

2nd December 2009: ECJ ruling on substitution in product liability claims

On 2nd December 2009 the European Court of Justice (ECJ) gave judgment in the latest chapter in the long running vaccine damage case, *O'Byrne v Aventis Pasteur*.

The Claimant issued proceedings (within the 10 year liability period under the EC Product Liability Directive) against D1, in the mistaken belief that it was the producer of the vaccine. In fact, the producer was D2, and an application was therefore made (after the expiry of the 10 year period) to substitute D2 for D1.

Domestic law allows for a new defendant to be substituted for an existing defendant named in error in the original proceedings, notwithstanding that the applicable limitation period may have expired prior to the substitution order being made. See s. 35 Limitation Act 1980. However, D2 has argued that these provisions are inconsistent with the EC Directive and the strict terms of the 10 year longstop.

These issues have been considered in *O'Byrne* by the High Court in 2003, the ECJ in 2006, the Court of Appeal in 2007, the House of Lords in 2008 and the ECJ for a second time in 2009. The case will now be returned to the Supreme Court.

The ECJ has confirmed that as a general rule it would not be open to the national courts to permit substitution out of time in circumstances where the only proceedings instituted within the 10 year period were against a person who is not a producer.

However, as an exception to this general rule, the ECJ has ruled that where (a) proceedings were instituted within time against a wholly owned subsidiary of the producer, and (b) the product was put into circulation at the determination of the producer (as opposed to the subsidiary), then substitution would not be precluded by European law.

In this case, both conditions are satisfied (D1 being a subsidiary of D2), and it is therefore anticipated that the Supreme Court will in due course confirm that substitution is permissible in this case, bringing an end to 7 years of litigation on this single issue.

Simeon Maskrey QC and Hugh Preston of 7 Bedford Row have been instructed throughout for the claimant.