



Product Liability

in 37 jurisdictions worldwide

2009

Contributing editors: Harvey L Kaplan and Gregory L Fowler



Published by
GETTING THE DEAL THROUGH
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Product Liability 2009

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Product Liability 2009

Published by
Law Business Research Ltd
87 Lancaster Road
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Tel: +44 20 7908 1188
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ISSN 1757-0786

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Printed and distributed by
Encompass Print Solutions
Tel: 0870 897 3239

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Canada

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Civil litigation system

1 The court system

What is the structure of the civil court system?

The Canadian civil court system is comprised of provincial and federal courts. Each province and territory has superior courts, which have primary responsibility for the administration of justice. The superior courts have ‘inherent jurisdiction’ in all matters except those specifically excluded by a statute. Most civil claims are within the jurisdiction of the superior courts. Appeals from final orders of the superior courts lie to the courts of appeal in each province.

The federal courts have civil jurisdiction limited to certain matters specified in federal statutes, such as intellectual property, competition law, admiralty and taxation. Appeals from the Federal Court lie to the Federal Court of Appeal.

Appeals from the provincial and federal appellate courts lie, with leave, to the Supreme Court of Canada, which is the ultimate court of appeal in Canada.

With the exception of Quebec (a civil jurisdiction), all Canadian provinces and territories are common law jurisdictions. Except where noted, the discussions in this chapter are limited to the procedural and substantive laws of the common law provinces.

2 Judges and juries

What is the role of the judge in civil proceeding and what is the role of the jury?

Canadian civil proceedings are adversarial. The judge does not have an inquisitorial or investigative role. In Canada jury trials are extremely rare in civil cases. There is no constitutional right to a civil jury trial in Canada, and there are statutory exceptions for the use of juries in cases involving certain types of relief such as equitable relief. There is no right to a jury trial in Quebec or in the federal courts.

In actions tried by judge alone, the judge is the trier of fact and law. In jury trials, the jury is the trier of the facts, while the judge will explain the evidence and the relevant law to the jury. The jury must then respond to questions posed by the judge and reach a verdict. Judges retain an inherent jurisdiction to dismiss a jury if the judge considers the evidence too complex.

3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

While the various steps in commencing and litigating a product liability action are generally uniform across the country, there are variations to when and how such steps are to be taken. The following is based on the Ontario Rules of Civil Procedure.

A product liability action is commenced by way of an originating process issued by the court, which in most jurisdictions is called a statement of claim. In Ontario, the plaintiff serves the statement of claim on the defendant who is required to provide a statement of defence within 20 days (which can be extended to 30 days if the defendant provides a notice of intent to defend within the initial 20 days). The plaintiff then has the option to serve a reply to the statement of defence within 10 days. Time limits in rules of civil procedure are often extended by the parties on consent.

Related proceedings may be commenced by way of a counter-claim (a defendant may assert any right or claim against the plaintiff and join as a defendant any necessary and proper party), cross-claim (a claim by one defendant against a co-defendant) or third-party claim (a claim by the defendant against any third party for contribution and indemnity arising out of the plaintiff’s claim against the defendant or for an independent claim related to the plaintiff’s claim).

4 Trials

What is the basic trial structure?

A civil trial involves: opening statements by the parties, direct examination and cross-examination of the plaintiff’s witnesses, direct examination and cross-examination of the defendant’s witnesses and closing statements. All such statements and examinations are conducted by counsel unless a party acts for itself.

The judge controls the court process and is entitled to question both witnesses and counsel. The judge can also order that witnesses be excluded from the courtroom until it is their turn to testify.

The public interest in open and accessible court proceedings is well entrenched in Canada. Accordingly, public access to court proceedings and documents filed with the court is restricted in only very limited circumstances. Provincial statutory provisions generally provide that the court may order the public to be excluded from a hearing when the possibility of serious harm or injustice to any person justifies a departure from the general principle that court hearings should be open to the public.

5 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

Most Canadian provinces have enacted class action legislation, which provides for the global resolution of issues common to the class, with individual issues to be separately determined. A class proceeding is commenced by the proposed representative plaintiff serving its statement of claim. Representative bodies that are legal persons, such as corporations, may commence a class action or be members of a class.

To proceed with a class action in Canada, the representative plaintiff must have the proceeding certified by a court. The criteria for certification in the common law provinces are:

- the pleading discloses a cause of action;
- there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- the claims or defences of the class members raise common issues;
- a class proceeding would be the preferable procedure for the resolution of the common issues; and
- there is a representative plaintiff or defendant who fairly and adequately represents the interests of the class and does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

There is no requirement that common issues predominate over individual issues in order for a class proceeding to be certified.

6 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

A product liability action will generally take at least two to three years from the service of the statement of claim to reach the trial stage. The duration of the trial will depend on the complexity of the issues and can range anywhere from several days to several months.

A product liability class action will generally take longer to reach the common issues trial. The main stages of a proposed class proceeding (leaving aside the appeals that generally characterise each stage) are: pre-certification motions such as jurisdiction or pleadings motions; the certification motion; notice and opt out period; documentary and oral discovery; trial of the common issues; and trials of the individual issues on causation and/or damages, if necessary.

Evidentiary issues and damages

7 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

Pre-trial discovery consists of documentary discovery and oral discovery.

Documentary discovery begins after the pleadings are completed in an action. In most provinces, the parties are required to deliver an affidavit of documents in which they list all relevant documents in their possession, power or control and to exchange all non-privileged documents. The parties must disclose the existence of documents regardless of whether they help or hurt the party's case or whether they are privileged. However, in Quebec, the parties must only disclose documents upon which they intend to rely. In some provinces, the parties must also disclose the existence of documents that were formerly in their possession with a statement of when and how they lost possession or control. Documents are defined very broadly under the rules of civil procedure and include any data recorded or stored on a computer, including e-mail.

There is an ongoing obligation of production. Therefore any documents that come into a party's possession, control or power after delivering the affidavit of documents must also be disclosed.

Oral examination for discovery involves the examination under oath of one or more representatives of each party by any party adverse in interest. If the party being examined is not able to answer certain questions, it may give undertakings, answers to which are provided subsequently, often in writing. The rules of civil procedure of each jurisdiction also provide for disclosure of documents by, and the oral examination of, non-parties, with leave.

8 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by opposing party?

Evidence at trial is presented through the examination and cross-examination of witnesses and experts, written reports of experts, and in limited cases, through affidavit evidence with leave of the court. The parties may also read-in at trial part of the transcript of the examination for discovery of the opposing party.

In most provinces and territories, with leave of the court or consent of the parties, evidence of a witness may also be taken prior to trial and admitted at trial in lieu of calling the witness. The grounds upon which the court may make such an order include (among others) the convenience of the parties, the unavailability of the person at trial, and the expense of bringing the person to trial.

9 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Though rarely exercised, the court is empowered under the rules of civil procedure in certain provinces, by its own initiative or on motion by a party, to appoint an independent expert to inquire into and report on any question of fact or opinion relevant to an issue in the action. The expert is treated as a witness and not as an adviser to the court. The expert is required to prepare a report which is provided to all parties. Any party may examine the expert at trial. Parties' own experts are frequently presented as witnesses at trial, provided a report of the expert's opinion is delivered to the opposing party in advance of the trial. The expert must be qualified to give the opinion and can be challenged on his or her qualifications in court.

10 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Product liability claimants who have suffered personal injury may seek compensatory damages for pecuniary and non-pecuniary losses. Pecuniary loss is any financial or material loss, past or future, whether or not precisely calculable, such as lost business profits, medical treatment expenses and repair or replacement costs. The aim of awarding pecuniary damages is to place the plaintiff back in the position he or she would have been in absent the injury.

Non-pecuniary damages are awarded in cases of personal injury to compensate for pain and suffering, loss of amenities or life and loss of expectation of life. In a trilogy of cases in 1978, the Supreme Court of Canada set strict limits on awards in respect of non-pecuniary losses. The Court capped non-pecuniary damages at C\$100,000. Adjusted for inflation, this figure today stands at approximately C\$330,000.

In limited circumstances, product liability claimants who have not suffered personal injury may recover pure economic loss. Such recovery is available where the plaintiff incurred costs to repair a defective product and there existed a 'real and substantial' threat of danger to persons, and possibly to property, from the defect.

11 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Punitive damages, sometimes called exemplary damages, are awarded sparingly in Canada and are treated as an exception to the rule that damages compensate the injured rather than punish the tortfeasor. Punitive damages are awarded against a defendant in exceptional

cases for ‘malicious, oppressive and high-handed’ misconduct that ‘offends the court’s sense of decency’. Accordingly, punitive damages are rarely awarded in negligence cases because negligence is most often inadvertent rather than intentional or malicious.

Punitive damages are awarded only if compensatory damages are inadequate to punish the defendant. Even where punitive damages are awarded, the quantum is modest. The record award in Canada is C\$4 million in a case where a bank conspired to commit fraud, and most recently the Supreme Court of Canada has indicated that C\$1 million is the appropriate limit for bad faith claims. There have been very few punitive damage awards in product liability cases.

Litigation funding, fees and costs

12 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

While legal aid is available in most provinces and territories, it is not generally available to litigants seeking to commence a product liability claim. In Ontario and Quebec public funding is available to individuals seeking to commence class actions.

13 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party litigation funding in Canada would be subject to the common law torts of champerty and maintenance. Maintenance is officious intermeddling with a lawsuit by a third party, by assisting a party with money, or otherwise, to prosecute or defend a suit. Champerty is maintenance together with an agreement to give the maintainer a share in the proceeds or subject matter of the proceedings, or some other profit.

The question of whether a funding arrangement between a plaintiff and a third party is invalid on the basis of maintenance and champerty is most likely to turn on the motive and intention of the third party funder. Courts will not generally find a third party’s financial assistance to be maintenance or champerty where the motive can be characterised as proper or legitimate. Examples of proper or legitimate motives include: charity and compassion, pre-existing commercial interests and legitimate business arrangements.

14 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency fee arrangements are permissible across Canada, subject to regulatory control. Regulation of contingency fees, which allow a client to pay fees only in the event of success, varies in each jurisdiction. In certain jurisdictions, contingency fees must be approved by the court.

15 ‘Loser pays’ rule

Can the successful party recover its legal fees and expenses from the unsuccessful party?

In Canada, the general rule is that the loser pays the winner’s costs. However, this does not mean that the successful party will receive complete indemnification from the unsuccessful party. Typically, the courts award costs on a partial indemnity basis, which means the successful party will recover approximately 50 per cent of its legal costs. In certain instances, the court will award costs on a substantial indemnity basis, which means the successful party will recover about 75 per cent of its legal costs.

Sources of law

16 Product liability statutes

Is there a statute that governs product liability litigation?

There is currently no specific statute that governs product liability litigation. As outlined in the answers that follow, there are a variety of federal and provincial statutes and regulations that could potentially be applicable in a product liability claim. The federal government regulates a variety of areas related to product liability, most notably food and drugs, hazardous products and safety standards for motor vehicles. Provincial governments also regulate the area of product liability through legislation dealing with the sale of goods, product warranties and general consumer protection legislation.

In January 2009, Bill C-6, ‘An Act respecting the safety of consumer products’, also known as the Canada Consumer Products Safety Act was introduced in Canada’s House of Commons. If enacted, Bill C-6 will standardise consumer product regulation and designate Health Canada as a regulator of manufacturers, sellers, importers and advertisers of consumer products in Canada. The proposed Act will replace part I of the Hazardous Products Act and will apply to all consumer products (other than exceptional products prescribed by regulation), and provide for increased reporting and notification requirements.

17 Traditional theories of liability

What other theories of liability are available to product liability claimants?

Product liability law in Canada can be broken down into four major common law causes of action:

- negligent design;
- negligent manufacture;
- failure to warn; and
- breach of warranty.

The first three are tort-based and the fourth is contract-based.

While there are some distinctions from province to province with respect to legislation and common law doctrine, in general the common law in Canada on product liability matters is fairly uniform because negligence and contract principles are subject to the authority of the Supreme Court of Canada, whose decisions are binding on all lower courts.

Tort principles have risen to a place of primary importance in the protection of consumers and users under product liability law in Canada. Negligence is the most common basis for product liability. The three specific types of product liability claims that are based on negligence are for design defects, manufacturing defects and failure to warn.

A product liability action based on breach of contract can involve a contractual warranty claim, a statutory warranty claim, or both. Contractual warranties as to the quality of a product may arise from the contract of sale, separate collateral contracts or oral discussions leading up to the sale.

By their very nature, contractual claims are limited to cases where privity of contract exists between the plaintiff and the defendant. Each of the common law provinces has enacted sale of goods legislation that codifies much of the common law on implied warranties. These sale of goods statutes contain two statutorily implied warranties: that the goods will be reasonably fit for the general purposes such goods serve; and that the product being sold is of merchantable quality. As a general rule, parties (other than in a consumer transaction) can contract out of the statutorily implied warranties of fitness for purpose and merchantability found in sale of goods legislation.

18 Consumer legislation

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

Federal consumer protection laws in Canada include legislation with respect to the safety of goods, labelling and misleading advertising, as well as regulation of certain products or industry sectors such as food and drugs.

Provincial consumer protection laws dealing with sale of goods, trade practices, general consumer protection, warranties, safety standards and licensing and regulation of businesses also affect product liability litigation. These statutes vary greatly from jurisdiction to jurisdiction.

19 Criminal law

Can criminal sanctions be imposed for the sale or distribution of products determined to be defective?

While there are no specific criminal sanctions for the sale or distribution of defective products in Canada, certain offences under the Criminal Code of Canada could apply to corporations and their officers, directors and employees for the negligent manufacture and distribution of products in Canada. These offences include fraud and criminal negligence. The Competition Act creates criminal offences in relation to false and misleading advertising. Furthermore, failure to comply with certain statutory and regulatory product standard requirements can result in criminal prosecution. For instance, the Hazardous Products Act, the Food and Drugs Act and the Consumer Packaging and Labelling Act contain detailed provisions concerning a wide range of goods and products.

20 Novel theories

Are any novel theories available or emerging for product liability claimants?

An emerging area of recovery for product liability claimants is restitutionary remedies such as unjust enrichment and disgorgement and recovery pursuant to the novel theory of 'waiver of tort', which has yet to be tested at a product liability trial but has been certified as a common issue in a number of product liability class actions. The theoretical basis for this is the equitable doctrine of 'waiver of tort,' whereby the plaintiff gives up the right to sue in tort and pursues a restitutionary claim instead, in order to recoup (or obtain disgorgement of) the profits the defendant has derived from its wrongful conduct. This means that if waiver of tort can successfully be pleaded as a cause of action in a product liability claim, proof of actual damages may not be a prerequisite to recovery if 'wrongful conduct' by the defendant can be demonstrated.

These remedies are based on the principle that a defendant should not be allowed to benefit from its own wrongdoing and that in certain circumstances, the claimant should be entitled to a disgorgement of the defendant's 'ill-gotten' gains.

21 Product defect

What breaches of duties or other theories can be used to establish product defect?

In addressing whether a product contains a design defect, the question is whether the design of the product poses an unreasonable risk of harm to the foreseeable user. In addition, a manufacturer will be liable for any foreseeable injuries or damage caused by an unintentional defect in the product that originated from a failure to manufacture the product in accordance with the relevant specifications.

To succeed against a manufacturer for negligent design or manu-

facture, the plaintiff must establish on a balance of probabilities:

- the product contained a defect;
- the manufacturer owed a duty of care;
- the manufacturer's conduct fell below the standard of care;
- the breach caused or contributed to the plaintiff's injury; and
- the defect and injury were reasonably foreseeable outcomes of the negligence.

Plaintiffs injured by a product's defect do not need to prove exactly how the defect occurred. If it is proven the defect originated during the manufacturing process, a presumption of negligence against the manufacturer arises in the plaintiff's favour. Consequently, the manufacturer will have the evidentiary burden of disproving that it was responsible for the defect. Canadian courts have also imposed liability on manufacturers for negligence resulting from a defective inspection system or a failure to inspect.

Additionally, manufacturers have a duty to warn consumers of the dangers inherent in the use of their products of which the manufacturer has, or ought to have, knowledge (other than obvious dangers). A manufacturer has an obligation to warn of dangers that arise from negligent design or manufacture, or from using the product in certain ways. This is a continuing duty and does not cease at the time of sale.

22 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

Having established that the manufacturer owes the consumer a duty of care, the plaintiff must then establish that the manufacturer breached the requisite standard of care. The standard of care imposed upon a manufacturer under Canadian tort law is to use reasonable care in the circumstances. Thus, the issue becomes whether the nature and extent of the risk demanded greater precaution than that taken by the manufacturer. Generally, the most important consideration in assessing the standard of care in negligent design and manufacture cases is the character of the product sold and its capacity to do harm.

There is no strict liability in Canadian product liability law. With respect to certain products (for example, baby food) and consumers, however, the courts have set the requisite standard of care so high that something approaching strict liability is achieved.

23 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

All parties in the distribution chain of a product, including a manufacturer, distributor and retailer could potentially be liable for injuries and damages caused by a defective product, if negligence can be established. For instance, a distributor may be liable for failing to meet its duty to use reasonable care in purchasing, testing or inspecting the product where it puts into circulation a product in a dangerous condition that could or ought to have been discovered by reasonable diligence on the distributor's part. Distributors may be liable for negligent misrepresentations, recommendations or instructions where a distributor makes a claim about a product without properly testing or inspecting the product. Liability may also be imposed on distributors and vendors for a failure to warn of the dangers in a product of which it knows or ought to know.

Contractually, parties in the distribution chain may potentially be liable for injuries and damages caused by defective products if there is privity of contract with the plaintiff and such contractual liability is not expressly excluded.

24 Causation

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

In order to succeed, a plaintiff must demonstrate on the balance of probabilities that ‘but for’ the defect in the product’s design, manufacture or warning, the injury would not have occurred. This is the main test for causation.

An exception to the ‘but for’ test has been recognised where denying liability by applying the ‘but for’ test would offend basic notions of fairness and justice. Recently, the Supreme Court of Canada recognised the ‘material contribution’ test, which is applied only in cases where the plaintiff is able to meet the following criteria: the plaintiff must be unable to prove that the defendant’s negligence caused the plaintiff’s injury due to factors outside of the plaintiff’s control, and it is clear the defendant breached a duty of care owed to the plaintiff, exposed the plaintiff to unreasonable risk of injury and the plaintiff suffered injury. This is a very high threshold for plaintiffs to meet.

25 Post-sale duties

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

The duty to warn is a continuing duty that requires parties in the chain of distribution to warn consumers of dangers discovered after the product has been sold and delivered. The common law duty to warn is supplemented in most Canadian jurisdictions with statutory warning requirements. Although compliance with regulatory standards may be sufficient to insulate a company from liability in some cases, more often the courts use these standards as a guide to determine whether a manufacturer has satisfied its duty to warn. There is no duty to recall. However, various regulatory agencies may require that a recall be undertaken with respect to defective products.

Limitations and defences

26 Limitation periods

What are the applicable limitation periods?

Time limits for commencing a proceeding are specified in the statutes of limitation of the provinces and territories and are not uniform across Canada. The limitation periods for actions in contract and negligence generally range from two to six years, usually from the date of discovery of the cause of action. Many jurisdictions also have ultimate limitation periods which preclude litigation for most claims after a certain period of time regardless of when a cause of action is discovered. For instance, the current ultimate limitation period in Ontario is 15 years.

27 State-of-the-art and development risk defence

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

Canadian product liability law does not recognise a specific state-of-the-art and development risk defence. The courts will generally consider the state of knowledge and technology at the time the product was manufactured or distributed to assess whether a reasonable standard of care was met in the circumstances. To evaluate whether the manufacturer exercised reasonable care, some Canadian courts have adopted a ‘risk-utility approach’, which calls for a balancing of the alternatives and risks faced by the manufacturer.

28 Compliance with standards or requirements

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with government or industry standards with respect to the alleged defect will not necessarily help a manufacturer to disprove negligence, although compliance will serve as an important consideration in arriving at any determination on liability. In Canada, the civil consequences of regulatory and statutory breaches are generally subsumed in the law of negligence and are just one of the circumstances a court can consider when assessing the applicable standard of care.

29 Other defences

What other defences may be available to a product liability defendant?

A product liability action may be defended on the basis that the defendant did not owe a duty of care, that there was no breach of the standard of care, or that there was no causal link between the breach of the standard of care and plaintiff’s injury. Where there is an intervening act by a third party that breaks the chain of causation between the defendant’s negligence and the alleged loss suffered by the plaintiff, the defendant can claim contribution and indemnity from the third party. A defendant may also seek to reduce its own liability where the plaintiff has contributed to his or her own damages by pleading contributory negligence or where the plaintiff has voluntarily assumed the risk of his or her actions.

Furthermore, with respect to failure to warn claims, the ‘learned intermediary’ rule provides that where a product is subject to inspection by, or its use is under the supervision of an expert (eg, a doctor), the manufacturer can discharge its duty to warn the ultimate consumer by informing the learned intermediary.

Jurisdiction analysis

30 Status of product liability law and development

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability law is well entrenched in Canada as a means to compensate persons who suffer loss or injury as a result of defects in the design, manufacture and distribution of products. With the development of class action law over the last decade in Canada, many product liability claims which would not have been advanced due to the economic limitations of individual plaintiffs are now being pursued on a class basis. Consequently, product liability law is continuing to expand and develop in Canada largely in the class action context.

31 Product liability litigation milestones and trends

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

The use of the doctrine of ‘waiver of tort’ (described above in section 20) in product liability litigation has arguably been the seminal event in Canadian product liability litigation in recent years. While Ontario courts have recognised that the law is unclear on whether waiver of tort is a choice of remedy where an actionable wrong has been established or an independent cause of action, they have held that this is an issue that should be resolved in the context of a factual background at trial, rather than at a certification hearing. This means that in the short term, waiver of tort has become a common pleading in product liability class actions. Depending on how the issue is resolved at a trial, which may not be for another several years, ‘waiver of tort’ has the potential to expose manufacturers to substantial damages

Update and trends

On 8 April 2008 the Canadian federal government introduced into the House of Commons two proposed pieces of legislation intended to overhaul the food and product safety laws in Canada: Bill C-51, legislation to amend the Food and Drugs Act, and Bill C-52, the Canada Consumer Product Safety Act. This proposed legislation did not come into law before Parliament was dissolved for a federal election in September 2008. In January 2009, Bill C-52 was reintroduced as Bill C-6 and it is expected that Bill C-51 will also be reintroduced in some form in 2009.

The proposed legislation is a key component of the Canadian government's Food and Consumer Safety Action Plan, which appear to be the government's response to a series of recent product recalls in Canada. The stated objectives of the Action Plan are to 'modernize and strengthen Canada's safety system for food, health and consumer products, and to better support the collective responsibilities that government, industry and consumers have for product safety' through a series of proposed initiatives that focus on: 'preventing problems in the first place'; 'targeting the highest or unknown risks'; and 'rapid response'.

Bill C-51 would amend the Food and Drugs Act. The bill creates new offences relating to food, therapeutic products (which include drugs) and cosmetics, requires licences for importing food, makes amendments to therapeutic product licensing, expands the powers of inspectors, adds new 'administration and enforcement' measures,

including mandatory recalls of therapeutic products and cosmetics, and substantially increases the penalties relating to offences.

The proposed Canada Consumer Product Safety Act (Bill C-6), would replace Part I of the Hazardous Products Act. The bill restricts the sale and importation of unsafe consumer products and requires reporting of serious product-related incidents, as well as imposing a duty to prepare and maintain documentation with respect to manufactured products. The bill's most significant features appear to be the powers it provides to both the minister of health and designated officials to order recalls of consumer products, and the new penalty and compliance regime that it establishes for consumer products. The bill grants the minister of health the authority to order a manufacturer or importer not only to conduct tests or studies on a product, but also to implement a recall. The bill further provides that a person who is convicted of contravening any of its provisions, or an order made under it (an 'offence'), could potentially be liable to a fine of up to C\$5 million, or to imprisonment of up to two years, or both. For persons who 'wilfully or recklessly' contravene a provision of the bill or an order made under it, the bill provides for even more severe penalties (a fine in an amount in the discretion of the court or imprisonment of up to five years, or both). In addition, officers and directors who direct, authorise, assent to, acquiesce in, or participate in the commission of an offence, are a party to that offence and are liable to the foregoing punishment.

through disgorgement of profits in the absence of a finding of negligence and simply on the basis of 'wrongful conduct'.

Additionally, damages for psychiatric harm, including damages for distress and anxiety, have recently been raised in product liability litigation, particularly in relation to recalled products. Stated briefly, the issue is whether plaintiffs can recover damages for mental distress and anxiety associated with recalled products that are allegedly defective, where the plaintiffs have not otherwise suffered physical injury (eg, plaintiffs implanted with recalled medical devices).

The law as applied by the provincial appellate courts generally provides that in order for a plaintiff to recover damages for emotional or psychological distress, the plaintiff must demonstrate on a balance of probabilities that the emotional distress suffered was a reasonably foreseeable consequence of the defendant's negligent conduct; and the emotional distress was so serious that it resulted in a medically recognised psychiatric or other medical illness. In product

liability class actions, particularly those related to recalled products, the majority of the proposed class will often not be able to establish such damages.

The Supreme Court of Canada recently dismissed an appeal in *Mustapha v Culligan of Canada Ltd*, in which damages for psychiatric harm was the central issue. In that case, Mr Mustapha found a dead fly in a bottle of water for his home water cooler, and as a result developed a major depressive disorder with associated phobia and anxiety. The Ontario Court of Appeal overturned the trial judge's decision to award Mr Mustapha damages. In upholding the Court of Appeal decision, the Supreme Court found that although Mr Mustapha had suffered a psychological injury, he had failed to establish that it was reasonably foreseeable that a person of ordinary fortitude would have suffered personal injury in these circumstances. The court held that the loss suffered was too remote to be reasonably foreseen.

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32 Climate for litigation

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs.

Historically, there has been significantly less product liability litigation in Canada than in the United States. This is for several reasons. For one, there are caps in Canada on pain and suffering damages as

well as on punitive damages. Second, jury trials are rare in Canada and juries are confined by the caps on damages, which means there are no large jury awards such as those typically awarded in the United States. Third, the 'loser pays' cost regime in Canada generally inhibits commencement of spurious litigation. Finally, the availability of universal healthcare in Canada means plaintiffs do not need to sue to recover their health-care costs.

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