

**International Product Liability Review**  
(incorporating European Product Liability Review)  
Issue 48 - September 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](http://www.hoganlovells.com) or contact the Product Liability Group Leader, John Meltzer, at [john.meltzer@hoganlovells.com](mailto: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:

**Rod Freeman**

[rod.freeman@hoganlovells.com](mailto:rod.freeman@hoganlovells.com)

**Siobhan Thomson**

[siobhan.thomson@hoganlovells.com](mailto:siobhan.thomson@hoganlovells.com)

**Claire Taylor**

[claire.taylor@hoganlovells.com](mailto:claire.taylor@hoganlovells.com)

**Valerie Kenyon**

[valerie.kenyon@hoganlovells.com](mailto:valerie.kenyon@hoganlovells.com)

**Alex Woods**

[alex.woods@hoganlovells.com](mailto:alex.woods@hoganlovells.com)

This issue of *International Product Liability Review* is produced with the support of our International Co-ordination Panel:

**Jacopo Bartolomeo (Milan)**

[jacopo.bartolomeo@hoganlovells.com](mailto:jacopo.bartolomeo@hoganlovells.com)

**Christelle Coslin (Paris)**

[christelle.coslin@hoganlovells.com](mailto:christelle.coslin@hoganlovells.com)

**Lindsay S Goldberg (Baltimore)**

[lindsay.goldberg@hoganlovells.com](mailto:lindsay.goldberg@hoganlovells.com)

**Karen Jelsma (Amsterdam)**

[karen.jelsma@hoganlovells.com](mailto:karen.jelsma@hoganlovells.com)

**Ji Jienji (Shanghai)**

[ji.jienji@hoganlovells.com](mailto:ji.jienji@hoganlovells.com)

**Valerie Kenyon (London)**

[valerie.kenyon@hoganlovells.com](mailto:valerie.kenyon@hoganlovells.com)

**Carolin Konzal (Munich)**

[carolin.konzal@hoganlovells.com](mailto:carolin.konzal@hoganlovells.com)

**Eugenio Vázquez (Madrid)**

[eugenio.vazquez@hoganlovells.com](mailto:eugenio.vazquez@hoganlovells.com)

## In this issue...

### 1 Overview

#### FEATURE

#### 2 Growing use of nanomaterials in consumer products: striking a balance between innovation and risk

The use of nanomaterials in consumer products has increased in recent years, particularly in the cosmetic industry. Dr Marion Palmer (Senior Scientist, London) and Sylvie Gallage-Alwis (Paris) examine the latest scientific and regulatory issues in this area.

#### EUROPE - EU

#### 7 Endocrine disrupting chemicals: should we be concerned?

Endocrine disruptors are chemicals that have been shown to interfere with hormonal processes in animals, including humans. During the last two decades, there has been a reported increase in many endocrine-related adverse effects. Dr Marion Palmer (Senior Scientist, London) considers the current state of science.

#### 11 The position of the Council of the European Union on the recast of the Brussels Regulation: a step forwards or backwards?

The Council of the European Union has recently adopted a general approach on the European Commission's draft proposal to recast the Brussels Regulation on jurisdiction and the recognition and enforcement of judgments. Christelle Coslin (Paris) reports.

#### 15 Product Liability Directive 85/374/EEC and French case law on the liability of service providers

Cécile Derycke and Chloé Cuilleron (Paris) consider the recent decision of the Court of Justice of the European Union in *Centre hospitalier universitaire de Besançon v Thomas Dutruieux and Caisse primaire d'assurance maladie du Jura*, and the potential impact it may have on the liability of service providers in the context of the Product Liability Directive.

#### 17 Germany takes European Commission to court over European Toy Safety Directive's chemical restrictions

In the interest of maintaining its high toy safety standards, the German Government applied to the European Commission for permission to retain its own thresholds for certain chemical substances in place of the thresholds provided for in the new European Toy

Safety Directive. Carolin Konzal, Christoph Weisser and Benita Zedelius (Munich) report on the Government's partial success, and on its legal action in respect of the balance of the Commission's decision.

#### 19 A team effort to achieve consumer safety: third Consumer Product Safety Trilateral Summit

In a continuing cooperative effort initiated in 2008, the EU, China and the US have recently held their third summit aimed at working towards streamlining their respective approaches to consumer product safety issues that are common to their markets. Claire Taylor and Valerie Kenyon (London) outline the focus and objectives of the latest summit.

#### EUROPE - FRANCE

#### 20 Towards the introduction of a notion of environmental loss in the French Civil Code?

Christine Gateau and Damien Bergerot (Paris) outline the legal developments in France following the *Erika* oil spill case. They discuss a bill filed with the French Senate which proposes that a person whose actions cause damage to the environment should remedy such damage, first using human resources.

#### EUROPE - GERMANY

#### 22 The distributor's liability for defective medical devices – latest judgment of the Court of Appeals Düsseldorf

Sebastian Lach, Carolin Konzal and Simone Schönberger (Munich) consider a recent case in the Düsseldorf Court of Appeals on the extent of a distributor's liability for defective medical devices, and examine other sources of law in this area.

#### EUROPE - ITALY

#### 28 Can a doctor's liability arise simply from breaching the patient's right to be informed?

A recent decision of the Italian Supreme Court in a medical malpractice case appears implicitly to accept that damages may be awarded for breach of a patient's right to informed consent, even in circumstances where the patient has suffered no health damage as a consequence. Jacopo Bartolomeo (Milan) comments on the decision.

## EUROPE – MALTA

### 30 The new Maltese Collective Proceedings Act

In June 2012, Malta passed a law to create a mechanism for the initiation of class actions for claims in competition, consumer affairs and product safety law. Zen Cho (London) looks at the key safeguards incorporated in the law to prevent its misuse.

## EUROPE – NETHERLANDS

### 31 Adequate instructions and warnings: new developments for Dutch product liability law?

Provision of instructions and warnings plays an important role in assessing the safety of a product. The Dutch Supreme Court has ruled that, to be considered adequate, a warning must not only provide clear information about the risk, but it must also result in persons taking adequate precautions to protect themselves against that risk. A recent paper also assesses the circumstances in which a warning can be considered adequate. Karen Jelsma (Amsterdam) reports.

## EUROPE – SPAIN

### 34 Asbestos litigation in Spain: the first claim based on tortious liability

Eugenio Vazquez and Christina Redondo (Madrid) explore the Uralita case, in which the Court of Appeal of Madrid recently issued its decision. The Court of Appeal dismissed the claims brought by residents of villages who claimed that exposure to asbestos, as a result of living in close proximity to Uralita's factories over the years, had caused them serious health problems.

## EUROPE – UK

### 36 Argos successfully sues chemical test house for millions in toxic sofa litigation

Following an earlier High Court ruling that Argos had barred itself from pursuing its supplier or insurer for damages incurred in connection with the provision of sofas containing DMF, the High Court has recently upheld Argos' claim against Leather Trade House, a body providing specialist leather advice and assistance. Claire Taylor (London) reports.

### 39 *Fairclough v Summers* - a lucky escape for a fraudulent claimant

The English Supreme Court has given an important ruling on the extent to which a claimant, who has grossly exaggerated an otherwise valid claim, should be allowed to keep the damages he has been awarded for the genuine element of his claim. Nick Atkins and Charlie Clarke-Jervoise (London) consider the judgment.

### 41 English Court of Appeal lights the fuse for the "big bang": a 10% increase in general damages awards

Giles Hutt (London) comments on a recent Court of Appeal case which will implement, as of April 2013, a proposal to increase by 10% the level of damages that can be awarded for pain, suffering and loss of amenity consequent on a tort.

## NORTH AMERICA – US

### 43 Is there a new FTC standard for scientific substantiation of disease and health benefit claims?

What scientific substantiation must a food or nutrient seller have in order to make a health benefit or disease treatment claim about its product? Barry Thompson and Rachel Patta (Los Angeles) report on the recent case concerning claims advertised by POM Wonderful, LLC in relation to its pomegranate-based products.

## ASIA PACIFIC – AUSTRALIA

### 47 A Twist in the Tale – *Samaan bht Samaan v Kentucky Fried Chicken Pty*

In a recent decision the New South Wales Supreme Court found Kentucky Fried Chicken liable for severe brain damage suffered by one of its customers, even though there was significant doubt over the question whether the product she had eaten had in fact caused the damage. Madeleine Kearney (Clayton Utz) comments on the decision and its potential implications from both product liability and product safety standpoints.

## ASIA PACIFIC – CHINA

### 49 China's restrictions on hazardous substances: a European mould with Chinese characteristics

On 4 June 2012, China's State Council's legislation office published for public comment a draft set of new Measures for the Administration of Pollution Control for Electronic and Electrical Products. These new measures are widely being regarded as the "new China

RoHS rules". Eugene Chen (Shanghai) outlines the legislative regime in China and considers the future development of China RoHS regulations.

**52 Lessons from the ConocoPhillips oil spill: the marine environmental legal regime in China**

Eugene Chen and Jieni Ji (Shanghai) report on liability for environmental damage in China, in the context of the ConocoPhillips oil spill. Although the Chinese authorities have not aggressively enforced environmental law in the past, as public awareness of environmental issues increases it seems realistic to anticipate that more environmental cases will be brought in the future.