A BRIEF REVIEW

PRODUCT LIABILITY IN CANADA

Nigel Kent and Jordan Watson Clark Wilson LLP

INTRODUCTION

Product liability law in Canada does not differ substantially from that of the United States. Manufacturers, distributors and sellers of goods are all subject to exposure. The basis of liability is essentially the same and arises from manufacturing defects, design defects and failures to warn ("marketing" defects).

Despite the similarities, there are nonetheless some significant differences in the Canadian regime, both procedural and substantive, that are worth noting. Some of these include:

- product defects do not give rise to strict liability in Canada, whether under statute or common law; rather, the cause of action is limited to the tort of negligence and, in the case of the actual purchaser, breach of contract;
- Federal legislation, the *Canada Consumer Product Safety Act* ("CCPSA") imposes onerous duties on manufacturers, importers and sellers of consumer products to report product defects and incidents which have or may cause serious injury;
- jury trials in Canadian product liability cases are relatively rare and the vast majority of cases are decided by judge alone;
- punitive damages awards in product liability cases are generally not available; and
- "general damages" for non-pecuniary loss (pain, suffering, loss of amenities) in personal injury cases are "capped" (presently at approximately $340,000, even in catastrophic injury cases).

It is sometimes forgotten that the 1933 English House of Lords decision in *Donoghue v. Stevenson*, which is considered to be the modern basis for the tort of negligence in the common law world, was actually a product liability drama arising from the discovery (and ingestion) of a snail in a bottle of ginger beer. The court declared "a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care and the preparation of putting up of the products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care." This principle, now 80 years old, remains the foundation for common-law product liability in Canada.

In Canada, the standard of care in product liability cases has been stated by one court as "the duty to take reasonable care in the circumstances, and nothing more." A breach of any statutory standard governing the manufacturer of the product does not in and of itself result in liability, but any such breach will very often be accepted as evidence of negligence in most cases.

Product liability in Canada, as in the USA, also arises from breach of a common-law "duty to warn." In Canada, manufacturers, distributors and retailers of products owe consumers a duty to warn them of the dangers that they know or ought to know are associated with the products they manufacture, distribute or sell. The duty applies to defects that are known at the time of manufacture as well as those defects that may arise later: the duty to warn is a continuous one.

The required explicitness and adequacy of the warning varies with a degree of danger likely to be encountered in the ordinary use of the product. Generally speaking, there is no duty to warn consumers of known and obvious dangers arising from use or misuse of the product although, of course, a risk obvious to an adult may not be obvious to a child and warnings should be tailored accordingly.

In product liability cases in Canada, expert evidence will usually be required in most cases to address issues respecting adequacy of design, industry standards, causa-

tion, and the efficacy of any warnings provided. As in the U.S., a prudent designer of warnings would be wise to assume minimal levels of intelligence on the part of the average consumer.

DEFENSES

Common defenses in Canadian product liability cases include:

- causation....in Canada the common law test for causation in tort is the "but for" test: would the injury not have occurred but for the negligent conduct of the defendant? No causation, no liability;
- contributory fault by the plaintiff: failing to read or heed warnings, misusing the product, failing to pay appropriate attention, and the like will all reduce (and in some cases eliminate) the liability of the manufacturer, supplier or retailer;
- subsequent modification of the product by third parties without the knowledge or approval of the manufacturer can immunize the latter in some cases;
- the "learned intermediary" exception to the general requirement to directly warn consumers of product risk may in limited circumstances relieve a manufacturer of liability.

THE CIVIL JUSTICE SYSTEM IN CANADA

Like the U.S., Canada's system of government comprises a constitutional federation. In addition to the federal government, there are ten provinces and three territories each of which has its own court system and legislation affecting judicial process. Such provincial statutes will govern limitation periods, contribution between tortfeasors, joint and several liability, implied warranties of fitness in sale of goods transactions, the availability of and procedure for class actions, and the like all of which can and will impact product liability cases.

Canadian judges are appointed by government and are not elected. Their mandatory retirement age is 75. Trial by jury is generally available for civil cases in Canada, including product liability cases, but unlike the U.S., such trials are rare and most product liability cases will be tried before a single judge.

Limitation periods can vary from province to province but generally speaking, most personal injury lawsuits in Canada are subject to a limitation period of two years starting on the date of the injury. Such limitation periods are usually "postponed" in cases involving plaintiffs under the age of majority or subject to disability and in situations involving delayed "discoverability" of the cause of action.

"Forum shopping" by plaintiffs is a fact of life in Canada as it is elsewhere. Plaintiffs will bring their product liability cases in those jurisdictions where they can expect to receive the most favorable treatment whether with respect to applicable legal principles or the availability of "generous" damage awards. Many products will involve international elements and those, for example, manufactured in South East Asia, imported into the USA, sold or advertised on the internet, and consumed in Canada (or elsewhere) raise the prospect of product liability plaintiffs bringing or at least considering claims in more than one jurisdiction. In Canada, most courts will accept jurisdiction to hear a products liability case based on the relevant provincial statutes and the common law regarding "conflicts of law." Generally the court will take jurisdiction over a foreign defendant based on a "real and substantial connection" test. The court also has the discretion to decline jurisdiction on the basis of "judicial comity" militating in favor of the case being heard elsewhere.

Product defect cases are particularly well suited to class action litigation, all the more so where an individual claim against a large institutional defendant is impractical given the high cost of litigation and Canadian judicial conservatism in both non-pecuniary and punitive damages awards. Class actions in Canada are governed by provincial legislation but, although variations exist (particularly respecting opt-in/out regimes and costs awards) the process and criteria for class action certification is fairly standard. A large number of product liability class actions have been certified in Canada over the years although most settle following certification and very rarely proceed to any trial.

CANADA CONSUMER PRODUCT SAFETY ACT

In June 2011, the federal government passed the *Canada Consumer Product Safety Act* ("CCPSA"), which imposes broad and onerous duties on persons who manufacture, import or sell consumer products in or to Canada. While the legislation does not expressly impose statutory liability for defective products or inadequate warnings, significant penalties can be imposed for non-compliance.

The CCPSA mandates record-keeping protocol that requires manufacturers, importers, and sellers of consumer products to maintain records, including names and addresses of all parties in the supply chain, at a place of business in Canada for a period of seven years.

In addition to record-keeping requirements, the CCPSA also obligates manufacturers, importers, and sellers to investigate and, if appropriate, report to Health Canada known "incidents," which, defined simply, amount to those defects that are expected to result in death or a serious injury to the health of a consumer. The reporting requirements apply to all entities that manufacture, distribute, or sell products in Canada, which includes foreign manufacturers that sell products in Canada through a subsidiary.

Health Canada enforces the CCPSA and is granted a number of powers including the ability to order mandatory product testing, to search and seize products, to collect and disclose documents, and to issue product recalls. In addition, compliance with the CCPSA is enforced through a series of fines and penalties including criminal convictions. If a party is convicted of an indictable offence (the Canadian equivalent of a felony conviction), they may be liable for fines of up to $5 million, imprisonment up to five years, or both. Those punishments can be brought against officers and directors of a corporation.

CONCLUSION

Although there are significant differences in the ways that product liability claims are treated in Canada and the United States, the similarities between the two jurisdictions far outweigh their differences. The implementation of Canada's CCPSA was done explicitly to make more uniform the consumer product regimes of both countries. While there remains a significant difference on the matter of strict liability, in many instances there is little practical difference in terms of outcome. It is probably fair to say, however, that Canada remains a somewhat more judicially conservative jurisdiction in terms of damage awards but perhaps that too will change in due course.

Nigel Kent is a senior partner and Jordan Watson an associate in the insurance litigation group at Clark Wilson LLP, one of USLAW's international members located in Vancouver, Canada. Their practice is focused on P&C, professional liability claims and class actions in Canada as well as complex insurance coverage matters.