Cassels

Product Liability Newsletter - December 2022

Stefanie Holland, Christopher Horkins, Jeremy Martin, Jessica L. Kuredjian, Suhuyini Abudulai, Jason Holowachuk, K.C., Danielle DiPardo, Meghan Rourke, Robert Sniderman

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Significant Legal Developments in the Product Liability Industry: A Review

This past year gave rise to significant legal developments in the product liability industry. As 2022 comes to a close, the Cassels Product Liability Group has rounded up the top Canadian product liability decisions of the year (with a bonus three decisions from 2021). From measuring the standard of care when dealing with dangerous products to the detrimental prejudice of failing to resolve a civil action in a timely fashion, here are the most notable judgments to help you stay informed of the latest developments:

1. *Spring v Goodyear Canada Inc*, 2021 ABCA 182
2. *Price v Smith & Wesson Corp*, 2021 ONSC 1114
3. *Maginnis and Magnaye v FCA Canada et al*, 2021 ONSC 3897
4. *Rebuck v Ford Motor Company*, 2022 ONSC 2396
5. *Coles v FCA Canada Inc,* 2022 ONSC 5575
6. *Palmer v Teva Canada Ltd,* 2022 ONSC 4690
7. *Ding v Prévost, A Division of Volvo Group Canada Inc*, 2022 BCSC 215
8. *Sidhu v Hiebert*, 2022 BCSC 1024
9. *Fazal v ABC Corporation, et al*, 2022 ONSC 4358

Spring v Goodyear Canada Inc, 2021 ABCA 182

In 2012, Goodyear issued a recall notice for six types of tires manufactured during a 13-week window at one plant. The representative plaintiff, who had been in an accident, received the recall notice but was not eligible for a replacement as his tires were manufactured before the recall period. He commenced the action and applied for certification alleging the defect affected 51 tires at multiple plants and that Goodyear issued an overly narrow recall.

The case management judge certified the action finding that the pleadings disclosed causes of action, including negligence, a breach of the duty to warn and unjust enrichment. The common issue was identified as the existence of a common defect across a larger range of tires than was covered by the recall.

Goodyear appealed the certification order arguing the case management judge erred on three grounds: (1) concluding there was some basis in fact for the existence of a common defect; (2) imposing a reverse onus on Goodyear to disprove the common defect; and (3) failing to require evidence that the issue respecting the common defect could be answered in common with respect to the entire class. The Court of Appeal found that the judge had not reversed the onus but agreed with Goodyear on grounds 1 and 3.

The central issue on appeal was whether there was “some basis in fact” to show the common issue of a defect in the tires. While the recall suggested a defect in some products, it alone was insufficient to show evidence of a manufacturing defect among the wider range of products covered by the class proceeding. The representative plaintiff also failed to produce any evidence that the tread separation on his or other tires resulted from a defect as opposed to normal wear and tear.

The Court of Appeal also found that the allegations of intentional misconduct should not have been certified, emphasizing that the requirement of “some basis in fact” is even more important where intentional misconduct is alleged. Similarly, the Court found that the plaintiff had not shown a viable claim in unjust enrichment, either supporting a claim for restitution or a claim for disgorgement. Exceptional gain-based remedies such as restitution or disgorgement are not available where simple damages can repair the wrong.

The Court of Appeal set aside the certification order.

Price v Smith & Wesson Corp, 2021 ONSC 1114

The representative plaintiffs (two victims and their families of the mass shooting which took place on Danforth Avenue in Toronto) commenced a class action against Smith & Wesson Corp., the manufacturer of the M&P®40 semi-automatic handgun. This handgun is the most common make of stolen handguns in the United States, and was the handgun used in the mass shooting. The representative plaintiffs claimed $150 million in general and punitive damages for negligence relating to the design, manufacturing and/or distribution of the handgun, and strict liability and public nuisance.

Justice Perell heard the first stage of the certification motion alongside Smith & Wesson’s Rule 21 motion to strike out the claim on the basis that it failed to disclose a reasonable cause of action.

Justice Perell found that it was plain and obvious that the claims for public nuisance and strict liability could not succeed because a manufacturer of a product cannot be made liable in nuisance for simply distributing its product in the regular course of business because the product is misused by others. The representative plaintiffs’ negligent manufacture and distribution claims were technically deficient because no material facts were pleaded.

The representative plaintiffs’ design negligence claim, however, met the first stage of the certification test

and was allowed to proceed.

In the claim, the representative plaintiffs allege that Smith & Wesson was negligent in failing to design the handgun with practicable safety measures, including “smart gun” or “authorized user” technology, when such technology would mitigate or eliminate harm to innocent third parties caused by unauthorized use. Smart gun technology is technology with features that allow the weapon to only fire when it is activated by an authorized user. Studies show that guns with authorized user technology reduce accidental shootings, neutralize the impact of gun thefts, and prevent criminal use of weapons by unauthorized persons. Although Smith & Wesson previously entered into an agreement with the United States government and undertook to use smart gun technology in new firearm designs, Smith & Wesson never complied with this undertaking.

Smith & Wesson argued that there is no cause of action in negligence because the relationship between a firearms manufacturer and victim of a shooting does not fall within an established category of duty of care relationships. Further, Smith & Wesson argued that the proximate cause of the Danforth Shooting was not its negligence, but the criminal acts of Mr. Hussain.

Justice Perell reviewed the law for product liability claims and noted that the House of Lords in *Donoghue v Stevenson* recognized an established category for duty of care cases involving goods that are dangerous *per se*. While there is now a recognized duty of care for manufacturers of both dangerous and non-dangerous products, the dangerousness of the goods is a factor in determining the standard of care. A handgun is a dangerous product. The more dangerous the product, the greater care that must be taken in manufacturing the product.

Accordingly, it was not plain and obvious that the representative plaintiffs’ design negligence claim would not succeed at trial. The Court has not yet determined whether Smith & Wesson’s failure to utilize smart gun technology amounts to culpable carelessness. Justice Perell dismissed Smith & Wesson’s Rule 21 motion and ordered that the certification motion for the Plaintiffs’ design manufacture claim continue to the second phase.

Maginnis and Magnaye v FCA Canada et al, 2021 ONSC 3897

The representative plaintiffs in this proposed class action sought certification of a class consisting of all owners and lessors of certain diesel-engine vehicles which contained a malfunctioning device. Although there were parallel proceedings in the US, prior to the hearing of the certification motion in *Maginnis*, the US litigation settled, and the defendant recalled the vehicles in issue in both Canada and the US. The recall and repair program offered a vehicle fix that would render the vehicles fully compliant with all relevant emission requirements.

Leading into the certification motion, the representative plaintiffs alleged that the defendants misled

consumers and committed unfair practices under the *Consumer Protection Act* (*CPA*) by making misleading representations about the vehicles. Justice Belobaba rejected the representative plaintiffs' submissions and refused to certify the case.

The Court found that there was no evidence anyone paid a "premium price" for a vehicle, and even if they did, the vehicles would be emissions-compliant post-repair, and could be bought, sold, or traded at a value unaffected by the malfunctioning device. Since a calculation of damages under the *CPA* would have to be made post-repair, and the repair was found to have "*eliminate[d] [the] [malfunctioning] device*" and "*extend[ed] emission control to the expected range of real-world driving conditions*", the representative plaintiffs were left without evidence of compensable loss on this point. Further, there was no evidence that the repair of the malfunctioning device resulted in reduced vehicle performance.

The Court found that the representative plaintiffs provided no basis in fact for any compensable loss, which was fatal to their attempt to certify a class action. As such, the motion could be dismissed for this reason alone under several different factors of the certification test under the *CPA*. However, the Court went one step further and applied the Supreme Court of Canada's recent decision in *Atlantic Lottery Corp Inc. v Babstock* to determine that even if representative plaintiffs produced some evidence of nominal damages, such nominal damages on their own are not enough to support certification.

The Court held that while a different set of plaintiffs with evidence of different types of loss (such as diminution in value or out-of-pocket expenses) may have been able to advance their claims further, the *Maginnis* decision – like several decisions coming before it – has confirmed that those damages must rise above the *de minimis* level for a class action to be a preferable procedure.

Rebuck v Ford Motor Company, 2022 ONSC 2396

In this case, the Ontario Superior Court of Justice dismissed a national class action against an automobile manufacturer for alleged misrepresentations to consumers *after* it had been certified as a class action.

In particular, the Court was asked to consider whether Ford Canada's fuel consumption estimates set out in the EnerGuide Labels affixed to their new vehicles and repeated in marketing materials were false or misleading under the federal *Competition Act* and certain provincial consumer protection statutes. The representative plaintiff alleged that the label was misleading, as his actual fuel consumption was 23 mpg on the highway.

The representative plaintiff sought damages for a 15% overpayment in fuel charges. Both sides brought motions for summary judgment.

The representative plaintiff asserted that the defendants failed to disclose that:

1. The ratings were provided for comparison purposes and not to predict actual fuel consumption;
2. The fuel consumption ratings were based on a 2-Cycle Test and not the more representative 5-Cycle Test used in the US, and understated fuel consumption under real-world driving conditions by at least 15 percent; and
3. The ratings printed on the EnerGuide Label could only be achieved with fuel-efficient driving and not normal “real world” driving.

The Court found no false or misleading advertising under s. 52(1) of the *Competition* Act. The Court concluded that the defendants did not knowingly or recklessly make false or misleading representations by affixing the required EnerGuide Label to their vehicles for several reasons including that: (a) the defendants complied with federal guidelines and it would be contrary to common sense and violate the principle of statutory interpretation if the guidelines were found to breach the *Competition Act*; and (b) the *Competition Act* requires courts to consider the “general impression” of a representation beyond its literal meaning but here there was nothing on its face and no evidence that the EnerGuide Labels were intended and understood to be median ratings.

Finally, the Court confirmed that non-disclosure (such as failing to explain the limitations of the 2-Cycle testing process) is not actionable under section 52 of the *Competition Act*.

The Court also found there was no violation of the *Consumer Protection Act*. In particular, the *Consumer Protection Act* prohibits “misleading or deceptive” representations, including “failing to state a material fact” that would deceive. However, the Court found that the defendants’ EnerGuide Label had sufficiently referenced the Fuel Consumption Guide, which explained that the EnerGuide Label was an estimate and varied vehicle-to-vehicle under the 2-Cycle testing process. The Court also explained that the representative plaintiff had not produced evidence showing that the defendants knew that its customers would not consult the Fuel Consumption Guide prior to obtaining the vehicles. As such, there was no violation of the *Consumer Protection Act*.

Coles v FCA Canada Inc, 2022 ONSC 5575

In this case, the Ontario Superior Court refused to certify a product liability class action as the Court determined that the defendant’s recall program was the preferable procedure to resolve the claims.

In *Coles*, a representative plaintiff brought a proposed class action against a car manufacturer. The proposed class action was one of a group of six national actions commenced against 12 groups of car manufacturers, after a recall of defective and dangerous automobile parts (airbags) were supplied by Takata Corporation and TK Holdings (collectively, "Takata"). Because of bankruptcy, Takata was no longer a party to any of the six actions.

On June 24, 2014, the defendant initiated a program to replace Takata beta-airbags in the high-risk areas identified by Takata. In May 2015, the defendant began to replace driver and passenger Takata beta-airbags worldwide, and by January 11, 2019, it had recalled over one million Takata airbags affecting 663,048 vehicles.

This action was commenced in 2015, before the defendant replaced the airbags in the representative plaintiff's vehicle. Following replacement, the representative plaintiff abandoned his claim in unjust enrichment and proceeded solely on negligence for pure economic losses associated with an imminently dangerous product. The representative plaintiff alleged that the defendant's recall of Takata's beta-airbags was inadequate and that the recall should be administered by the Consortium of Class Counsel. However, based on the fact that it had recalled and began replacing Takata's beta-airbags free of charge, the defendant disputed that the cause of action criterion had been satisfied and opposed certification of the proposed class action.

The Court dismissed the defendant's argument that the representative plaintiff's products liability negligence action did not satisfy the cause of action criterion. The Court also concluded that the representative plaintiff satisfied the identifiable class criterion of the certification test.

However, the representative plaintiff failed the certification test on the preferable procedure criterion. The Court held that the defendant's existing recall campaign was preferable to the proposed class action as it had been in place for many years before the certification hearing and was in line with what class members could achieve if the class action was allowed to proceed. Part of the Court's analysis was the delay in advancing the proposed class action, which the Court found had made "no meaningful progress for its intended purpose of getting dangerous airbags replaced before a class member dies or is dismembered". The Court also recognized that the proposed class action was limited to pure economic loss for dangerous goods. It noted that while recovery for pure economic loss is permitted in Canada, the scope of recovery is "limited to mitigating or averting the danger". In cases where a plaintiff can simply discard the defective product, the plaintiff's basis for recovery falls away with the danger to the plaintiff's economic rights. The Court thus concluded that given that the defendant provided class members with a replacement of defective airbags at no cost, it was unlikely that class members would be able to achieve more if the class action was allowed to proceed.

On this basis, the Court refused to certify the proposed class action.

Palmer v Teva Canada Ltd, 2022 ONSC 4690

The Ontario Superior Court dismissed the representative plaintiff's motion to certify a class action against manufacturers of the anti-hypertensive drug valsartan. The representative plaintiff alleged that valsartan products were negligently manufactured because they contained carcinogenic impurities. The

representative plaintiff sought to obtain compensation for the prejudice related to the increased risk of cancer, specifically, the fear of developing the disease caused by the recall of the drug, as well as the economic prejudice related to the various costs incurred because of the recall.

The Court applied the Supreme Court of Canada's decision in *Mustapha v Culligan of Canada Ltd*, which provides that to constitute a sufficiently serious and long-term disorder, the psychological prejudice giving rise to compensation must rise above the ordinary annoyances, anxieties, and fears that people living in society must routinely accept. It found that even if some people experienced the type of severe psychological prejudice required by *Mustapha*, nothing in the certification motion allowed the conclusion that all the members of the putative class experienced this prejudice.

With respect to economic prejudice, the Court confirmed found that although the costs claimed by the representative plaintiff – including future costs – were not hypothetical and should be compensable, to compensate such costs, the risk must still be real and imminent. The Court further found that the representative plaintiff had not based their claim on a causal link between the contaminated medicine and the risk of cancer diagnosis, but on a mere increase in the risk of developing cancer. The Court found that in this case, while the costs claimed were not hypothetical, the causal link was hypothetical and therefore insufficient.

The Court refused to certify the class action. The Court's decision in *Palmer* affirms that just as an increased risk of harm is not legally compensable, mental distress associated with an increased feeling of risk is similarly not a compensable psychiatric injury. Plaintiffs must demonstrate some evidence of compensable harm and general causation.

Ding v Prévost, A Division of Volvo Group Canada Inc, 2022 BCSC 215

This case is resulted from a 2014 tour bus crash in which 56 people were injured. Prévost, the manufacturer of the tour bus, was named as a defendant. The plaintiffs claimed that the bus was negligently designed because it did not have seatbelts and used tempered glass for the passenger windows instead of laminated glass. Although the plaintiffs did not claim that the accident was caused by a defect in the bus, they alleged that their injuries were made worse by the lack of seatbelts and the use of tempered glass.

The Court began by noting that the advisability of seatbelts in motor coaches was not a simple issue because the technology for seatbelts in cars was not directly transposable to coaches. In particular, the Court observed that coaches perform differently from cars and have different safety considerations, and as well Canada's *Motor Vehicle Safety Act* did not require the installation of seatbelts until September 1, 2020 (6 years after the crash).

The Court held that Prévost owed a duty of care to the plaintiffs to exercise reasonable care not to

manufacture a motor coach with a design defect or one that was unreasonably dangerous. However, the Court concluded that Prévost acted reasonably in its design and manufacture of the coach without seatbelts. The Court found that Prévost followed industry and regulatory standards and that the plaintiffs had not shown that those standards were negligent or unreasonable or that another industry standard existed in North America.

The plaintiffs claimed that despite this, Prévost had an ongoing duty to ensure that seatbelts were retrofit onto buses to protect passengers from harm of ejection or partial ejection in a rollover collision, and that Prevost breached the standard of care by failing to ensure that the bus was retrofitted with seatbelts prior to the collision. The Court disagreed. It found that the retrofit was akin to a safety enhancement that is common in the car industry, and the fact that safety improvements are made does not mean that the vehicle was defective to begin with or that the enhancements need be retrofitted at a manufacturer's cost. It thus concluded that Prévost was not under a duty to recall the bus for the retrofitting of seatbelts. The Court dismissed the action against Prévost and all other defendants.

Sidhu v Hiebert, 2022 BCSC 1024

The plaintiff brought an action following a motor vehicle collision which rendered the plaintiff a ventilator-dependent quadriplegic. At the time of the collision, the plaintiff, who was 9 years old, had moved the shoulder belt of his seatbelt from his left shoulder to his right shoulder.

Among other claims, the plaintiff brought the action against Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc., and Abbotsford Nissan Ltd. (collectively, Nissan), alleging that Nissan was negligent in the design, manufacture, distribution, and sale of the Pathfinder. Specifically, the plaintiff alleged that that the seatbelt assembly in the rear passenger seats of the Pathfinder was not properly fitted for children, was unsafe for use by children, and that Nissan failed to warn purchasers of this.

In June 2020, Nissan and the plaintiff entered into a settlement agreement. As a result of that settlement, Nissan applied for and were granted a bar order, and the plaintiff agreed not to recover from the remaining defendants any portion of the plaintiff's losses that the Court may allocate and apportion to Nissan. Nissan did not participate in the trial. The effect of the settlement agreement was that the onus fell to the remaining defendants to develop and advance a case respecting Nissan's alleged liability. In turn, it fell to the plaintiff to, essentially, defend Nissan from a claim in negligence.

The defendants alleged that the rear-seat restraint system in the 2006 Nissan Pathfinder was not properly fitted and was unsafe for children, and the design was inherently dangerous. Specifically, they alleged that the 2006 Pathfinder's seatbelt did not properly fit children who had outgrown booster seats, referred to as the "forgotten children." They argued that the shoulder belt would cross these children's neck or face, which they alleged was the reason the plaintiff moved the shoulder belt to his right shoulder.

The plaintiff, now in the position of defending Nissan, alleged that the remaining defendants failed to meet their burden of establishing that the plaintiff's damage or loss was caused by the fault of Nissan. The evidence did not establish the requisite elements to prove that Nissan negligently designed the Pathfinder seatbelt. The plaintiff argued that the seatbelt, when used properly, was a reasonable fit and would have provided reasonable protection and that the seatbelt design met all applicable government regulations and standards, and the generally accepted industry standards, at the time of manufacture.

The Court found that there was no evidence that the plaintiff moved the shoulder belt because it was rubbing against his neck. Rather, the evidence supported the conclusion that he moved the seatbelt because he had an upset stomach. The Court found that the shoulder belt in the rear seat of the Pathfinder did not pose any problem for the plaintiff leading up to the collision. It found that Nissan provided appropriate instructions on the use of the seatbelt, which recommended that a child be placed in a commercially available booster seat if the shoulder belt in the child's seating position fits close to the face or neck. The Court held that the fact that the plaintiff's parents had not read the Pathfinder owner's manual was not a fault of Nissan.

The remaining defendants also alleged that Nissan did not meet its standard of care by failing to provide comfort guides and rear-seat pretensioners. The Court disagreed and held that the provision of these safety devices in the Pathfinder was not required. It thus concluded that the defendants failed to present the evidence necessary to establish that a manufacturer has breached the standard of care. There was no evidence of any alleged defect in the seatbelt. As such, the Court concluded that causation had not been proven. It found that there was no basis for any allocation or apportionment of liability against Nissan.

Fazal v ABC Corporation, et al, 2022 ONSC 4358

The action was commenced by the plaintiff in 2014 and had not been set down for trial or terminated by any means by the fifth anniversary of its commencement. Accordingly, the Registrar made an administrative dismissal order dated May 15, 2019, administratively dismissing this action under Rule 48.14 of the Ontario *Rules of Civil Procedure*. The plaintiff then brought a motion to set aside that administrative dismissal order.

The case arose from an incident that occurred in May 2012 where the plaintiff was struck on the head by the liftgate of her vehicle as she was removing items from the trunk due to the failure of the gas-charged "prop rods" that support the liftgate. The plaintiff's first lawyer issued a statement of claim alleging failure in liftgate prop-rods resulting from defective materials. The defendants commenced a counterclaim alleging the plaintiff's husband was operating the vehicle at the time of injury. The plaintiff's second lawyer failed to diarize the action and the action was dismissed for delay seven years after the injury.

The prop-rods from the vehicle were never inspected and experts testified that even though the prop-rods had been retained and preserved in accordance with best practice, after being in storage for almost a

decade, there was likely degradation preventing expert report on the condition of the prop-rods at the date of the injury. This, combined with other evidence of no satisfactory explanation for at least two years of cumulative delays, would ultimately result in the defendants suffering non-compensable prejudice if the action proceeded and a fair trial would not be possible. As such, the decision to dismiss the motion and maintain the dismissal order was upheld on the basis that civil actions must be resolved in timely and efficient manner to maintain public confidence in administration of justice along with the fact that expert reports on the condition of the prop-rods could not be efficiently conducted.

Chris Horkins and Meghan Rourke successfully represented the defendant manufacturer in this case.

What We're Up To

- Cassels was ranked among Canada's market-leading firms in 2022 in the area of Product Liability litigation by *Lexpert*.
- Suhuyini Abudulai and Chris Horkins were recognized as leaders in their field in the 2022 edition of *The Canadian Lexpert Directory*.
- Chris Horkins, Jessica Kuredijan, Jeremy Martin, and Danielle DiPardo were named to *Best Lawyers: Ones to Watch*.
- Chris Horkins was named as a Litigation Future Star and featured on the "40 and Under List" by *Benchmark Litigation Canada 2022*.
- Stefanie Holland spoke on a panel discussing the broad topic of "providing exceptional service" at the Forging a Better Union: Strategies for Optimizing In-House and Litigation Counsel Relationship program on June 2, 2022.
- Stefanie Holland, Chris Horkins, and Jeremy Martin recently authored the Canada chapter for Getting the Deal Through: Product Liability published by *Lexology*.
- Stefanie Holland has authored "A Guide to Managing Product Recalls," published by the American Bar Association as part of their Practice Points series
- Jeremy Martin was the Chair of the OBA Class Actions Section (2022-2023).
- Jeremy Martin spoke on "Class Actions Reform in Ontario: One Year Later" at the Barreau du Québec's Colloque national sur l'action collective (National Class Actions Colloquium), which took place in Montreal, QC on October 22, 2021.
- Chris Horkins recently concluded his term as a Chair of the Manufacturer's Risk specialized litigation group of the DRI Products Liability Committee. He was appointed as the Marketing Chair for the Recreational Products specialized litigation group in 2022.
- Chris Horkins, Jessica Kuredjian, and Jeremy Martin will attend the 2023 DRI Product Liability Conference in Austin, Texas. Jessica and Jeremy will be speaking at the conference.
