

Damage Control: Two Recent Decisions Show the Benefits and Pitfalls of Proactive Risk Management in Products Claims

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Two recent Ontario decisions shed light on the conflicting consequences of a manufacturer's attempts to rectify product defects. Where a defendant has taken proactive and successful steps to mitigate losses caused by its product, litigation may be avoided before it is even commenced. On the flipside, if those efforts are not successful, the defendant may be extending the relevant limitation period and thereby exposing themselves and others to additional risk.

***Richardson v Samsung*: Mitigating Risk Before The Class Action Hits**

The Ontario Superior Court's decision in *Richardson v Samsung*, which denied certification of a proposed class action regarding Samsung's Galaxy S7 smartphone, provides a good example of what product manufacturers can do to protect themselves against class actions through proactive risk mitigation.¹

The smartphones at issue contained batteries were prone to overheating, creating a risk of fire or explosion. The phones were released and distributed in Canada beginning August 19, 2016. About one week after their release, the issue was identified and sales were halted. Shortly thereafter, a recall was initiated. In October 2016, Samsung offered a compensation package to Galaxy S7 purchasers that provided either a replacement phone or a full refund along with some compensation for out of pocket costs. The proposed class action essentially alleged that the compensation package was inadequate because it did not properly reimburse consumers for their losses.

The Ontario Superior Court refused to certify the class action on the grounds that the claim failed to meet some of the "preferable procedure" criterion for certification under Ontario's *Class Proceedings Act* for two reasons. First, Samsung's compensation program was found to be preferable to a class action. Second, the voluntary compensation scheme was found to sufficiently address access to justice and behaviour modification concerns, two of the stated policy goals underlying the *Class Proceedings Act*. The fact that Samsung responded promptly and in concert with Health Canada in initiating its recall and compensation program demonstrated the response of a "responsible corporate citizen" and "behaviour that should be encouraged rather than discouraged" in the Court's view. Further, access to justice was not an issue since the class had already received compensation. While some proposed class members remained out of pocket, the Court noted that perfect compensation was not required. Accordingly, certification of the

proposed class proceeding was denied.

***Presley v Van Dusen*: For Whom The Limitation Period Is Told**

Conversely, the Ontario Court of Appeal's recent decision in *Presley v Van Dusen* shows how a defendant's unsuccessful attempts to rectify product defects can be harmful to its position in the ensuing litigation.² In that case, the Ontario Court of Appeal considered whether the appellant plaintiffs' claims for negligent design, installation, approval and inspection of a septic system at their property were statute-barred under the *Limitations Act* or whether the defendant's ameliorative efforts in attempting to remedy those issues delayed the start date for the commencement of the limitation period.

The appellant homeowners had retained the respondent Van Dusen to install a septic system in 2010. From 2011 to 2012, the homeowners experienced various issues, which Van Dusen tried to address unsuccessfully. In the spring of 2013, the homeowners further notified Van Dusen that the problems persisted and were worsening. Van Dusen continually assured the homeowners that he would fix these problems up until the winter of 2014. Ultimately, on June 1, 2015, the local Health Unit condemned the system and issued an Order to Comply requiring the plaintiffs to replace it. At trial, the Court initially found that the plaintiffs were statute-barred for having failed to commence their claim within two years of first noticing the issues. At the Court of Appeal, however, the Court found that the limitation period did not actually start to run until after it became clear that Van Dusen's attempts to remedy the issues had failed, since the plaintiffs would not have discovered that a legal proceeding was an appropriate means of addressing the issues until then.

In deciding when the claim was discovered, or ought to have been discovered, the Court of Appeal considered s. 5(1)(a)(iv) of Ontario's *Limitations Act, 2002*, which provides that if a legal proceeding is inappropriate means of remedying the loss or injury suffered by the plaintiff, the start date for the commencement of the limitation period may be postponed. The Court stressed that commencing a legal proceeding may be inappropriate in cases where a plaintiff relies on the superior knowledge and expertise of a defendant who engages in efforts to right the wrong they caused.

Since Van Dusen had attempted to fix the problem and continued to assure the plaintiffs that he would fix the problem, which the plaintiffs relied upon, the plaintiffs held a reasonable belief that the problem could and would be remedied without the need to bring an action. Accordingly, the Court found that the action was commenced within the two-year limitation period. Notably, the Court even found that this principle applied to the limitation period for the plaintiffs' claim against the local Health Unit, which played no role in Van Dusen's unsuccessful attempts to mitigate the issue. Manufacturers should thus be aware that the unsuccessful mitigation attempts of others, such as dealers or service providers, may expose them to additional litigation risk as well.

Key Takeaway Principles

Cassels

In assessing what these decisions and their differing outcomes mean for manufacturers seeking to mitigate risk proactively, an important distinguishing factor should be noted. In *Samsung*, the proposed class of consumers were found to have been adequately compensated for their losses. In *Van Dusen*, the plaintiff homeowners were not compensated for their loss despite Van Dusen's attempts to address their septic system issues. *Samsung* shows how a well-executed risk mitigation strategy may limit product liability litigation risk before proceedings are even commenced, whereas *Van Dusen* shows the risks inherent in an unsuccessful risk mitigation strategy, which may extend relevant limitation periods and leave manufacturers exposed. Before offering assurances or compensation in relation to product defects, manufacturers should carefully weigh options and consider consulting with counsel as soon as the issue arises to determine what steps they can take to protect against potential liability.

¹ *Richardson v Samsung*, 2018 ONSC 6130 <<http://canlii.ca/t/hvks1>> ["*Samsung*"].

² *Presley v Van Dusen*, 2019 ONCA 66, <<http://canlii.ca/t/hx8n5>> ["*Van Dusen*"].