

International Product Liability Review
(incorporating European Product Liability Review)
Issue 47 - June 2012



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About our Product Liability Practice

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 and children's products, sporting goods, blood products, aircraft and machinery. 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 or contact the Product Liability Group Leader, John Meltzer, at john.meltzer@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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FEATURE

2 Preparing for civil liability reform in France

Christelle Coslin (Paris) takes a look at some important changes that have been proposed to the civil liability regime in France and which have been under recent public consultation.

EUROPE - FRANCE

5 Patients' right to information: change in position of the French courts

Cécile Derycke and Raphaëlle Monjou (Paris) consider recent developments in case law in France in relation to a patient's right to receive information on the risks associated with medical treatment.

EUROPE - GERMANY

7 Importers' liability for defects in construction and manufacture - latest German judgment

Dr Sebastian Lach and Sebastian Polly (Munich) canvass the German law concerning importers' liability for product defects and reports on a recent judgment in which an appellate court suggested that importers may incur more stringent obligations to take safety precautions where they import products from non-EU countries, particularly countries (such as China) which have a record of product safety issues.

9 The new German Product Safety Act – pro-consumer amendments

December 2011 heralded the coming into force of the new Product Safety Act, which introduces some new features into the German product safety landscape that place heavier burdens on both market surveillance authorities and producers. Dr Sebastian Lach and Sebastian Polly (Munich) summarise the notable new provisions.

EUROPE - ITALY

11 Italian Supreme Court finds Health Ministry liable for breaching supervisory duty vis-à-vis a patient who developed hepatitis C after a blood transfusion

A recent decision of the Italian Supreme Court offers new thoughts on the issues of causation and the basis for liability of the Ministry of Health in circumstances where a patient contracted hepatitis C following a blood

transfusion that was administered before the diagnostic test for that virus became available. Francesca Rolla and Jacopo Bartolomeo (Milan) analyse the judgment.

14 Recent reform of Italian class action law

Jacopo Bartolomeo and Alessandro Borrello (Milan) provide a brief report on recent amendments to the Italian Class Action Law.

EUROPE - NETHERLANDS

15 An introduction to partial dispute proceedings in the Netherlands: two years on

On 1 July 2010, the Act on Partial Dispute Proceedings came into force in the Netherlands, enabling parties to a claim for personal injury or death to obtain judgment on specific aspects of their claim that are otherwise preventing them from reaching settlement. Machteld Hiemstra (Amsterdam) introduces us to the Act, and its success two years on.

EUROPE - SPAIN

18 Breast implant litigation in Spain: first judgment to rule against a doctor

Eugenio Vázquez and Cristina Redondo (Madrid) report a recent first instance decision in Spain, in which the court held - somewhat controversially against the backdrop of breast implant litigation to date - that the hospital and doctor responsible for implanting the breast prostheses were liable to the plaintiff for damages.

EUROPE - UK

19 EL Trigger Litigation - Supreme Court judgment provides clarity for insurers, companies, local authorities with asbestos exposures and mesothelioma claimants

On 28 March 2012, the Supreme Court handed down judgment in the "Employers Liability Trigger Litigation". Christian Wells, Natasha Gunney, Rod Freeman and Heather Gagen (London) outline the background to the litigation and consider the decision of the Supreme Court, suggesting potential future implications of the ruling.

23 The pursuit of a better costs regime: the developing approach to costs and funding in the UK

Litigating in England and Wales can be a very costly process, and while the usual rule is that the loser should pay the successful party's costs, this is not always a

simple rule to apply. Over two years ago Lord Justice Jackson concluded his review of civil litigation costs in England and Wales. Giles Hutt (London) outlines the reforms to be introduced, and considers recent case law on the approach to the "loser pays" rule.

25 Pushing the boundaries: duty of care owed by parent company to the employees of its subsidiary

Heather Gagen (London) considers the decision of the Court of Appeal in the case of *Chandler v Cape plc* – that a parent company can owe a direct duty of care to the employees of a subsidiary - and the potentially far-reaching consequences of the decision for groups of companies in all sectors.

27 Claims arising out of 1950s nuclear testing: Supreme Court considers when the limitation clock starts ticking

Valerie Kenyon (London) reports on the important judgment of the Supreme Court in *AB and others v Ministry of Defence*, in which the Court considered the meaning of an injured claimant's "knowledge" for the purpose of the Limitation Act 1980.

NORTH AMERICA - US

30 Litigation over product labels in the food and beverage industry is on the rise

The past few years have seen a rise in product labelling litigation in the food and beverage industry in the US, with plaintiffs alleging false or misleading product labels. Lauren Colton, Lindsay Goldberg (Baltimore) and Michael Kidney (Washington DC) consider some recent case law and draw some interesting conclusions as to the circumstances in which pre-emption may be a defence to such claims, and when it will not be.

NORTH AMERICA - CANADA

33 Are you in or are you out? Supreme Court of Canada reformulates test for jurisdiction over foreign defendants in tort claims

Siobhan Thomson (London) explores the test for jurisdiction in Canada, and discusses the Supreme Court of Canada's new test as set out in the recent decision in *Club Resorts Ltd v Van Breda*.

38 Health Canada consults on proposed penalties for violations of orders issued pursuant to the Canadian Consumer Product Safety Act

Siobhan Thomson (London) reports on Health Canada's recent completion of its consultation on proposed administrative monetary penalty (AMP) regulations. The regulations will enable the AMP system established under the Canada Consumer Product Safety Act, by prescribing the manner in which penalties for breach are to be calculated, the means by which they may be modified, and the time frames for payment.

Overview

If anyone were tempted to believe that product liability law in Europe is relatively settled, with the fundamental principles well established, such misconception is quickly dispelled by this issue of *International Product Liability Review*.

In this issue, we report on significant recent and prospective developments in the law in a number of countries in Europe, each of which could have a significant impact on the liability risks faced by product manufacturers, and on the prospects of litigation in the relevant countries.

Starting in France, we see some proposals that go to the core of tort-based liability in that country (page 2). These include reform of the principles on the basis of which corporations will be found liable, and new provisions allowing the court to assess damages by reference to the profits earned by a company as a result of its wrongful conduct. The proposed reforms also include the introduction of a concept of "harm to a collective interest", aimed primarily at actions causing environmental damage. Also in France, we report on a recent case in which the Supreme Court has overturned well-established principles concerning liability for failure to warn patients of risks associated with treatment for which there is no alternative (page 5). Applying new principles that may be unique to France, the Court found that claimants in such circumstances are entitled to compensation for the "psychological damage" caused by a failure to warn of the unavoidable risk associated with treatment for which there was no alternative.

In Germany, the focus is on liability for importers of products from outside the EU (page 7). Notably a High Court of Appeal has suggested that importers may owe a higher duty of care to verify the safety of products when importing them from non-EU countries including, specifically, China. It will be interesting to see how this principle is developed in future cases in Germany.

The Netherlands has been a jurisdiction that has brought to Europe some interesting procedural mechanisms to help resolve civil disputes, as has been reported in previous issues of this publication. In this issue, we report on the Dutch system's procedure for the bringing of "Partial Dispute Proceedings" (page 14). Whilst this initiative is intended to reduce litigation by enabling resolution of discrete issues in dispute, it remains to be seen whether it actually has the reverse effect, encouraging the commencement of actions raising specific issues, perhaps for tactical purposes. Much will depend on the extent to which the courts effectively exercise the controls that have been built into this relatively new procedure.

In the UK, we report on the landmark decision of the English Court of Appeal in which a parent company was found liable for injuries caused to employees of one of its subsidiaries (page 25). Whilst fact-specific, this judgment has the potential to undermine some of the fundamental liability principles affecting the relationships within corporate groups in the UK. Developments in this area of the law will be closely watched.

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