

# Liability Insurance Report



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## News Summaries

### Australia:

#### *Out-of court assessors can settle claims for future economic loss in the form of a financial buffer*

In the Australian state of New South Wales, claims assessors of the Motor Accidents Authority (MAA) Claims Assessment & Resolution Service (CARS) are instrumental in the out-of-court settlement of compensation claims arising from road traffic accidents. In the case of Allianz Australia Insurance Ltd. v. Sprod & Ors ([2011] NSWSC 1157), the Supreme Court of New South Wales has ruled that the courts have only limited powers to review a decision by an out-of-court claims assessor.

In the underlying case, the claimant had suffered injuries to the neck, back and left shoulder in an accident on 20 June 2008. He was no longer able to work his usual overtime and therefore feared losing his job. The insurer of the party who caused the accident argued that the claimant’s inability to work overtime derived from an earlier injury and not, therefore, from the accident. However, the claims assessor concluded that this earlier injury had cleared up. He awarded the injured party AUD 10,000 (EUR 7,510) for loss of overtime and AUD 250 (EUR 188) net per week for 18 years as an allowance against any future job loss.

The insurer petitioned the Supreme Court to review this decision, citing as grounds that the claims assessor had breached the requirements of section 126 of the Motor Accident Compensation Act 1999 on the determination of future economic loss.

However, the Supreme Court upheld the claims assessor’s decision. It found that, unlike a ruling of a District Court Judge, a decision of an official claims assessor can only be overturned if a jurisdictional error can be proven, i.e., an error of procedure or in the grounds of the decision. The Court added that, with regard to the latter, it is sufficient to make clear how the assessor reached his or her decision. There is no need to enunciate every step in the reasoning process. As the claims assessor had made an award in the form of a financial buffer against future loss, he had not been bound by the requirements of section 126 of the Motor Accident Compensation Act 1999.

## **Denmark:**

### **Compensation for neighbours of wind farms**

Owners of land next to a wind farm construction site receive compensation for loss of value of their property. This is allowed under the Danish Law promoting renewable energy sources, which took effect on 1 January 2009. There is no requirement for the nuisance to exceed a threshold of tolerance, as described by the Danish law on the respective interests of occupiers of adjoining property. However, only landowners, and not tenants, are entitled to compensation. Any loss in value greater than 1 % is compensated.

Despite the waiver of a threshold of tolerance, the total compensation paid under this provision of the Renewables Promotion Law has so far remained modest. Thus, for example, the Kappel Vindmøllepark wind farm in South Denmark caused a total value loss of DKK 3.5 million (EUR 470,152) to the adjoining 50 or more properties. However, most landowners received no compensation, as their loss lay between DKK 50,000 and DKK 150,000 (EUR 6718 and EUR 20.153) and therefore did not exceed the 1 % threshold.

## **Europe:**

### **Commission Recommendation on the definition of nanomaterial**

On 18 October 2011, the European Commission issued a Recommendation on the definition of nanomaterial (2011/696/EU). The Recommendation relies on an expert opinion entitled "Scientific Basis for the Definition of the Term 'Nanomaterial'" of the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR), which was subject to a public consultation in 2010.

According to item 2 of the Recommendation, "nanomaterial" means:

*"A natural, incidental or manufactured material containing particles, in an unbound state or as an aggregate or as an agglomerate and where, for 50 % or more of the particles in the number size distribution, one or more external dimensions is in the size range 1 nm - 100 nm.*

*In specific cases and where warranted by concerns for the environment, health, safety or competitiveness the number size distribution threshold of 50% may be replaced by a threshold between 1 % and 50 %."*

According to item 3, by derogation, "fullerenes, graphene flakes and single wall carbon nanotubes with one or more external dimensions below 1 nm should be considered as nanomaterials."

Item 6 of the Recommendation states that this definition will be reviewed by December 2014 in the light of experience and of scientific and technological developments.

Under item 7, the Recommendation is addressed to the Member States, Union agencies and economic operators. The scope of EU legal provisions and conditions establishing further requirements of nanomaterial remain unchanged (Recital 16). The same applies to the use of the prefix "nano" in the definition of certain pharmaceuticals and medical appliances (Recital 17).

The reason for the Recommendation is that the relevant legal instruments of the EU and its Member States define nanomaterials on an individual basis. The definitions therefore differ according to economic sector, leading to unnecessary effort and expense for industry. This therefore compounds the difficulty of public debate on the advantages and risks of nanotechnology.

Further information on this Recommendation is available at the Commission's FAQ page on nanomaterials.

## **Europe:**

### **Hydraulic fracturing ("fracking") is potentially illegal due to breach of the REACH Directive**

The controversial process of hydraulic fracturing, or "fracking", extracts natural gas stored in rock (known as shale gas) by pressing fluid, charged with various chemicals, into the earth. To date this fracturing process has not been practised in the EU, though extraction could begin in some countries in 2015.

The European Chemicals Agency (ECHA) review of the REACH files has now found that the registration files for the chemicals normally used in fracking did not declare this purpose at all. As a result, the relevant chemicals cannot be used at all for natural gas fracturing in the EU.

The European Commission presumes that the substances for which ECHA has reviewed files should not be used at all for shale gas fracturing, or that they were not among the substances which had to be registered by 30 November 2010. That initial deadline only applied to substances manufactured or imported in quantities of 1,000 tonnes per year, and to certain hazardous chemicals.

## **International:**

### **CEFALO study of mobile phone radiation and brain tumours in children and young people**

The lack of studies into a link between mobile phone radiation and brain tumours in children has been a common subject of complaint in the past, and most recently by the authors of an international metastudy on carcinogenic magnetic fields. As children have smaller heads than adults, it has been suggested that high-frequency electromagnetic fields may penetrate the regions of the lower brain. Additionally, children's nervous systems are still in development and potentially more vulnerable to effects of electromagnetic fields.

The CEFALO study now seeks to close this gap in the research. The case-control study was published on 27 July 2011 in JNCI (Journal of the National Cancer Institute). It examined data from 352 patients, aged 7 to 19, who fell ill with brain tumours between 2004 and 2008, and 646 control persons from Denmark, Norway, Sweden and Switzerland.

Only one sub-group of the study revealed a statistically significant link between time since commencement of mobile phone use and risk of developing a brain tumour. These were the cases in which objective data were available from network operators about the examinees' mobile phone usage (35% of patients and 34% of control persons). The risk was heightened by a factor of 2.15 in children who had had a mobile phone contract for more

than 2.8 years. However, no link could be established with the total duration or number of calls. No increased risk to the regions of the brain most affected by mobile phone radiation could be detected. Besides, the Swedish data at least showed that there had been no increase in occurrences of brain tumours in children and young people in the years 2000 to 2008.

The researchers conclude from this that, despite the statistical link in the sub-group, there is no causal connection between mobile telephony and brain tumour risk. They suggest that the affected children may have been provided with mobile phones when their first symptoms of illness emerged, so that they could contact their parents in emergency.

The group of researchers point out, however, that the statistical reliability of the study is limited, because of the rarity of childhood brain tumours. Therefore, despite the higher participation rates in four countries (patients: 83.2 %; control persons: 71.1 %), only 352 patients could be questioned. It is therefore possible that a slight rise in the risk remained undetected.

The research team therefore urges further investigations based on objective data on this subject, especially as the study found a relatively low frequency and duration of mobile phone usage by children and young people, though this may have risen in recent years. Nevertheless, the experimentees would have mainly used GSM phones, whereas now there is an increasing use of UMTS phones, which emit an average of 100 to 500 times less radiation.

Critics point out that the lack of any rise in brain tumour illnesses to date does not prove the absence of a risk, as brain tumours have a 10- to 15-year latency period.



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