

# PRINCIPLES OF PRODUCT LIABILITY LAW IN CANADA

PRESENTED BY JACQUELINE ARMSTRONG GATES, JOSH HANET, NICHOLAS KLUGE, SUZIE LANTHIER, ALEXANDRE SAMI, AND AMBER BONNELL



# TOPICS COVERED

- **Welcome**
- **Defects**
- **Liability claims**
- **Limitation of liability clauses**
- **Consumer protection**
- **Quebec specifications**
- **Class Actions**
- **Practical consideration**
- **Best practices**
- **Emerging areas**

# DEFECTS

# DEFECTS – BASIC OBLIGATIONS AND DUTIES

- **The manufacturer's basic obligation is to manufacture products with reasonable care and to make them reasonably safe and fit for their intended purpose.**
- **Product liability claims focus on three phases of production and sale:**
  - Negligent design, development and testing;
  - Negligent manufacturing;
  - Negligent distribution, marketing and sale.

# DEFECTS – BASIC OBLIGATIONS AND DUTIES

- **Established duties of care are imposed on manufacturers such as:**
  - A duty to design their products to avoid safety risks and to make the product reasonably safe for its intended purpose;
  - A duty to ensure that there are no manufacturing defects that are likely to cause injury during ordinary use of the product;
  - A duty to warn consumers of dangers inherent in the use of the product, provided the manufacturer knew or ought to have known about the dangers. This duty is a continuous one so a manufacturer should warn consumers if it has learned of defects or dangers after time passes from the manufacture and sale of the product;
  - A duty to compensate consumers for the cost of repairing a dangerous product that presents a real or substantial danger.

# DEFECTS – WHAT ARE THE FACTORS TO CONSIDER TO DETERMINE IF THERE IS A DEFECT?

- **A design defect makes a product unfit for the use for which it is destined and usually affects all the products manufactured with this design. It typically will require a recall to fix.**
- **Manufacturing defects are usually due to poor quality control issues and will affect one unit or one batch, but not all the products in the supply chain.**
- **While a design in manufacturing defect can cause a safety defect, this notion is broader and extends to situations where insufficient information was provided as to the safe use of the product.**
- **To give rise to a liability claim, the defect must be serious enough to diminish the intended use of the product, it must be hidden or non-apparent to a diligent buyer and must have existed at the time of the sale.**

# LIABILITY CLAIMS

# WHO MAY BE LIABLE FOR A PRODUCT DEFECT?

- **The supply chain: Product manufacturers**
  - Part suppliers;
  - Assemblers/installers;
  - Importers;
  - Wholesale distributors/retailers;
  - Repairers;
  - Inspectors;
  - Certifiers.
- **It is common to bring a proceeding against every party in a supply chain.**
- **It is common for unrelated parties to sue for contribution and indemnity.**



# WHO IS THE MANUFACTURER?

- **A manufacturer is a person/company engaged in a business to design, formulate, produce, create, construct, assemble, or rebuild a product or a component of a product.**
- **The product is later distributed to wholesalers and retailers who then sell to customers.**
- **A product can be composed of different products manufactured by different entities, rendering the identification of the manufacturer or manufacturers responsible more difficult to identify.**

# WHO MAY FILE A SUIT?

- **Anyone in the chain of ownership of the product can file a suit and/or third party claims.**
- **In addition, anyone who alleges that they suffered damages, who is or was not owner of the product can also file a suit against anyone in the chain of ownership of the product, up to the manufacturer.**
- **If a plaintiff has not named other parties as defendant, the manufacturer should issue a third party claim against the other party within the time period allowed to have brought the original action. (Out of caution, it is best to issue a third party claim within two years of the date that the statement of claim was issued.)**

# WHO BEARS THE BURDEN?

- Except in Quebec, the plaintiff bears the burden of proving the constituent elements of the case on the balance of probabilities.
- The constituent elements are:
  1. Duty of care
  2. Breach of the duty of care
  3. Damages
  4. Damages were *caused* by the breach of the duty of care
- There is no reverse onus, although in certain cases the defendant's failure to bring evidence refuting a plaintiff's case has led to an adverse inference against it.

# DEFENCES

- **Defences may be available and include:**
  - Contributory negligence;
  - Intervening act of another;
  - Voluntary assumption of risk;
  - Expiration of limitation period;
  - Contractual limitation and liability.

# REMEDIES

- **Remedies that may be available in product liability actions include:**
  - Monetary damages;
  - Pecuniary damages/non-pecuniary damages;
  - Discouragement of revenue and/or profit;
  - Cancellation of the contract of purchase and sale;
  - Monetary fines;
  - Injunctions;
  - Criminal sentencing;
  - Punitive damages (rare, and very rarely over \$100,000 CDN);
  - Interest and costs of the proceeding.

# LIMITATION OF LIABILITY CLAUSES

# LIMITATION OF LIABILITY CLAUSES

- **A manufacturer or seller may attempt to contractually limit its liability in relation to:**
  - Types of damages;
  - Types of fault;
  - A maximum amount;
  - Time, either regarding the duration of a warranty and/or to report the defect.



# LIMITS OF LIMITATION OF LIABILITY CLAUSES

- **Only enforceable between contractual parties.**
- **The *Consumer Protection Acts* prohibit some limitations to consumers.**
- **The governing laws of the contract may limit the effect of the limitations depending on the jurisdiction of contract or the place of residence of the end user.**



# CONSUMER PROTECTION

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The main regulator in Canada is a federal ministry, Health Canada, which oversees the *Canada Consumer Product Safety Act* (“CCPSA”).

- Under the CCPSA, Health Canada regulates all products, including components, parts or accessories reasonably expected to be obtained by an individual for non-commercial use, including for domestic, recreational and support purposes.
- These regulations apply to a product and its packaging.
- The CCPSA imposes obligations and liabilities upon each member of the product supply chain, including manufacturers, distributors, retailers and importers.
- The CCPSA further provides for:
  - A blanket prohibition on the marketing of unsafe products;
  - Support by supplier for the safety of their product;
  - An obligation on the supplier to report;
  - Broad governmental investigatory and enforcement powers, including ordering product recalls<sup>1</sup>.

# CONSUMER PROTECTION – PROVINCIAL LEGISLATION

- **Each Canadian province also has its own legislation which provides remedies to consumers for defective consumer products.<sup>1</sup>**
- **These statutes generally provide statutory warranties, like merchantability and fitness for the purpose, with respect to all consumer products marketed within the province.**
- **These statutes also provide for individual causes of action for breach of deemed warranties in addition to possible government action.**

# CONSUMER PROTECTION - RECALL

**The federal Minister of Health has power to order a Consumer Product Recall.**

- **There are no formal pre-set requirements for recalls. Each incident is viewed as unique for the purpose of determining the scope of necessary measures in light of the severity of the risk and likelihood of the risk materializing.**
- **A report to Health Canada is mandatory where a participant in the supply chain becomes aware of:**
  - An occurrence in Canada or elsewhere that resulted or may reasonably have been expected to result in an individual's death or in serious adverse effects of their health, including a serious injury;
  - A defect or characteristic that may reasonably be expected to result in an individual's death or in serious adverse effects of their health, including a serious injury;
  - Incorrect or insufficient information on a label or in instructions or the lack of label instructions that can be reasonably expected to result in an individual's death or in serious adverse effects on their health, including a serious injury; or
  - A recalling measure that is initiated for the reason of human health and safety.
- **Penalties for breaches of the CCPSA can include fines or imprisonment.**

# CONSUMER PROTECTION

## QUEBEC VARIATIONS

**The specific legal warranties provided in the Act are the following:**

- Warranty of fitness for purpose (Article 37)
- Warranty of durability (Article 38)
- Warranty as to post-sale service and parts (Article 39)
- Warranty of conformity to contract (Articles 40 to 42)
- Warranty against latent defects and warranty of sufficient instructions or warnings (Article 53)

# CONSUMER PROTECTION

## QUEBEC VARIATIONS

Under Article 53 of the *Consumer Protection Act*, there is a specific presumption of knowledge of the defect by the manufacturer. The manufacturer cannot plead that he was unaware of the defect.

The defences that a manufacturer can raise are:

- Try to demonstrate that the consumer knew the defect.
- To demonstrate the consumer's misuse of the product.

# QUEBEC SPECIFICATIONS

# QUEBEC SPECIFICATIONS

- **Legal warranty of safety**
- **Legal warranty of quality**
- **Legal presumptions and rebuttal**
- **Damages**
- **Limitation of liability clauses**
- **Choice of law clauses**





# QUEBEC SPECIFICATIONS

## LEGAL WARRANTY OF SAFETY

The notion of safety defect is defined in Article 1469 of the *Civil Code*. It provides that a safety defect can result from three different sources:

- Defective design or manufacturing:
  - In this case, the safety defect must render the product dangerous to give rise to the manufacturer's liability.
- Poor preservation or presentation of the product :
  - This concerns the adequacy of the packaging and processing of a product after its manufacturing.

# QUEBEC SPECIFICATIONS

## LEGAL WARRANTY OF SAFETY

- Insufficient indications as to the risks and dangers involved in the product or as to the safety precautions that should be taken in the use of the product.
- Any “victim” of a safety defect may bring suit, not only the purchaser. It is therefore an extracontractual claim.

# QUEBEC SPECIFICATIONS

## LEGAL WARRANTY OF QUALITY

- **Article 1726 of the *Civil Code of Québec*:**

The seller is bound to warrant the buyer that the property and its accessories are, at the time of the sale, free of latent defects which render it unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it or paid so high a price if he had been aware of them.

The seller is not bound, however, to warrant against any latent defect known to the buyer or any apparent defect; an apparent defect is a defect that can be perceived by a prudent and diligent buyer without any need of expert assistance.

# QUEBEC SPECIFICATIONS

## LEGAL WARRANTY OF QUALITY

**The notion of latent defect therefore turns on how the usefulness of a product is affected:**

- A defect can be material, such as where the product is delivered broken or damaged.
- A defect can be functional, where the product is unfit for its intended use.
- A defect can be conventional, such as where the product is fit for its intended use, but is unfit for a particular use which was expected by the buyer in view of the seller's representations or the seller's knowledge of the buyer's intended use of the product.

# QUEBEC SPECIFICATIONS

## LEGAL WARRANTY OF QUALITY

To give rise to the manufacturer's liability in Quebec, the criteria are the same as in the rest of Canada:

- The defect must be serious: it must render the good unfit for its intended use;
- The defect must be hidden: it must not be apparent and it would have been impossible for a prudent buyer to realize that there was a defect by examining the product, without the assistance of an expert;
- The defect must be unknown to the buyer; and
- The defect must have existed at the time of the sale: this avoids attributing liability to the seller for a defect that is due to the improper use by the buyer.

# QUEBEC SPECIFICATIONS

## LEGAL PRESUMPTIONS

- **Article 1729 of the *Civil Code of Québec*:**

In a sale by a professional seller, a defect is presumed to have existed at the time of the sale if the property malfunctions or deteriorates prematurely in comparison with identical property or property of the same type; such a presumption is rebutted if the defect is due to improper use of the property by the buyer.

# QUEBEC SPECIFICATIONS

## LEGAL PRESUMPTIONS

### *ABB Inc. v. Domtar Inc., 2007 SCC 50*

This Supreme Court case involved the purchase of a large boiler which was found to be defective. The Supreme Court in its decision stated that:

- In Quebec civil law, manufacturers are considered to be the ultimate experts with respect to goods because they have control over the labour and materials used to produce them.
- The buyer's expertise is also relevant as it serves to assess whether the defect is hidden or apparent. Buyers therefore have an obligation to inform themselves by carrying out a reasonable inspection of the product. The manufacturer will be unable to rely on a limitation of liability clause unless it can rebut the presumption of knowledge of the defect.

# QUEBEC SPECIFICATIONS

## LEGAL PRESUMPTIONS

***CNH Industrial Canada Ltd. v. Promutuel Verchères, société mutuelle d'assurances générales, 2017 QCCA 154***

The Court of Appeal of Quebec rendered a decision which now creates a triple presumption against the manufacturer.

The Court of Appeal held that the legal presumption implies, in fact, three different presumptions when the buyer proves that the property malfunctioned or deteriorated prematurely:

- The presumption that there was a hidden defect in the property;
- The presumption that such defect existed at the time of the sale; and
- The presumption that the defect caused the injury.



# QUEBEC SPECIFICATIONS

## REBUTTAL OF LEGAL PRESUMPTIONS

The presumption of liability, although it creates a high threshold, it can be rebutted if the manufacturer can demonstrate:

- That the defect is due to the improper use of the product by the purchaser;
- That it is due to a fault on the part of a third party;
- That it is due to superior force (force majeure); or
- That it would have been impossible to detect the defect.

# QUEBEC SPECIFICATIONS

## DAMAGES

- A quality defect gives rise to a claim in repair, replacement or refund of the defective product.
- The knowledge of the defect gives rise to a claim in all other damages, including consequential damages.

# QUEBEC SPECIFICATIONS

## LIMITATION OF LIABILITY CLAUSES

In Quebec, you cannot limit your liability for intentional faults (tort). Therefore, because professional sellers and manufacturers are presumed to have been aware of the defect, the presumption also invalidates any limitation of liability clause in the sales contract.

# QUEBEC SPECIFICATIONS

## CHOICE OF LAW CLAUSE

Article 3128 of the *Civil Code of Québec* provides that the claimant in a product liability claim against a manufacturer can choose that the governing law be the laws of Quebec if:

- the manufacturer has a place of business in Quebec; or
- the product was purchased in Quebec.

Notwithstanding the choice of law clause in the sales contract, if any.

# CLASS ACTIONS

# PRACTICAL CONSIDERATIONS - CLASS ACTIONS

- **In most Canadian jurisdictions, a putative Class Action must be certified by the Court in order to proceed.**
- **To certify a Class Action, the Court must be satisfied that :**
  1. the pleadings or the notice of application discloses a cause of action;
  2. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
  3. the claims or defences of the class members raise common issues;
  4. a class proceeding would be the preferable procedure for the resolution of the common issues; and
  5. there is an representative plaintiff (or defendant) who would fairly and adequately represent the class, without conflict, and has produced a workable plan for doing so.
- **Class actions are now a central part of the Canadian product liability landscape, most frequently in Ontario, Quebec, British Columbia and Saskatchewan.**

# CLASS ACTIONS - CONTINUED

- **Ontario amended its Class Proceedings Act in late 2020.**
- **Common issue trials for product liability class actions are rare.**
- **In many provinces (including Ontario), Court approval is required to discontinue or dismiss a putative class proceeding.**
- **Settlements are often reached prior to or shortly following motions for certification.**
- **Settlements require court approval; must be “fair, reasonable and in the best interest of the class”.**

# PRACTICAL CONSIDERATIONS



# PRACTICAL CONSIDERATIONS - GOVERNING LAW

- **Governing law is the law of the jurisdiction where the contract took place.**
- **It is common to have a conflict in governing law, i.e. the contract was signed in one province and the work took place in another.**
- **See the terms of the contract as a first step to determine whether a jurisdiction is specified.**
- **Watch for situations where a contract states one jurisdiction and a purchase order, which may be sent to a different department, states another.**

# PRACTICAL CONSIDERATIONS – CONFLICT OF LAWS AND JURISDICTION

- **Situations where there are multiple jurisdictions can result in a conflict of laws.**
- **This can result in the plaintiff racing to file in the jurisdiction they would prefer.**
- **The Court determines jurisdiction based on the following legal test:**
  - Whether the defendant is domiciled/resident in the province;
  - Whether the defendant carries on business in the province;
  - Whether the tort was committed in the province;
  - Whether the contract connected with the dispute was made in the province.

# PRACTICAL CONSIDERATIONS – JOINT AND SEVERAL LIABILITY

- **Several liability versus joint liability.**
- **The plaintiff may collect full amount of a judgment from any of the defendants if joint and several.**
- **Paying defendant to recover contribution from other defendants based on finding of proportion of faults.**
- **Creation of issues.**
- **Ability to collect.**
- **Potential claim for contribution and indemnity against another party.**
- **If the plaintiff has not named other parties as defendants, manufacturer should issue a claim.**

# PRACTICAL CONSIDERATIONS – TIME LIMITS

- **Limitation period runs from the date discovered or ought to have been discovered by a reasonable person.**
- **Does not run if potential claimant is incapable of commencing a proceeding due to physical, mental or psychological conditions.**
- **Expired statute of limitations (will be a high bar for potential claimant to overcome).**

# LITIGATION CONSIDERATIONS

- **Duration of litigation**
- **Documents to be disclosed during litigation**
- **Reputation – Precedent effect**
- **Recovery of legal costs (Quebec vs other jurisdictions)**

# BEST PRACTICES

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- **Preservation of evidence**
- **Spoliation of evidence**
- **Expert reports**

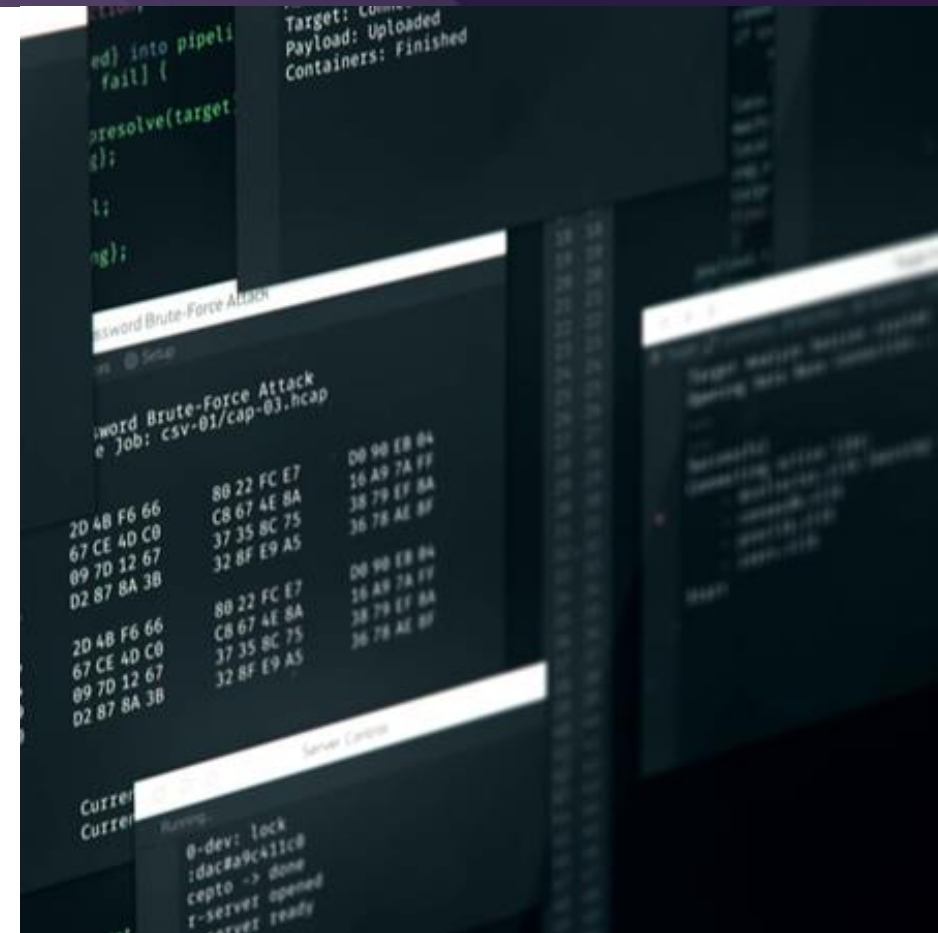


# EMERGING AREAS



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- **Connected and autonomous vehicles (“CAVs”)**
  - After years of theoretical discussion, the picture of what a world in which CAVs are the dominant presence on the roads is coming into focus
- **Data breaches/hacking/privacy and cyber security**
- **The “Internet of things” (IOT) devices**
- ***Consumer Protection Act (“CPA”)***
  - Plaintiffs will no longer be able to take advantage of the presumptions flowing from the CPA in claims related to prescription products, including the presumption that the manufacturer is aware of all material risks



# QUESTIONS?



**Jacqueline  
Armstrong Gates**

*Partner*

✉ jacqueline.armstronggates@gowlingwlg.com

☎ +1 519 575 7526



**Josh Hanet**

*Partner*

✉ josh.hanet@gowlingwlg.com

☎ +1 416 814 5640



**Nicholas Kluge**

*Partner*

✉ nicholas.kluge@gowlingwlg.com

☎ +1 416 369 4610



**Suzie Lanthier**

*Partner*

✉ suzie.lanthier@gowlingwlg.com

☎ +1 514 392 9542



**Alexandre Sami**

*Partner*

✉ alexandre.sami@gowlingwlg.com

☎ +1 514 392 9581



**Amber Bonnell**

*Associate*

✉ amber.bonnell@gowlingwlg.com

☎ +1 519 571 7627



**GOWLING WLG**