

"Take This Implied Warranty With A Grain of Sand": Different Results in Contract and Tort Claims Over Defective Septic System Filter Sand

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The Ontario Superior Court's recent decision in *Parkhill Excavating Limited v Robert E. Young Construction Limited* is an interesting snapshot of how Canadian courts treat product liability claims differently based on whether they are framed in contract or in tort.¹

Background of the Case

The *Parkhill* decision stems from the trial of a Third Party Claim by the defendant to a product liability action concerning 35 septic systems which failed after being installed in a rural subdivision. The main action commenced by the builder against the contractor who installed the septic systems was settled mid-trial. The contractor sought to recover the amounts paid and its legal fees from the supplier and manufacturer of the filter sand used in the installed systems on the basis that a deficiency in the sand was the principal reason for the failure of the septic systems. The contractor's claim was framed in both contract and tort.

Two Different Causes of Action, Two Different Results

With respect to the contractual claim, the contractor alleged that the supplier had breached the implied warranty of fitness under the Ontario *Sale of Goods Act*. The Act implies that the goods supplied will be reasonably fit for the purpose where the purpose is made known, expressly or by implication, between the buyer and seller, the buyer relies on the seller's skill or judgement, and the goods are sold in the ordinary course of the seller's business.² In this case, there was no express discussion between the contractor and the sand supplier regarding the intended use for the sand. Despite that the filter sand had a number of purposes in addition to being used as filtration sand in septic systems, the Court ultimately found that it could be implied that the sand being purchased was for use in a septic system and that the contractor was entitled to rely on the supplier's skill and judgment that the sand was fit for such use.

The Court found that the sand's failure to meet relevant requirements under the Ontario Building Code was sufficient to find that the implied warranty of fitness was breached. Although the Court acknowledged that regulatory laws, such as the Building Code, do not inform product liability cases under Canadian law, where the failure to meet Building Code regulations results in a requirement to remove and replace building materials such as the filter sand at issue, the implied warranty of fitness includes compliance with the

Building Code. As such, the supplier was found liable for breaching the implied warranty of fitness, subject to certain reductions to damages to account for the contractor's own negligence in installing the septic systems.

With respect to the tort claim, the Court reached a different conclusion. The Court readily accepted that the filter sand supplier owed a duty of care to the contractor, but found that it did not have sufficient evidence to find that the standard of care was breached. Unlike the contract claim, the contractor's claim for negligence imposed an onus to prove the applicable standard of care for a reasonable manufacturer and supplier of filter sand. The Court found that it could not make such a determination without expert evidence on the subject, of which there was none. The Court did find, however, that the filter sand supplier had taken reasonable steps to have its product tested in the manufacturing process to ensure compliance with the Building Code. Although the sand ultimately was found to have not met those requirements, the Court found there was no evidence to suggest that there were any deficiencies in the manufacturing process and the contractor's tort claim was dismissed.

Key Take-Away Principles

The *Parkhill* decision is an interesting example of the different ways that Canadian courts look at causes of action in product liability claims. The framing of a claim, either in contract or tort or both, may impose different evidentiary burdens on the plaintiff and may lead to different results stemming from the same set of facts. Manufacturers defending such claims should be aware of how claims are pleaded against them, as it will have an impact on what evidence the plaintiff needs to put forward to succeed and how the claim can be successfully defended.

¹ 2017 ONSC 6903 (CanLII), <<http://canlii.ca/t/hnv12>> [*"Parkhill"*].

² Sale of Goods Act, RSO 1990, c S.1, s. 15.1.