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Product Liability 101

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PRODUCT LIABILITY 101

I. Introduction

Product liability law in British Columbia is based on two fundamental legal concepts: contract and tort. Where a contractual relationship exists between the manufacturer (or seller) and the customer, liability will normally be founded on contract and warranty law (including statutory warranty) principles, although independent and concurrent liability in tort law may also exist.[1] A manufacturer's contractual and tort duties, and the principles governing the awarding of damages under liability in tort and contract, are independent, concurrent and distinct. This paper reviews the tort principles that British Columbian and Canadian courts have adopted to govern product liability claims.

II. Principles of Tort Liability

A. The Causes of Action

Tort liability for damages or injuries caused by a defective or dangerous product is based on the claim of negligence. There are three main types of negligence establishing tort liability for damages

1 Even in the absence of a contractual relationship, tort liability may arise. *Central and Eastern Trust Co. v. Rafuse et al.*, [1986] 2 S.C.R. 147.

or injuries caused by defective products: (i) negligent manufacture; (ii) negligent design; and (iii) failure to warn. To prove negligence, the plaintiff must plead and establish the following elements:[2]

(a) the product was defective in that it posed an unreasonable danger or risk of harm to person or property when foreseeably used;

(b) the defendant owed a duty of care to the plaintiff with respect to the product;

(c) the defendant was negligent in failing to meet the applicable standard of care;

(d) the defendant's breach of the standard of care caused or contributed to the defect;

(e) the defect caused or contributed to the plaintiff's damages; and

(f) the plaintiff's damages were reasonably foreseeable.

While general principles of Canadian negligence law will apply in any tort case, courts have developed a distinct body of law relating to the analysis and application of the elements in product liability claims. Each of the elements will be considered below.

B. The Product Must be Defective

Tort liability for damages or injuries caused by a defective or dangerous product is based on the claim of negligence.[3] The fundamental threshold concept of product liability is that the product must pose an unreasonable risk of harm to person or property when used as foreseeably intended due to the negligent design, manufacture or warning of the product.[4] While the preponderance of cases hold that products which are shoddy but not unreasonably dangerous are not capable of founding a product liability claim, a recent Ontario Court of Appeal decision has opened the door to product liability claims for shoddy but not dangerous goods.[5] There is no strict liability in Canadian product liability law--a plaintiff must always establish that his or her damages were caused by the negligence of the manufacturer.[6]

Further, while there are some narrow exceptions (most notably the dangerous building exception set out by the SCC in *Winnipeg Condominium Corp. v. Bird Construction*[7]--which itself is unclear as whether it includes defective building products as opposed to negligent construction practices), the economic loss rule normally requires that a plaintiff must suffer personal injury or property damage other than "damage" caused by the defective condition to the product itself to maintain a claim.[8] As a result, situations where a user of a product learns of a dangerous defect before injury

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2 *More v. Bauer Nike Hockey Inc.*, 2011 BCCA 419; *More v. Bauer Nike Hockey Inc.,* 2010 BCSC 1395.

3 To prove negligence, the plaintiff must plead and establish the following elements: (a) the product was defective or dangerous; (b) the defendant owed a duty of care to the plaintiff with respect to the product; (c) the defendant was negligent in failing to meet the applicable standard of care; (d) the defendant's breach of the standard of care caused or contributed to the defect; (e) the defect caused or contributed to the plaintiff's damages or injuries; and (f) the plaintiff's damages or injuries were reasonably foreseeable.

4 *Aurora v. Whirlpool Canada*, 2013 ONCA 657.

5 *Aurora v. Whirlpool Canada, supra*.

6 *Phillips v. Ford Motor Company of Canada Ltd.,* (1971), 18 DLR (3d) 641 (Ont CA); *Andersen v. St. Jude Medical Inc.,* [2002] OJ No. 260 (SCJ).

7 *Winnipeg Condominium Corp. v. Bird Construction*, [1995] 1 SCR 85.

8 *Rivtow Marine v. Washington Iron Works*, [1974] 3 SCR 1189.

or property damage occurs may not have a tort claim against the manufacturer due to the absence of damage to person or property.

1. The Duty of Care

The duty of care owed by a manufacturer is very broad, extending beyond the original purchaser of its product to encompass other foreseeable consumers and users of the product (including second hand purchasers) and, in appropriate cases, even others foreseeably in the vicinity of a product.[9] However, the scope of tort liability is always limited by the concepts of foreseeability,[10] proximity,[11] and remoteness.[12]

A duty of care will normally be owed by not only the manufacturer of the product but other parties in the supply chain including raw material suppliers, component manufacturers, private testing laboratories and agencies, importers, distributors and sellers. While the duties owed by each party will be different, if it can be established that a supply chain party negligently performed its respective duties which caused or contributed to the plaintiff's damages, then that party may be liable in tort. It is not unusual in Canadian product liability claims for more than one supply chain party to be named as a defendant, most commonly the foreign manufacturer and the Canadian subsidiary or distributor of the manufacturer.

The fact that a manufacturer or other party in the supply chain is not incorporated in or does not carry on business in Canada will not prevent Canadian courts from assuming jurisdiction over such a party. When a manufacturer releases its product into the normal channels of trade, the court of the territory where the manufacturer knew or could have reasonably foreseen that its product would be purchased, used or consumed may be entitled to take jurisdiction over a claim for damages suffered in that jurisdiction as a result of an alleged defect in the product.[13] It is very difficult to defeat product liability claims in British Columbia on the basis that the British Columbia court lacks jurisdiction where the injury or damage caused by the product was suffered in British Columbia.[14]

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9 *Donoghue v. Stevenson*, [1932] A.C. 562 at 599. *Hollis v. Dow Corning Corp*., [1995] 4 S.C.R. 634 (S.C.C.). *Saccardo v. Hamilton (City)*, [1971] 2 O.R. 479 (H.C.). *Martin v. T.W. Hand Fireworks Co*., [1963] 1 O.R. 443 (H.C.).

10 While tort law does not require the "wisdom of Solomon," it requires people to act reasonably in all of the circumstances. *Stewart v. Pettie (sub nom. Mayfield Investments v. Stewart)* (1995), 121 D.L.R. (4th) 222 (S.C.C.).

11 Proximity will normally be found where there is a sufficiently close relationship between the plaintiff and the defendant. This will depend on the particular facts of the case.

12 *Kamloops (City) v. Nielsen*, [1984] 2 S.C.R. 2; *Plas-Tex Canada Ltd. v. Dow Chemical of Canada* (2004), 245 D.L.R. (4th) 650 (Alta C.A.), leave to appeal S.C.C. refused, 250 D.L.R. (4th) vii (S.C.C.).

13 *British Columbia v. Imperial Tobacco Canada Ltd.* (2004), 239 D.L.R. (4th) 412 (B.C.C.A.), aff'd [2005] 2 S.C.R. 473.

14 *Fairhurst v. DeBeers Canada Inc.*, 2012 BCCA 257.

2. The Standard of Care

Not every product that causes damage is necessarily dangerous, defective or a source of liability.[15] Simply because a person is injured by a product is not, by itself, sufficient basis to prove a claim. Rather, the plaintiff must prove on the balance of probabilities that the product, as designed, manufactured or labelled, fell short of reasonable standards which failure caused the product to be dangerous and harmful. Put another way, a plaintiff must prove that the product was unreasonably dangerous and that the risk to person or property in question arose as a result of a lack of reasonable care or skill on the part of the manufacturer.[16] Establishing the standard of care (and the alleged breach) will typically require a combination of fact and expert evidence.[17]

Certain products are so inherently dangerous that a very high standard of care will be imposed by courts.[18] In addition to the type of product, factors which inform the standard of care include the type of user, the nature of the risk in question, statutory and regulatory standards, industry codes and practices, the manner in which the product is used, the "state-of-the-art" of the industry at the time of design and manufacture, the cost to change the design to remedy the defect and the social utility of the product.[19] Determining the applicable standard of care and the asserted breach is often the most complex and difficult aspect of a product liability case.

3. Onus and Burden of Proof

Once the standard of care has been established, the onus then rests on the plaintiff to adduce evidence proving on the balance of probabilities that the defendant did not meet the standard of care.[20] In certain limited cases involving dangerous or sealed products, the plaintiff may seek to

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15 A defect has commonly been described as "a defective condition unreasonably dangerous to the user or consumer or to his property". See *Restatement (Second) of Torts*, § 402A.

16 *Kreutner v. Waterloo Oxford Co-Operative Inc.* (2000), 50 O.R. (3d) 140 (C.A.). While Canada has adopted a high standard of care for the design, manufacture and distribution of products, Canadian courts have repeatedly rejected the doctrine of strict liability. *Phillips v. Ford Motor Co. of Canada Ltd.* (1971), 18 D.L.R. (3d) 641 (Ont. C.A.).

17 Industry practices and regulatory standards play an important role in determining the applicable standard of care in product liability cases. *Piche v. Lacours Lumber Co.,* [1993] O.J. No. 3170 (Gen. Div.); *Meisel v. Tolko Industries Ltd.,* [1991] BCJ No. 105 (SC). However, simply because a manufacturer adheres to an industry code or regulatory standard will not necessarily be proof that it has met the standard of care. *Tabrizi v. Whallon Machine Inc.* (1996), 29 C.C.L.T. (2d) 176 at 185 (B.C.S.C.); *Murphy v. Atlantic Speedy Propane Ltd.* (1979), 103 D.L.R. (3d) 545 (N.S.S.C.); *Williams v. Saint John (City)* (1983), 53 N.B.R. (2d) 202. (Q.B.).

18 *Lem v. Barotto Sports Ltd.* (1976), 69 D.L.R. (3d) 276 (Alta. C.A.).

19 *Baker v. Suzuki Motor Co.* (1993), 12 Alta.L.R. (3d) 193 at 211 (Q.B.).

20 *Fontaine v. British Columbia (Official Administrator)*, [1998] 1 S.C.R. 424. The types of evidence considered by courts in evaluating whether a manufacturer has met the standard of care include: (i) whether industry and statutory standards have been met respecting design, testing, analysis, manufacture, assembly, inspection, auditing and quality control; (ii) whether the defendant's own policies, procedures and protocols have been followed; (iii) the field and service history of the product; and (iv) the defendant's state of knowledge respecting the alleged defect and the circumstances alleged to have caused it. *Buchan v. Ortho Pharmaceutical (Canada) Ltd.* (1986), 54 O.R. (2d) 92 (C.A.); *ViSP Construction v. Scepter Manufacturing Co.*, [1991] O.J. No. 356 (Gen. Div).

shift the onus to the manufacturer requiring the manufacturer to prove that its negligence did not cause the plaintiff's injury.[21]

Where there is direct evidence available with respect to how the plaintiff's injury occurred, the court will normally be required to decide liability on that evidence alone.[22] While the principle of *res ipsa loquitur* is now unquestionably abolished in Canada,[23] where there is insufficient direct evidence to establish negligence, the court may still consider circumstantial evidence to determine whether the evidence reasonably gives rise to an inference of negligence.[24] There is a distinction between drawing an inference based on circumstantial evidence (which is permissible) and drawing an inference simply because an event occurred (which is not permissible).

4. Causation

Canadian courts require the plaintiff to demonstrate not only that the defendant breached the standard of care in designing or manufacturing the product but also that the breach caused or contributed to the plaintiff's injuries.[25]

The general test for causation is the "but-for" test which requires the plaintiff to show that the loss would not have occurred but for the negligence of the defendant.[26] Thus, a manufacturer who is found to have been negligent will not escape liability merely because other causal factors may have contributed to the plaintiff's injuries.[27] However, a manufacturer may break the chain of causation by demonstrating that but for an unforeseeable intervention by a third party or event, the injury would not have occurred.[28]

Where it is impossible to prove liability using the but-for test due to factors outside the plaintiff's control (e.g., unavailability of evidence due to limitations of science), the court may apply a less onerous "material contribution" test if the defendant clearly breached the duty of care owed to the plaintiff.[29] In most product liability cases, the court will apply the but-for test in determining causation.

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21 *Viridian Inc. v. Dresser Canada Inc.* (2000), 274 A.R. 28 (Alta. Q.B.), aff'd 216 D.L.R. (4th) 122 (Alta. C.A.).

22 *Fontaine v. British Columbia*, *ibid*.

23 *Fontaine v. British Columbia*, [1998] 1 S.C.R. 424.

24 *Mississauga (City) v. Keiper Recaro Seating Inc.*, [1999] O.J. No. 2005 (S.C.J.), aff'd 105 A.C.W.S. (3d) 983 (C.A.); *MacLachlan & Mitchell Homes Ltd. v. Frank's Rentals and Sales Ltd.* (1979), 106 D.L.R. (3d) 245 (Alta. C.A.).

25 *Rentway Canada Ltd./**Ltée** v. Laidlaw Transport Ltd.* (1989), 49 C.C.L.T. 150 (Ont. H.C.), aff'd [1994] O.J. No. 50 (C.A.); (1989), 49 C.C.L.T. 150 (Ont. H.C.), aff'd [1994] O.J. No. 50 (C.A.).

26 *Athey v. Leonati*, [1996] 3 S.C.R. 458; *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.

27 *Walker Estate v. York Finch General Hospital*, [2001] 1 S.C.R. 647, 2001 SCC 23; *Mississauga (City) v. Keiper Recaro Seating Inc.*, *supra* note 15.

28 *Smith v. Inglis Ltd.* (1978), 83 D.L.R. (3d) 215 (N.S.C.A.).

29 *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333.

III. Negligent Manufacture

A manufacturer must employ reasonable manufacturing and quality control processes in manufacturing a process. If a plaintiff can demonstrate that a product was not in accordance with the manufacturer's design specifications, or otherwise applicable manufacturing standards and processes, and that the resulting product was dangerous due to the non-compliance, this will be *prima facie* evidence of a defect.[30] However, the plaintiff must also prove that the defect was caused by the manufacturer's negligence and that the defect caused the plaintiff's loss.[31] While a plaintiff may ask the court to draw an inference that a manufacturing defect was due to negligent manufacturing processes, it is possible for a manufacturer to have reasonable manufacturing processes which do not detect and prevent every defect, i.e., not every manufacturing defect is negligent.[32] The standard of care is always reasonableness--not perfection. That said, numerous cases have held that where a plaintiff can establish that a product was defective when it left the factory, an inference of negligence is "practically irresistible".[33]

A plaintiff need not adduce direct evidence that a defect existed when the manufactured product left the defendant's factory. The plaintiff may instead exclude the probability that another person created the hazard after the product left the factory.[34] Where the defect arises in the manufacturing process solely controlled by the defendant, the inference of negligence may be difficult to rebut.[35]

In a claim for negligent manufacture, the litigation will typically be focused on determining the standard of care of the manufacturing and quality control processes and on whether the defendant manufacturer negligently failed to follow such standards and processes.[36] As a result, expert evidence in the relevant manufacturing and engineering fields is critical to both prosecuting and defending product liability claims.

IV. Negligent Design

A manufacturer must be reasonable in designing every product. It is not reasonable to manufacture a dangerous product if the same product can reasonably be manufactured with a substantially reduced risk of injury.[37] Where a plaintiff can show that there was a safer available design at the time of manufacture and that the manufacturer, due to want of reasonable care or skill, failed to use

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30 Mere shoddy workmanship which does not create a dangerous risk from using the product (e.g., a cosmetic blemish) will normally be insufficient to ground tort liability.

31 *Meisel v. Tolko Industries*, [1991] BCJ No. 105 (SC). A manufacturer is not held to a standard of perfection, only of reasonableness in all of the circumstances. *Farrow v. Nutone Electrical Ltd.* (1990), 68 D.L.R. (4th) 269; *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.).

32 *Farrow v. Nutone Electrical Ltd.* (1990), 68 DLR (4th) 268; *Stewart v. Pettie* (1995), 121 DLR (4th) 222 (SCC).

33 Hans v. Volvo Trucks North America, 2017 BCSC 1155.

34 *Forsyth v. Sikorsky Aircraft Corp*., [2000] B.C.J. No. 813 (S.C.).

35 *McMorran v. Dominion Stores Ltd.* (1976), 74 D.L.R. (3d) 186) (Ont H.C.).

36 *Hans v. Volvo Trucks North America, supra*.

37 *Tabrizi v. Whallon Machine Inc.*, *supra* note 10.

that reasonable alternative design, a claim of negligent design will be proven.[38] However, a manufacturer is not required to use the most advanced design, the safest design, or the best materials, in manufacturing a product. Rather, a manufacturer is only required to use a design that is reasonable in all of the circumstances.[39] The question of whether a manufacturer was negligent in not using a different design is often a complicated and fraught question involving many factors and types of evidence.

Some Canadian courts have applied the "risk-utility" theory to balance the risks inherent in the product as designed against the product's utility and cost.[40] Where the manufacturer can demonstrate that the effect of addressing the alleged design defect would have created additional, new design issues (such as increased cost or other safety issues), negligence may be avoided.[41] However, where the design risk in question is extreme, there will be a lower threshold for the plaintiff to establish that the manufacturer should have used an alternative design.[42]

V. Negligent Failure to Warn

A manufacturer should provide reasonable directions and instructions with almost every product. Where there is an inherent and reasonably known risk of harm in using a product and the danger is not manifestly obvious to foreseeable users during foreseeable use, manufacturers have a duty to warn users of the known risk and how to avoid it.[43] In determining whether a manufacturer owed a duty to warn of a risk, courts will apply an objective standard to determine what the manufacturer

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38 For factors considered in examining whether a manufacturer breached the standard of care in the design of a product, see *Nicholson v. John Deere Ltd.* (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), aff'd (1989), 57 D.L.R. (4th) 639 (Ont. C.A.); *Rentway Canada Ltd./**Ltée** v. Laidlaw Transport Ltd., supra* note 17; *George Day Contracting v. Coneco Equipment*, [1996] A.J. No. 605 (Alta. Q.B.). See also *Tabrizi v. Whallon Machine Inc.*, *ibid*.

39 *London & Lancashire Guarantee & Accident Co. of Canada v. Cie F.X. Drolet,* [1944] S.C.R. 82.

40 *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, *supra* note 23. In making the risk-utility analysis, the court may consider the following factors: (i) the utility of the product to the public as a whole and to the individual user; (ii) the nature of the product and its inherent risk; (iii) the availability of a safer design; (iv) the potential for designing and manufacturing the product so that it is safe but it remains functional and reasonably priced; (v) the ability of the plaintiff to avoid an injury by carefully using the product; (vi) the degree of awareness of the potential danger which reasonably can be attributed to the plaintiff; and (vii) the manufacturer's ability to bear and spread any cost relating to improving the safety of the design. *Rentway Canada Ltd./**Ltée** v. Laidlaw Transport Ltd*., *supra* note 17; *McEvoy v. Ford Motor Co.* (1992), 63 B.C.L.R. (2d) (362) (B.C.C.A.).

41 *Baker v. Suzuki Motor Co*., *supra* note 12. As a result, a plaintiff may be required to establish that the proposed alternative design not only reduces the risk asserted by the plaintiff but risk generally. *George Day Contracting v. Coneco Equipment*, *supra* note 27.

42 *Nicholson v. John Deere Ltd.* (1986), *supra* note 27.

43 *Murphy v. St. Catherine's General Hospital* (1963), 41 D.L.R.. (2d) 697 (Ont. H.C.J.). *Deshane v. Deere & Co.* (1993), 106 D.L.R. (4th) 385 (Ont. C.A.). *Hollis v. Dow Corning Corp.*, *supra* note 3. A warning must indicate the likelihood of the danger occurring, the seriousness of the likely consequences, and a description of how the harm is likely to occur. *Lambert v. Lastoplex*, [1972] S.C.R. 569; *Can-Arc Helicopters Ltd. v. Textron Inc.*, (1991), 86 D.L.R. (4th) 404 (B.C.S.C.); *Ruegger v. Shell Oil Co. of Canada Ltd.* (1963), 41 D.L.R. (2d) 183. Where the risk is created by a design or manufacturing defect (i.e., an unreasonable risk due to negligent design or manufacture), a manufacturer may not be able to avoid liability by simply warning the user of the risk. *Nicholson v. John Deere Ltd.* (1986), *supra* note 27.

ought to have known about the risk based on all of the available information at the material time.[44] The burden of the duty to warn is dependent on the danger posed by the product – the greater the risk posed by the product, the greater the clarity and specificity required in the warning.[45]

The issue of liability in failure to warn cases frequently centres on the manufacturer's knowledge of the asserted danger and the adequacy of the warning, if any.[46] The plaintiff must establish on the balance of probabilities that: (i) the manufacturer knew or reasonably ought to have known of the asserted risk; (ii) the manufacturer negligently failed to warn of the risk (i.e., the manufacturer gave no warning or the warning was inadequate); and (iii) the plaintiff would have heeded the warning and used the product differently had adequate warning been made.[47] Where it is established that the plaintiff was previously aware of the alleged unwarned risk through independent means, this may be sufficient to defeat a failure to warn claim.[48]

Where the product is distributed through an intermediary, a manufacturer may satisfy the duty to warn by informing the intermediary.[49] Where a manufacturer adequately warns the intermediary of the risk of the product (or the intermediary is already aware of the risk), it is the intermediary himself who may be liable for failing to pass the warning on to the ultimate user.[50]

VI. Defences

Canadian law recognizes a number of defences which may be raised by a defendant in a product liability claim. In addition to asserting that the plaintiff has not established the requisite elements of the claim (e.g., defendant met the standard of care or the breach did not cause the plaintiff's loss), a defendant may also advance one or more of the following affirmative defences: (i) the plaintiff knew of and accepted the risk or defect[51]; (ii) the plaintiff improperly used or maintained the product[52]; (iii) the plaintiff or third party repaired or modified the product in an improper or unforeseeable way[53]; (iv) there was an unforeseeable intervening act or event which caused or contributed to the

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44 *Labrecque v. Saskatchewan Wheat Pool* (1977), 78 D.L.R. (3d) 289 (Sask. Q.B.). See also *Hollis v. Dow Corning Corp.*, *supra* note 3.

45 *Hollis v. Dow Corning Corp.*, *supra* note 3.

46 *Stiles v. Beckett* (1996), 17 B.C.L.R. (3d) 144 (C.A.), leave to appeal to S.C.C. refused (1996), 23 B.C.I.R. (3d) xxvi (S.C.C.); *Deshane v. Deere & Co*., *supra* note 32. Generally, the adequacy of a product will be judged by the standard existing at the time the product entered the marketplace, not when the product caused the injury. *Brunski v. Dominion Stores Ltd.* (1981), 20 C.C.L.T. 14 (Ont.H.C.).

47 *Hollis v. Dow Corning Corp., supra.*

48 *Deshane v. Deere & Co.* (1993), 106 DLR (4th) 385 (Ont. CA).

49 *Hollis v. Dow Corning Corp.*, *supra* note 3.

50 *Albert et al. v. Breau et al.* (1977), 19 N.B.R. (2d) 476 (S.C.).

51 Because this defence operates as a complete defence, Canadian courts are reluctant to find that the plaintiff actually assumed the risk of injury. *Lehnert v. Stein*, [1963] S.C.R 38.

52 *Rae v. T. Eaton Co. (Maritimes) Ltd.* (1961), 28 D.L.R. (2d) 522 (N.S.S.C.). However, where there is a defect but the plaintiff's misuse contributes to or exacerbates the injury, apportionment between the plaintiff and defendant will occur. *LaFarge Cement Ltd. v. Canadian National Railway Co.* (1962), 34 D.L.R. 154 (2d) (B.C.S.C.).

53 Where the unintended use was foreseeable, the duty to warn may arise. *Rae v. T. Eaton Co. (Maritimes) Ltd., ibid*. See *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968). See also *Hollis v. Dow Corning Corp.*, *supra* note 3.

plaintiff's injuries; and (v) the plaintiff contractually waived his or her right to sue.[54] The availability of these defences is very fact-specific.

VII. Damages

In Canadian common law provinces, a manufacturer of a defective product will be liable in tort for damages to persons and property caused by its negligence, including in certain limited circumstances, economic loss.[55] Damages in tort are based upon the principle of restoring the injured person to the position he or she would have been in had the defendant's negligence not occurred. The overarching objective of tort damages is to compensate the injured party as opposed to punishing the wrongdoer.[56]

Damages for personal injuries are commonly organized into pecuniary and non-pecuniary losses. Pecuniary losses are intended to compensate for lost monies such as the cost of future care and loss of earning capacity arising from injuries. Non-pecuniary losses are intended to compensate the plaintiff for more intangible losses such as pain and suffering and loss of quality of life. The SCC has now recognized the ability of a plaintiff to claim non-pecuniary damages for nervous shock or psychiatric damage in certain limited circumstances.[57]

Canadian courts have held that a plaintiff is only entitled to damages for pure economic loss in negligence claims where the plaintiff has suffered injury to person or property.[58] Unless a plaintiff has suffered personal injury or property damage, economic loss is normally not recoverable although there are some exceptions to this rule.[59]

Generally, a plaintiff cannot recover damages in negligence for damage to the defective product itself or the cost of repairing the defective product.[60] However, where the defective product causes damage to other property, the cost of repairing or replacing the damaged property may be recoverable in tort.[61] While the restrictions on pure economic loss normally bar damages for the cost of repairing the defective product itself when the claim is in negligence, where the defective component damages the greater product in which it is installed, the plaintiff will be entitled to damages to repair or replace the greater product.[62]

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54 *Crocker v. Sundance Northwest Resorts Ltd.* (1988), 51 D.L.R. (4th) 321 (S.C.C.). Waiver, exclusion and limitation clauses must be drafted very precisely in order to ensure their enforceability, particularly where the clause is intended to exclude or limit liability for negligence. *Hunter Engineering Co. v. Syncrude Canada Ltd*. (1989), 57 D.L.R. (4th) 321 (S.C.C.).

55 *Seaway Hotels v. Cragg (Canada) Ltd.,* [1959] O.R. 581 (C.A.); *Chabot v. Ford Motor Co. of Canada Ltd.*, *supra*.

56 *Andrews v. Grand & Toy Alberta Ltd.* (1978), 83 D.L.R. (3d) 452 (S.C.C.).

57 *Mustapha v. Culligan of Canada Ltd.,* 2008 SCC 27*; Saadati v. Moorhead,* 2017 SCC 28.

58 *Rivtow Marine Ltd. v. Washington Iron Works*, *supra*.

59 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, *supra*.

60 *Rivtow Marine Ltd. v. Washington Iron Works*, *supra* note 14.

61 *Dominion Chain Co. Ltd. v. Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201 (C.A.).

62 *Chabot v. Ford Motor Co. of Canada Ltd.*, *supra*.

Canadian courts have awarded punitive damages in product liability cases,[63] including cases where the manufacturer's conduct was not consciously directed towards the plaintiff.[64] However, awards of punitive damages in Canadian common law product liability cases are rare.

VIII. Case Law Update

***More v. Bauer Nike Hockey Inc.*, 2011 BCCA 419**

The plaintiff suffered a brain injury from a body check during a hockey game. He sued the manufacturer of his helmet, Bauer, for negligently designing and manufacturing the helmet. He also sued the Canadian Standards Association for negligently approving the subject helmet and for not designing more stringent safety standards. The trial judge found that the helmet met and exceeded all existing safety and design standards and that there was no reasonable alternative helmet design which would have prevented the plaintiff's injury. The trial judge also found that the CSA owed a duty of care to the public with respect to its standards and warnings, but that the CSA was not liable because the plaintiff's injuries were not caused by the CSA's alleged negligence. The plaintiff and CSA appealed. The plaintiff's appeal was dismissed on all grounds. The court of appeal set aside the trial judge's ruling that CSA owed a duty of care on public policy grounds.

***Stekel v. Toyota Canada Inc.*, 2011 ONSC 6507**

The Plaintiff sued Toyota Canada alleging negligent design and manufacture of a vehicle. Toyota Canada defended the claim on the basis, amongst others, that it was only the distributor of the vehicle and did not design and manufacture the vehicle. The vehicle was designed and manufactured by Toyota Motor Co., a Japanese company. The plaintiff was allowed to add the Japanese parent company after the limitation period on the basis that there was no prejudice because the parent company was aware of the claim. The case is illustrative of the rules that the identity of corporate defendants is better raised and resolved sooner than later.

***Pennock v. Aerostar*, 2012 BCSC 1422**

The plaintiff was severely injured in a hot air balloon fire. He sued the manufacturer of the balloon's fuel system on the basis that it was negligently designed and manufactured. There were numerous competing possible causes of the fuel system's failure, numerous of them having nothing to do with the design and manufacture of the fuel system. The court dismissed the claim on the basis that the preponderance of the evidence established that the most probable cause of the fuel system's failure was damage due to misuse during service and not negligent design or manufacture. The court also found that the defendant's alleged failure to incorporate failsafe systems would not have prevented the accident or the plaintiff's injuries.

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63 *Lai v. All Seeding Corp.*, [1998] O.J. No. 4914 (Gen. Div.).

64 *Vlchek v. Koshel* (1988), 30 B.C.L.R. (2d) 97 (S.C.).

***Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744**

This decision involved a motion for certification of a class action alleging a drug caused undisclosed side effects. In the statement of claim, the plaintiffs pleaded "negligence" as a single cause of action without differentiating between the types of negligence and did not differentiate between the alleged negligent acts of the various defendants. The court found that defendants are entitled to know precisely what they are alleged to have done and that the pleadings must state clearly and precisely the material facts regarding each defendant's role and provide particulars of each party's alleged negligent activities. The court dismissed the certification application and granted leave to the plaintiffs to submit an amended statement of claim.

***Johansson v. General Motors of Canada Ltd.*, 2012 NSCA 120**

The case involved an appeal of a summary trial judgment dismissing the plaintiff's claim on the basis that the plaintiff had failed to adduce evidence establishing the applicable standard of care or that the standard had been breached. The plaintiff had alleged his vehicle was defectively designed and manufactured and that the defect had caused him to crash. The trial judge found the plaintiff's failure to adduce expert or other evidence establishing the standard of design to be fatal to his claim. The court of appeal overturned the dismissal on the basis that the plaintiff was not required to adduce such evidence. Rather, the court found that if the plaintiff's evidence "permits an inference of negligence attributable to the defendant, the non-suit motion should be dismissed and the jury, after any evidence from the defendant, would decide whether or not that inference should be drawn." The case stands for the proposition that a plaintiff need not adduce expert evidence to support a claim of negligent design or manufacture where the circumstantial evidence is sufficient to allow the trier of fact to infer negligence.

***Andersen v. St. Jude Medical Inc.*, 2012 ONSC 3660**

The plaintiff class claimed negligent design and manufacture, and failure to warn respecting an allegedly defective medical device. The case was tried over 130 days. In evaluating the negligent design claim, the court utilized the risk-utility analysis to assess the standard of care. Adopted from U.S. jurisprudence, the risk-utility analysis weighed the foreseeable risk against the foreseeable utility of the product based on the information available to the manufacturer at the time of distribution or implantation and without the benefit of hindsight. The court dismissed the entirety of the claim on the basis that the medical device was not defective and was reasonably designed, manufactured and warned. The court found that manufacturers are required to weigh the likelihood of both the benefit and the risk offered by a product as well as the value of the potential benefit and the seriousness of the potential risks in order to fulfill its standard of care. The court found that the product was not defective and the defendant manufacturer had met the standard of care.

***Aurora v. Whirlpool Canada*, 2013 ONCA 657**

This decision involved an appeal of a lower court decision dismissing the plaintiff's application to certify a class action against Whirlpool Canada based on the allegedly negligent design of the front loading washing machines which defect allegedly caused odours and mildew. Although the court dismissed the appeal of the certification application, the court found that the motions judge had erred when he concluded that *Winnipeg Condominium* settled that there can be no recovery in tort for defective, non-dangerous consumer products. Instead, the court of appeal stated that the question of recovery for pure economic loss for shoddy but not dangerous goods remained open for consideration, even if it was not found in this case for policy reasons.

***Powder Creek Farms Ltd. v. CNH America LLC*, 2013 ABQB 622**

Powder Creek Farms purchased two used combines from a third party. Powder Creek sued the combine manufacturer for business income losses the plaintiff said it had suffered as a result of the alleged negligent design and manufacture of the combines. The defendant manufacturer sought summary dismissal on the basis that the plaintiff's claim was barred by the economic loss doctrine. The court dismissed the application on the basis that the plaintiff's novel argument that the economic loss doctrine did not apply in the circumstances deserved the benefit of a full hearing at trial.

***Burton Canada Company v. Coady*, 2013 NSCA 95**

This decision involved an appeal of a judge's dismissal of a summary judgment application. The plaintiff had been catastrophically injured in a snowboarding accident. The plaintiff sued the snowboard manufacturer for failure to warn of alleged risks and dangers in using the snowboard. The manufacturer applied for summary judgment on the basis that the risks of snowboarding were notorious and known to the plaintiff. The chambers judge refused to dismiss the claim. The court of appeal dismissed the manufacturer's appeal on the basis that there was evidence on which a trial judge may find the manufacturer owed a duty to the plaintiff to have warned him about the nature and potential dangers of the new snowboard. One judge dissented on the grounds that a manufacturer had no duty to warn where the dangers are either obvious or are known to the user of the product. The plaintiff had admitted in discovery that he knew snowboarding was dangerous and that the impugned snowboard was lighter and faster than his previous boards.

***Los Angeles Salad Company Inc. v. Canadian Food Inspection Agency*, 2013 BCCA 34**

The plaintiff distributed salad products for retail sale in Canada and the U.S. In 2007, numerous people became ill due to contamination of the plaintiff's salad products. The plaintiff sued the CFIA and other health regulators alleging that they had negligently performed their duties which allowed the contamination to occur. The regulators applied to strike the claim on the basis that there was no triable cause of action because they did not owe the plaintiff a duty of care at law as regulators. The chambers judge dismissed the claim on the basis there was no private law duty of care owed by the regulators to the plaintiff, applying the *Anns* test and finding insufficient proximity and adverse public policy consequences. The plaintiff's appeal was dismissed. Followed in *Gill v. Canada (Minister of Transport)*, 2015 BCCA 344. Accordingly, absent the regulator acting outside the scope of its statutory duties, there does not appear to exist in British Columbia a private cause of action against a government regulator for negligent performance of its regulatory duties.

***Brantford Engineering and Construction Ltd. v. Underground Specialties Cambridge Inc.*, 2014 ONSC 4726**

The plaintiff ordered copper pipes from the defendant supplier to fulfill a contract with a municipality. The supplier sourced the pipes from the defendant manufacturer. The court found the pipes were defective and dangerous to consumers because they absorbed the chlorine that was intended to destroy the pathogens in the water. The court found that the manufacturer had a "due diligence obligation" to ensure that its product met regulatory and municipal standards, and that it should have made inquiries after the introduction of water safety legislation because it knew that its product would be used in water mains. As a result, the manufacturer was liable for negligent design and manufacture of the pipes. The court also found that the manufacturer had owed and breached a duty to warn once it had performed tests that concluded that the pipes did not meet applicable standards.

***Stillwell v. World Kitchen Inc.*, 2014 ONCA 770**

The plaintiff was severely injured when a crockpot shattered during washing. The plaintiff sued the manufacturer Corning for negligence and breach of warranty alleging the pot was defective and that

the manufacturer had failed to warn of risks with washing. The evidence showed that that manufacturer was aware of approximately 2000 reports of injuries related to the use of the pot. A jury found the manufacturer liable for $1.5 million in damages. The court of appeal upheld the jury award on the basis that it was not patently unreasonable.

***Wise v Abbott Laboratories, Limited*, 2016 ONSC 7275**

This case involved a pre-certification application for summary judgment by the defendant medical product manufacturer. The plaintiff alleged a medical ointment caused serious side-effects including heart attacks. The manufacturer denied the allegations and sought summary judgment on the basis that the product was not defective and the plaintiff could not establish causation. The chambers judge dismissed the action because the plaintiff could not prove general causation (i.e., the plaintiff could not prove that the alleged side effects were caused by the product). While the court stated, "an association between a product and a dangerous condition may give rise to a duty to warn even if the association has not been demonstrated to be causal", the plaintiff had not established on the evidence that his heart problems were caused by the product. The court also affirmed the difference between scientific causation and legal causation noting that the two are not necessarily always the same. Legal causation as found by a judge is based on the "but-for" test on a balance of probabilities, not scientific principles of causation.

***Hans v. Volvo Trucks North America*, 2016 BCSC 1155**

The plaintiffs were a couple who owned and operated a long haul truck. The plaintiffs alleged the truck's electrical system failed during operation causing the truck to violently crash, severely injuring the plaintiffs. The plaintiffs sued the manufacturer of the truck on the basis that the truck was negligently designed, manufactured and assembled. Specifically, the plaintiffs alleged that Volvo Trucks negligently designed and manufactured the truck's electrical system at the factory which caused the truck's electrical system to fail during operation. The court found that the crash was caused by a loose wire and the loose wire was due to negligent design and manufacturing and quality control processes at Volvo. The coming to this finding the court adopted the reasoning of the NSCA in *Johannsson, supra*. The court's finding of liability largely turned on evidence that Volvo was aware of the problem of the wire coming loose in other vehicles but did not adequately modify the electrical system's design or its manufacturing processes to address the problem. The court also found that Volvo had breached the duty to warn by failing to assign a critical safety rating to the subject aspect of the electrical system or to notify users of the risk of failure after it became known to Volvo. The court awarded almost $5 million in damages to the plaintiffs due in large part to the fact that the plaintiffs had serious medical complications and loss of income. The decision is under appeal.