris) summarise the latest reports, as well as explaining why manufacturers should anticipate future hostile litigation. Particularly in light of the current drive for the reduced civil liability rules which apply to asbestos-related disputes to be extended to other substances.

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EUROPE – GERMANY

25 Germany's challenge to the European Toy Safety Directive's chemical restrictions: judgment of the General Court of the European Union

In May 2012, the German government challenged the Commission's rejection of current German thresholds for various chemicals in toys. As Dr Carolin Konzal and Nicole Böck (Munich) explain, a recent decision in the General Court of the European Union, dismissing Germany's action in relation to certain chemicals, has a direct impact on manufacturers, importers and/or distributors active in the German market.

EUROPE – ITALY

27 Pharmaceutical products: new trends in application of strict liability rules?

Until recently, most Italian courts have applied to pharmaceutical products the general liability tort regime set out in the Civil Code. A recent decision in the Court of Bergamo could represent an important departure from that trend. Francesco Rolla and Mauro Teresi (Milan) summarise the judgment and assess its impact for manufacturers of pharmaceutical products.

EUROPE – NETHERLANDS

30 Dutch District Court rules that the causal link between damage and a product defect cannot be assumed

A recent District Court judgment has brought clarity to claims under the Netherlands Product Liability Act. Karen Jelsma and Laura-Jean van de Ven (Amsterdam) summarise the judgment, which clearly establishes that the probable cause of damage must be based on the facts and circumstances of the case, and not on mere presumption.

EUROPE – SPAIN

34 Practical concerns related to expert evidence in Spain

Spanish Royal Decree 1/2007 states that the claimant in product liability litigation should submit to the court an expert report concluding that the product in question is defective and that it has caused the damages claimed. The presence of a defect can (and often is) presumed by the Spanish courts; defendants can also submit evidence on the lack of a defect. Carolina Revenga (Madrid) summarises some of the practical issues that can attach to expert evidence in product liability cases in Spain.

EUROPE – UK

36 What makes a product "defective"? New guidance on the safety standards that people are entitled to expect

A recent case reminds consumers and cosmetic product manufacturers that persons generally are not entitled to expect that products that carry a risk of harm are completely free from risk. As Cécile Duchesne (London) explains, the case also highlights the importance for product manufacturers of ensuring that consumers are sufficiently informed of all risks associated with their products.

39 New Pre-Action Protocol for Low Value Personal Injury claims comes into force

The new Pre-Action Protocol for Low Value Personal Injury claims is intended to ensure swift payment of admitted claims, while keeping costs as low as possible. As Lydia Savill (London) explains, there are adverse cost sanctions for parties that fail to comply with its terms, so it is important to be aware of the new requirements.

In this issue...

41 Behind the veil: Court of Appeal re-examines the issue of whether a parent company owes a duty of care to employees of its subsidiary for asbestos-related disease

The Court of Appeal recently handed down its judgement in the case of *Thompson v The Renwick Group plc*. As Alex Woods (London) comments, this is an important decision for various reasons, including its re-evaluation of the test formulated in *Chandler v Cape plc* for whether a duty of care can be imposed on a parent for the acts or omissions of its subsidiary in relation to the latter's employees.

44 Clarifying the applicable law in product liability cases

A recent High Court judgment has brought clarity to the applicable law in relation to a product liability claim. Danyal Arnold (London) summarises the judgment and assesses its implications for product manufacturers.

46 *Mitchell* lesson proves hard to apply

The Court of Appeal's decision in *Mitchell v News Group Newspapers* has now been considered in over 50 cases. However, as Charlie Clarke-Jervoise (London) explains, the inconsistent way in which the courts have applied *Mitchell* puts litigants in a no-win situation. They run the risk of not being able to rely on crucial evidence, or even of having their case struck out, for what might be an unintentional mistake which caused no prejudice to their opponents.

48 Defective products: interpretation of jurisdictional rules in liability claims

Valerie Kenyon and Estelle Isik (London) comment on a recent judgment of the Court of Justice of the European Union that clarified the interpretation of Article 5.3 of the Brussels I Regulation on jurisdiction and the recognition and enforcement of judgments for

liability claims arising from defective products. Providing welcome certainty, the decision establishes that in cases where the manufacturer faces a claim of liability for a defective product, the event giving rise to the damage is the place where the product in question was manufactured.

NORTH AMERICA – US

51 A significant milestone in curbing the broad scope of "Proposition 65" liability exposure for businesses

Mark Goodman, Michelle Alborzfar and Jessica Liddle (San Francisco) comment on a recent decision by the California Court of Appeal that suggests a sea change in how courts approach complaints filed by private plaintiffs, and potentially provides a foundation for defendants to encourage greater judicial scrutiny of private claims.