

Lovells

European Product Liability *Review*

Issue 23
June 2006

In this issue

Overview	1
Tobacco feature	2
Science feature	7
Consumer protection - EU, UK and Germany	10
Law and procedure - UK	17
Recent cases - UK	21
Recent cases - France	30
Recent cases - Italy	34

Lovells has a comprehensive 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. Lovells' product liability lawyers are supported by a dedicated Science Unit and Project Management Unit.

If you would like more information about Lovells' product liability practice, please visit our website at www.lovells.com or contact any of the following:

John Meltzer (London)

Tel: +44 (0) 20 7296 2276

Email: john.meltzer@lovells.com

Klaas Bisschop (Amsterdam)

Tel: +31 (0) 20 55 33 714

Email: klaas.bisschop@lovells.com

Joe Cyr (New York)

Tel: +1 212 909 0600

Email: joe.cyr@lovells.com

Ina Brock (Munich)

Tel: +49 (0) 89 290 12-0

Email: ina.brock@lovells.com

Gian Paolo Zanchini (Rome)

Tel: +39 6 6758231

Email: gianpaolo.zanchini@lovells.com

Allan Leung (Hong Kong)

Tel: +852 2219 0888

Email: allan.leung@lovells.com

José Luis Huerta (Madrid)

Tel: +34 91 349 82 00

Email: joseluis.huerta@lovells.com

Christopher Thomas (Brussels)

Tel: +32 (0) 2 647 06 60

Email: christopher.thomas@lovells.com

Francesca Rolla (Milan)

Tel: +39 02 7202 5249

Email: francesca.rolla@lovells.com

Thomas Rouhette (Paris)

Tel: +33 1 53 67 47 47

Email: thomas.rouhette@lovells.com

Neal Moglin (Chicago)

Tel: +1 312 832 4404

Email: neal.moglin@lovells.com

Ewa Rutkowska (Warsaw)

Tel: +48 (0) 22 5292 2914

Email: ewa.rutkowska@lovells.com

Lovells' *European Product Liability Review* is distributed worldwide free of charge to clients and others with an interest in international product liability issues. If you would like additional copies of this publication, or if you wish to be added to our mailing list for future editions, please return the form enclosed with this edition, or contact a member of the editorial team by telephone or email:

Rod Freeman

Tel: +44 (0) 20 7296 5256

Email: rod.freeman@lovells.com

Siobhan Thomson

Tel: +44 (0) 20 7296 5373

Email: siobhan.thomson@lovells.com

Matthew Hibbert

Tel: +44 (0) 20 7296 2147

Email: matthew.hibbert@lovells.com

Claire Taylor

Tel: +44 (0) 20 7296 5934

Email: claire.taylor@lovells.com

In this issue...

1 Overview

TOBACCO FEATURE

2 Smoking and asbestos exposure: Dutch Supreme Court holds employer partly liable for employee's lung cancer

The Dutch Supreme Court has recently held that an employer who fails to comply with his duty of care to an employee will be liable not only for the dangers of working with asbestos that he knew or should have known about, but also for those dangers that were unknown, provided that the negligence significantly increases the risk of causing damage. However, in a similar result to that of the English case of *Badger v Ministry of Defence*, reported in the last issue of *European Product Liability Review*, the employee also shouldered some responsibility for the loss because of his smoking habit, as Sjoerd Meijer (Amsterdam) reports.

3 UK cases influence landmark New Zealand tobacco case

Having a close eye on the ruling of the Scottish Court of Session's ruling in *McTear v Imperial Tobacco*, the New Zealand High Court has recently rejected, in a similarly convincing manner, a claim brought against two tobacco manufacturers by the estate of a claimant who died of lung cancer. Claire Taylor (London) reports on some of the interesting aspects of the detailed judgment.

SCIENCE FEATURE

7 Product liability and nanotechnology

Recent high-profile accidents, including the Buncefield oil depot explosion in England, and the hospitalisation with pulmonary oedema of a number of German consumers, have given rise to a discussion of nanotechnology, which is concerned with the manipulation of tiny particles of matter. Dr Mark Hillier (London) explains the benefits that nanotechnology has brought and is capable of bringing to business and consumers, why it is also seen as giving rise to potential health issues, and considers some of the problems associated with its regulation.

CONSUMER PROTECTION - EU, UK AND GERMANY

10 New EU rules imminent on health and nutrition claims on food

Three years ago, we reported on the European Commission's proposal for a Regulation in the area of nutrition and health claims. In May, the European Parliament finally agreed a compromise text, which opens the way for the Regulation to be formally adopted. Richard Welfare and Katrina Lajunen (London) highlight the key provisions of what may well be the final draft of the Regulation.

11 Reducing the burden of regulation on businesses in the UK

The UK Department of Trade and Industry has recently published the responses to a consultation which came out of the 2005 Hampton Report, the purpose of which was to consider ways to reduce the administrative burden that is imposed on English businesses by regulatory inspection and enforcement. Matthew Hibbert and Jane Gamble (London) review the background to the consultation, examine the responses to it, and discuss the next steps in the implementation of the report's recommendations.

13 General product safety directive: the notification obligation under German law

The General Product Safety Directive was implemented in Germany two years ago, and business has been seeking to come to terms with the new obligations the Directive contains, particularly the obligation to notify authorities about dangerous products. Dr Gerd Hagen of the automotive company TRW and Fabian Volz (Munich) examine some inconsistencies in the notification obligation as set out in German law, and offer some practical advice on how best to comply with that obligation.

LAW AND PROCEDURE - UK

17 Corporate manslaughter - another step closer

We have reported extensively over the last year on the developments in relation to the UK Government's latest proposals for an offence of corporate manslaughter. In the most recent move, the Government has responded to the Law Commission's report on the proposed offence. Claire Taylor (London) considers the latest changes.

19 Compensation Bill: asbestos case prompts call for amendment

Since we reported, six months ago, on the last draft of the controversial Compensation Bill, there have been significant developments in relation to its content, not least to deal with the impact of the House of Lords decision in *Barker v Corus*, described elsewhere in this issue. Matthew Hibbert and Nick Palmer (London) provide an update.

RECENT CASES - UK

21 The role of voluntary safety standards in determining the level of safety a person is "entitled to expect" under the Product Liability Directive

In an interesting and somewhat surprising decision, the English Court of Appeal has ruled on whether a bottle safety cap that fails to meet the requirements of the relevant voluntary safety standard can be considered defective in circumstances where the safety cap was not a legal requirement. Chris Webber (London) considers the ruling and its implications for the important question of the role that safety standards play in an assessment of whether a product is defective under the Product Liability Directive.

23 Winding back the clock on *Fairchild*

In May, the House of Lords handed down its judgment in a number of appeals in which certain issues in relation to the interpretation of the *Fairchild* decision, involving liability for asbestos-related mesothelioma, were raised. The controversial effect of the judgment is to hold defendants who have negligently exposed claimants to asbestos responsible only for their share of the damage to the claimant. Rod Freeman and Matthew Hibbert (London) explain the basis on which the House of Lords reached this decision, and the proposed legislative developments that have followed it.

25 Wilfully dangerous acts and occupiers' liability

One of the proposals in the draft Compensation Bill in the UK is to embody, in a negligence analysis, a consideration of whether, if precautions had been taken by a defendant, a desirable activity might have been prevented. A recent Court of Appeal decision concerned with occupiers' liability provides a timely reminder of the justification for that clause, as Matthew Hibbert and Nick Palmer (London) explain.

26 English High Court rejects application for Group Litigation Order

In a case that will be of interest to product manufacturers, the English High Court has handed down a judgment which gives useful guidance as to the criteria that will need to be satisfied in order to make out a valid case for a Group Litigation Order. Nicole Travers and Peter Davis (London) summarise the ruling.

28 Credit card issuers held liable to compensate customers for defective goods and services supplied overseas

In the December 2004 issue of *European Product Liability Review*, we reported on the High Court's ruling that banks and card issuers were not liable to compensate customers who had purchased defective products and services overseas. In a surprising judgment, the Court of Appeal has overturned that ruling, as Jon Holland and Louise Lamb (London) report.

RECENT CASES - FRANCE

30 French Supreme Court rules pharmaceutical manufacturer of Distilbene liable for cancer in two women

In a judgment that may have far-reaching consequences, the French Supreme Court has allowed two claimants to recover from a pharmaceutical manufacturer in circumstances where it remained in doubt whether its Distilbene product had caused their illnesses. Virginie Adam (Paris) explains the decision of the French Supreme Court and examines the wider legal developments in relation to the drug that has affected so many individuals.

RECENT CASES - ITALY

34 The Italian Supreme Court grants the "double track" protection set forth by Article 13 of the Product Liability Directive

Valerio Biondi (Rome) reports on a recent ruling of the Italian Supreme Court which confirms that in seeking compensation for damage caused by a defect in a product, a claimant can rely on national principles of negligence as well as the laws implementing the Product Liability Directive.