



# Product Liability

in 31 jurisdictions worldwide

Contributing editors: Harvey L Kaplan and Gregory L Fowler

# 2011



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# Canada

Douglas Harrison, Yves Martineau and Samaneh Hosseini

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## Civil litigation system

### 1 The court system

What is the structure of the civil court system?

The Canadian civil court system is comprised of provincial, territorial and federal courts. Each province and territory has a superior court, which has primary responsibility for the administration of justice. The superior courts have 'inherent jurisdiction' in all matters except those specifically excluded by a statute. Most civil claims are within the jurisdiction of the superior courts. Appeals from final orders of the superior courts lie to the courts of appeal in each province or territory.

The federal courts have civil jurisdiction limited to certain matters specified in federal statutes, such as intellectual property, competition law, admiralty and taxation. Appeals from the federal court lie to the federal court of appeal.

Appeals from the provincial, territorial and federal appellate courts lie, with leave, to the Supreme Court of Canada, which is the ultimate court of appeal in Canada.

With the exception of Quebec (a civil law jurisdiction), all Canadian provinces and territories are common law jurisdictions. Where significant differences exist, we address Quebec's substantive and procedural law in this chapter.

### 2 Judges and juries

What is the role of the judge in civil proceedings and what is the role of the jury?

Canadian civil proceedings are adversarial. The judge does not have an inquisitorial or investigative role. In Canada jury trials are extremely rare in civil cases. There is no constitutional right to a civil jury trial in Canada, and there are statutory exceptions for the use of juries in cases involving certain types of relief such as equitable relief. There is no right to a jury trial in Quebec or in the federal courts.

In actions tried by judge alone, the judge is the trier of fact and law. In jury trials, the jury is the trier of the facts, while the judge will explain the evidence and the relevant law to the jury. The jury must then respond to questions posed by the judge and reach a verdict. Judges retain an inherent jurisdiction to dismiss a jury if the judge considers the evidence too complex.

### 3 Pleadings and timing

What are the basic pleadings filed with the court to institute, prosecute and defend the product liability action and what is the sequence and timing for filing them?

While the various steps in commencing and litigating a product liability action are generally uniform across the country, there are variations to when and how such steps are to be taken. The following is based on the Ontario Rules of Civil Procedure.

A product liability action is commenced by way of an originating process issued by the court, which in most jurisdictions is called a statement of claim. In Ontario, the plaintiff serves the statement of claim on the defendant who is required to provide a statement of defence within 20 days if served in Ontario (which can be extended to 30 days if the defendant provides a notice of intent to defend within the initial 20 days). A defendant served elsewhere in Canada or in the United States has 40 days to provide a statement of defence and a defendant served outside of Canada and the United States has 60 days to provide a statement of defence. The plaintiff then has the option to serve a reply to the statement of defence within 10 days. Time limits in rules of civil procedure are often extended by the parties on consent.

Related proceedings may be commenced by way of a counterclaim (a defendant may assert any right or claim against the plaintiff and join as a defendant any necessary and proper party), cross-claim (a claim by one defendant against a co-defendant) or third-party claim (a claim by the defendant against any third party for contribution and indemnity arising out of the plaintiff's claim against the defendant or for an independent claim related to the plaintiff's claim).

In Quebec, a product liability action is initiated by a motion to institute proceedings. The parties then must negotiate a timetable which will include a deadline for filing a statement of defence and the plaintiff's answer. Normally the parties must complete all procedural steps, including discovery, within 180 days, but this deadline can be extended with leave from the court.

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### 4 Pre-filing requirements

Are there any pre-filing requirements that must be satisfied before a formal law suit may be commenced by the product liability claimant?

There are no such pre-filing requirements.

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### 5 Summary dispositions

Are mechanisms available to the parties to seek resolution of a case before a full hearing on the merits?

A product liability case may be resolved prior to a full hearing on the merits through a motion for summary judgment. The procedure for bringing a motion for summary judgment is set out in provincial Rules of Civil Procedure. In Ontario, the threshold for granting summary judgment is that the evidence must establish there is no genuine issue requiring a trial. In determining whether there is no genuine issue requiring a trial, a judge may 'weigh evidence, draw reasonable inferences and evaluate credibility'; however, the record before the motions judge must contain the full evidentiary record the parties intend to rely on at trial. Specific to product liability actions where allegations are often grounded in technical claims requiring expert evidence, summary judgment in favour of the defendant may be granted where the plaintiff does not offer expert evidence to support his or her allegations.

In Quebec, there is no motion for summary judgment, but motions to dismiss are available to a defendant who can show that a claim is unfounded in law, assuming that the facts alleged are true. Quebec procedure also allows the court to declare an action 'improper' and impose a sanction on the plaintiff, which may include the dismissal of his claim. Procedural impropriety may consist in a claim that is clearly unfounded, frivolous or dilatory or in conduct that is vexatious or quarrelsome.

Quebec courts are required to exercise a measure of caution before summarily dismissing a claim. In product liability cases, motions to dismiss are seldom granted. They have sometimes been granted, for example, in circumstances where the plaintiff had failed to give the defendant notice of a defect in writing prior to making any repairs to the product, as will be discussed later in this chapter.

## 6 Trials

What is the basic trial structure?

A civil trial involves:

- opening statements by the parties;
- direct examination and cross-examination of the plaintiff's witnesses;
- direct examination and cross-examination of the defendant's witnesses; and
- closing statements.

All such statements and examinations are conducted by counsel unless a party acts for itself.

The judge controls the court process and is entitled to question both witnesses and counsel. The judge can also order that witnesses be excluded from the courtroom until it is their turn to testify.

Public access to court proceedings and documents filed with the court is restricted in only very limited circumstances.

## 7 Group actions

Are there class, group or other collective action mechanisms available to product liability claimants? Can such actions be brought by representative bodies?

All Canadian jurisdictions (except Prince Edward Island and the territories) have enacted class action legislation, which provides for the global resolution of issues common to the class, with individual issues to be separately determined. A class proceeding is commenced by the proposed representative plaintiff serving its statement of claim.

To proceed with a class action in Canada, the representative plaintiff must have the proceeding certified (or, in Quebec, 'authorised') by a court. The criteria for certification in the common law provinces are:

- the pleading discloses a cause of action;
- there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- the claims or defences of the class members raise common issues;
- a class proceeding would be the preferable procedure for the resolution of the common issues; and
- there is a representative plaintiff or defendant who fairly and adequately represents the interests of the class and does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

There is no requirement that common issues predominate over individual issues in order for a class proceeding to be certified.

In Quebec, four conditions must be met for a class action to be authorised:

- the recourses of the members raise identical, similar or related questions of law or fact;
- the facts alleged seem to justify the conclusions sought;

- the composition of the group makes the application of alternate procedures for joining multiple plaintiffs difficult or impracticable; and
- the proposed class representative is in a position to represent the members adequately.

It is generally recognised that even if these four conditions are technically met, Quebec courts retain the discretion to refuse authorisation.

All provincial class action legislation, with the exception of Ontario, provide that representative bodies may bring class proceedings only if a substantial injustice would result to the class if the representative body were denied representative status. Ontario's Class Proceedings Act does not directly address the issue of class representation by a representative body, although it permits any legal person to act as class representative. In Quebec, a representative body may institute a class proceeding so long as: one of its members is a member of the class on behalf of which the organisation intends to bring a class action; and the interest of the member is linked to the objects for which the organisation has been constituted.

## 8 Timing

How long does it typically take a product liability action to get to the trial stage and what is the duration of a trial?

A product liability action will generally take at least two to three years from the service of the statement of claim to reach the trial stage. The duration of the trial will depend on the complexity of the issues and can range anywhere from several days to several months.

A product liability class action will generally take longer to reach the common issues trial. The main stages of a proposed class proceeding (leaving aside the appeals that generally characterise each stage) are:

- pre-certification motions such as jurisdiction or pleadings motions;
- the certification motion;
- notice and opt-out period;
- documentary and oral discovery;
- trial of the common issues; and
- trials of the individual issues on causation and/or damages, if necessary.

## Evidentiary issues and damages

### 9 Pre-trial discovery and disclosure

What is the nature and extent of pre-trial preservation and disclosure of documents and other evidence? Are there any avenues for pre-trial discovery?

Pre-trial discovery consists of documentary discovery and oral discovery.

Documentary discovery begins after the pleadings are completed in an action. In most provinces, the parties are required to deliver an affidavit of documents in which they list all relevant documents in their possession, power or control and to exchange all non-privileged documents. The parties must disclose the existence of documents regardless of whether they help or hurt the party's case or whether they are privileged. However, in Quebec, the parties must only disclose documents upon which they intend to rely. In some provinces, the parties must also disclose the existence of documents that were formerly in their possession with a statement of when and how they lost possession or control. Documents are defined very broadly under the rules of civil procedure and include any data recorded or stored on a computer, including e-mail.

There is an ongoing obligation of production. Therefore any documents that come into a party's possession, control or power after delivering the affidavit of documents must also be disclosed.

Oral examination for discovery involves the examination under oath of one or more representatives of each party by any party adverse in interest. The general rule in most jurisdictions is that only one representative is examined on behalf of each party. If the party being examined is not able to answer certain questions, it may give undertakings, answers to which are provided subsequently, often in writing. The rules of civil procedure of each jurisdiction also provide for disclosure of documents by, and the oral examination of, non-parties, with leave of the court.

#### 10 Evidence

How is evidence presented in the courtroom and how is the evidence cross-examined by the opposing party?

Evidence at trial is presented through the examination and cross-examination of witnesses and experts, written reports of experts and, in limited cases, through affidavit evidence with leave of the court. The parties may also read-in at trial relevant portions of the transcript of the examination for discovery of the opposing party.

In most provinces and territories, with leave of the court or consent of the parties, evidence of a witness may also be taken prior to trial and admitted at trial in lieu of calling the witness. The grounds upon which the court may make such an order include (among others) the convenience of the parties, the unavailability of the person at trial and the expense of bringing the person to trial.

#### 11 Expert evidence

May the court appoint experts? May the parties influence the appointment and may they present the evidence of experts they selected?

Though rarely exercised, the court is empowered under the rules of civil procedure, in certain provinces, by its own initiative or on motion by a party, to appoint an independent expert to inquire into and report on any question of fact or opinion relevant to an issue in the action. The expert is treated as a witness and not as an adviser to the court. The expert is required to prepare a report which is provided to all parties. Any party may examine the expert at trial. Parties' own experts are frequently presented as witnesses at trial, provided a report of the expert's opinion is delivered to the opposing party in advance of the trial. The expert must be qualified to give the opinion and can be challenged on his or her qualifications in court.

#### 12 Compensatory damages

What types of compensatory damages are available to product liability claimants and what limitations apply?

Product liability claimants who have suffered personal injury may seek compensatory damages for pecuniary and non-pecuniary losses. Pecuniary loss is any financial or material loss, past or future, whether or not precisely calculable, such as lost business profits, medical treatment expenses and repair or replacement costs. The aim of awarding pecuniary damages is to place the plaintiff back in the position he or she would have been in absent the injury.

Non-pecuniary damages are awarded in cases of personal injury to compensate for pain and suffering, loss of amenities or life and loss of expectation of life. In a trilogy of cases in 1978, the Supreme Court of Canada set strict limits on awards in respect of non-pecuniary losses. The Court capped non-pecuniary damages at C\$100,000. Adjusted for inflation, this figure today stands at approximately C\$330,000.

In limited circumstances, product liability claimants who have not suffered personal injury may recover damages for pure economic loss. Although the law is not settled, in certain cases such recovery has been available where the plaintiff incurred costs to repair a defective product and there existed a 'real and substantial' threat of danger to persons, and possibly to property, from the defect.

#### 13 Non-compensatory damages

Are punitive, exemplary, moral or other non-compensatory damages available to product liability claimants?

Punitive damages, sometimes called exemplary damages, are awarded sparingly in Canada and are treated as an exception to the rule that damages compensate the injured rather than punish the tortfeasor. Punitive damages are awarded against a defendant in exceptional cases for 'malicious, oppressive and high-handed' misconduct that 'offends the court's sense of decency'. Accordingly, punitive damages are rarely awarded in negligence cases because negligence is most often inadvertent rather than intentional or malicious.

Even where punitive damages are awarded, the quantum is modest. The record award in Canada is C\$4 million in a case where a bank conspired to commit fraud, and more recently the Supreme Court of Canada has indicated that C\$1 million is the appropriate limit for bad faith claims. There have been very few punitive damage awards in product liability cases.

An award of punitive damages in Quebec is permitted only when provided by specific legislative provisions (article 1621 Civil Code of Quebec). They are rarely applicable in product liability cases, except in consumer cases where a breach of the Consumer Protection Act is established and it is proven that the manufacturer acted with a certain degree of carelessness towards its legal obligations.

#### Litigation funding, fees and costs

#### 14 Legal aid

Is public funding such as legal aid available? If so, may potential defendants make submissions or otherwise contest the grant of such aid?

While legal aid is available in most provinces and territories, it is not generally available to litigants seeking to commence a product liability claim. In Ontario and Quebec, public funding is available to individuals seeking to commence class actions.

#### 15 Third-party litigation funding

Is third-party litigation funding permissible?

Third-party litigation funding in Canada would be subject to the common law torts of champerty and maintenance. The question of whether a funding arrangement between a plaintiff and a third party is invalid on the basis of maintenance and champerty is most likely to turn on the motive and intention of the third-party funder. Courts will not generally find a third party's financial assistance to be maintenance or champerty where the motive can be characterised as proper or legitimate. Examples of proper or legitimate motives include charity and compassion, pre-existing commercial interests and legitimate business arrangements. Recently, Ontario courts have approved third party funding in several class actions.

In Quebec, the common law concept of champerty was found to be inapplicable by the Court of Appeal. Third-party litigation funding is therefore generally permissible.

#### 16 Contingency fees

Are contingency or conditional fee arrangements permissible?

Contingency fee arrangements are permissible across Canada, subject to regulatory control. Regulation of contingency fees, which allow a client to pay fees only in the event of success, varies in each jurisdiction. In certain jurisdictions, contingency fees must be approved by the court. In Quebec, contingency fee arrangements are generally allowed, save in family law matters where they were found to be against public order.

**17 'Loser pays' rule**

Can the successful party recover its legal fees and expenses from the unsuccessful party?

In Canada, the general rule is that the unsuccessful party pays the successful party's costs. However, this does not mean that the successful party will receive complete indemnification. Typically, the courts award costs on a partial indemnity basis, which means the successful party will recover approximately 50 per cent of its legal costs. In certain instances, the court will award costs on a substantial indemnity basis, which means the successful party will recover about 75 per cent of its legal costs. Pre-trial offers to settle can also have an impact on the ability to claim costs and their quantum.

In Quebec, unless an abuse of process is established, the unsuccessful party is generally only bound to pay court costs, which include expert fees but not legal fees. Court costs also include 'judicial fees' based on a tariff, which in practice often cover only a small fraction of the winning party's legal costs.

**Sources of law****18 Product liability statutes**

Is there a statute that governs product liability litigation?

In Canada, there is no one single statute that governs product liability litigation in its entirety. Rather, product liability is addressed through several different legislative schemes. Most recently, the Canada Consumer Product Safety Act (CCPSA) was enacted in December 2010 and came into force in June 2011. The purpose of the legislation is to protect consumers from consumer products that may pose a threat to health and safety. Under the legislation, consumer products are broadly defined to include any product that could reasonably be expected to be obtained by an individual for non-commercial purposes, including components, parts, accessories and packaging.

The federal government also regulates a variety of other areas related to product liability, most notably food and drugs, cosmetics, hazardous products and motor vehicles. In addition, provincial governments regulate the area of product liability through legislation dealing with the sale of goods, product warranties, electrical safety and general consumer protection legislation. In Quebec, product liability litigation is governed by specific statutes, the most important of which is the Civil Code of Quebec. The Consumer Protection Act also provides similar protection to consumers. The main relevant protections provided by these statutes are a legal warranty of quality and a protection from safety defects.

**19 Traditional theories of liability**

What other theories of liability are available to product liability claimants?

Product liability law in Canada can be broken down into four major common law causes of action:

- negligent design;
- negligent manufacture;
- failure to warn; and
- breach of warranty.

The first three are tort-based and the fourth is contract-based.

While there are some distinctions from province to province with respect to legislation and common law doctrine, in general the common law in Canada on product liability matters is fairly uniform because tort and contract principles are subject to the authority of the Supreme Court of Canada, whose decisions are binding on all lower courts.

By their very nature, contractual claims are limited to cases where privity of contract exists between the plaintiff and the defendant. Each of the common law provinces has enacted sale of goods legislation that contain two statutorily implied warranties: that the goods

will be reasonably fit for the general purposes such goods serve; and that the product being sold is of merchantable quality. As a general rule, parties (other than in a consumer transaction) can contract out of the statutorily implied warranties of fitness for purpose and merchantability found in sale of goods legislation.

In Quebec, the vast majority of product liability claims are based on the legal warranty of quality or the legal warranty against safety defects. Claims based on specific contractual provisions are also possible but the legal warranties generally afford superior protection to the purchaser. Manufacturers and other parties in the distribution chain may not contract out of these legal warranties.

**20 Consumer legislation**

Is there a consumer protection statute that provides remedies, imposes duties or otherwise affects product liability litigants?

Federal consumer protection laws in Canada include legislation with respect to the safety of goods, labelling and misleading advertising, as well as regulation of certain products or industry sectors such as food and drugs. The newly enacted Canada Consumer Product Safety Act does not provide any private remedies for litigants.

Provincial consumer protection laws dealing with sale of goods, trade practices, general consumer protection, warranties, safety standards and licensing and regulation of businesses also affect product liability litigation. These statutes vary greatly from jurisdiction to jurisdiction.

**21 Criminal law**

Can criminal sanctions be imposed for the sale or distribution of defective products?

Under the Canada Consumer Product Safety Act, a company and its directors, officers or agents may be found guilty of a criminal offence for contravening the Act. Penalties include fines of up to \$5,000,000 and imprisonment.

In addition, certain offences under the Criminal Code of Canada could apply to corporations and their officers, directors and employees for the negligent manufacture and distribution of products in Canada. These offences include fraud and criminal negligence. The Competition Act (Canada) creates criminal offences in relation to false and misleading advertising. Furthermore, failure to comply with certain statutory and regulatory product standard requirements can result in criminal prosecution. For instance, the Hazardous Products Act (Canada), the Food and Drugs Act (Canada) and the Consumer Packaging and Labelling Act (Canada) contain detailed provisions concerning a wide range of goods and products.

**22 Novel theories**

Are any novel theories available or emerging for product liability claimants?

An emerging area of recovery for product liability claimants is restitutionary remedies such as unjust enrichment and disgorgement and recovery pursuant to the theory of 'waiver of tort', which has been advanced and certified as a common issue in almost all product liability class actions in Ontario in the past five years.

Pursuant to the equitable doctrine of 'waiver of tort', the plaintiff gives up the right to sue in tort and pursues a restitutionary claim instead, in order to recoup (or obtain disgorgement of) the profits the defendant has derived from its wrongful conduct. This means that if waiver of tort can successfully be pleaded as a cause of action in a product liability claim, proof of actual damages may not be a prerequisite to recovery if 'wrongful conduct' by the defendant can be demonstrated. This is because a restitutionary remedy is based on the defendant's gain and not on the plaintiff's loss. These remedies are based on the principle that a defendant should not be allowed to benefit from its own wrongdoing and that in certain circumstances,

the claimant should be entitled to a disgorgement of the defendant's 'ill-gotten' gains.

Although the doctrine has not been addressed at a product liability trial, and its scope is not yet fully determined, it has helped plaintiffs overcome the hurdle of certification in a number of class proceedings that may not otherwise have been certified.

### 23 Product defect

What breaches of duties or other theories can be used to establish product defect?

In addressing whether a product contains a design defect, the question is whether the design of the product poses an unreasonable risk of harm to the foreseeable user. In addition, a manufacturer will be liable for any foreseeable injuries or damage caused by an unintentional defect in the product that originated from a failure to manufacture the product in accordance with the relevant specifications.

To succeed against a manufacturer for negligent design or manufacture, the plaintiff must establish on a balance of probabilities that:

- the product contained a defect;
- the manufacturer owed a duty of care;
- the manufacturer's conduct fell below the standard of care;
- the breach caused or contributed to the plaintiff's injury; and
- the defect and injury were reasonably foreseeable outcomes of the negligence.

Plaintiffs injured by a product's defect do not need to prove exactly how the defect occurred. If it is proven the defect originated during the manufacturing process, a presumption of negligence against the manufacturer arises in the plaintiff's favour. Consequently, the manufacturer will have the evidentiary burden of disproving that it was responsible for the defect. Canadian courts have also imposed liability on manufacturers for negligence resulting from a defective inspection system or a failure to inspect.

Additionally, manufacturers have a duty to warn consumers of the dangers inherent in the use of their products of which the manufacturer has, or ought to have, knowledge (other than obvious dangers). A manufacturer has an obligation to warn of dangers that arise from negligent design or manufacture, or from using the product in certain ways. This is a continuing duty and does not cease at the time of sale.

In Quebec, product liability claims can be based either on a breach of the warranty of quality or of the legal warranty against safety defects, provided in the Civil Code of Quebec and the Consumer Protection Act.

Warranty of quality provides that the product and its accessories must be, 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 it had been aware of them.

The warranty does not protect against defects that can be perceived by a prudent and diligent buyer without expert assistance. The following four characteristics are essential to the warranty:

- the defect must be latent;
- it must be sufficiently serious;
- it must have existed at the time of the sale; and
- it must have been unknown to the buyer.

Manufacturers, distributors and suppliers are also liable for safety defects (ie, products which do not afford the safety which a person is normally entitled to expect). Safety defects can result from defective design or manufacturing, poor preservation or presentation of the product or insufficient safety precautions or warnings.

### 24 Defect standard and burden of proof

By what standards may a product be deemed defective and who bears the burden of proof? May that burden be shifted to the opposing party? What is the standard of proof?

Having established that the manufacturer owes the consumer a duty of care, the plaintiff must then establish that the manufacturer breached the requisite standard of care. The standard of care imposed upon a manufacturer under Canadian tort law is to use reasonable care in the circumstances. Thus, the issue becomes whether the nature and extent of the risk demanded greater precaution than that taken by the manufacturer. Generally, the most important consideration in assessing the standard of care in negligent design and manufacture cases is the character of the product sold and its capacity to do harm.

There is no strict liability in Canadian product liability law. With respect to certain products (for example, baby food) and consumers, however, the courts have set the requisite standard of care so high that something approaching strict liability is achieved.

In Quebec, to establish a warranty of quality claim the plaintiff has the burden of proving, on the balance of probability, that the four conditions for a latent defect existed at the time of the sale. Unless the repairs were urgent, the plaintiff must also prove that it gave notice of the defect in writing to the defendant. For manufacturers and parties to the distribution chain, a defect is presumed to have existed at the time of a sale if the product malfunctions or deteriorates prematurely in comparison with identical items of property or items of the same type. Once a breach of the warranty is established, the plaintiff must also prove causation and damages. The burden then shifts to the defendant to rebut this evidence or to prove, on the balance of probability, that the defect is due to improper use of the product by the buyer.

As to safety defects, the plaintiff bears the burden of proving that the conditions of this legal warranty are met as well as causation and damages. The burden then shifts to the defendant to contest that these conditions are met or to prove that the plaintiff knew or should have known of the defect, or that the injury was foreseeable.

### 25 Possible respondents

Who may be found liable for injuries and damages caused by defective products?

All parties in the distribution chain of a product, including a manufacturer, distributor and retailer, could potentially be liable for injuries and damages caused by a defective product, if negligence can be established. For instance, a distributor may be liable for failing to meet its duty to use reasonable care in purchasing, testing or inspecting the product where it puts into circulation a product in a dangerous condition that could or ought to have been discovered by reasonable diligence on the distributor's part. Distributors may be liable for negligent misrepresentations, recommendations or instructions where a distributor makes a claim about a product without properly testing or inspecting the product. Liability may also be imposed on distributors and vendors for a failure to warn of the dangers in a product of which it knows or ought to know.

Contractually, parties in the distribution chain may potentially be liable for injuries and damages caused by defective products if there is privity of contract with the plaintiff and such contractual liability is not expressly excluded.

In Quebec, parties in the distribution chain are by statute liable towards the purchaser as if they were the manufacturer, although each would have a recourse in warranty against its own supplier and the manufacturer.

**26 Causation**

What is the standard by which causation between defect and injury or damages must be established? Who bears the burden and may it be shifted to the opposing party?

In order to succeed, a plaintiff must demonstrate on the balance of probabilities that 'but for' the defect in the product's design, manufacture or warning, the injury would not have occurred. This is the main test for causation.

An exception to the 'but for' test has been recognised where denying liability by applying the 'but for' test would offend basic notions of fairness and justice. Recently, the Supreme Court of Canada recognised the 'material contribution' test, which is applied only in cases where the plaintiff is able to meet the following criteria: the plaintiff must be unable to prove that the defendant's negligence caused the plaintiff's injury due to factors outside of the plaintiff's control; and it is clear that the defendant breached a duty of care owed to the plaintiff, exposed the plaintiff to unreasonable risk of injury and the plaintiff suffered injury. This is a very high threshold for plaintiffs to meet.

In Quebec, the plaintiff bears the burden of proving on the balance of probabilities that the damages are the direct result of the defect.

**27 Post-sale duties**

What post-sale duties may be imposed on potentially responsible parties and how might liability be imposed upon their breach?

The duty to warn is a continuing duty that requires parties in the chain of distribution to warn consumers of dangers discovered after the product has been sold and delivered. The common law duty to warn is supplemented in most Canadian jurisdictions with statutory warning requirements. Although compliance with regulatory standards may be sufficient to insulate a company from liability in some cases, more often the courts use these standards as a guide to determine whether a manufacturer has satisfied its duty to warn. There is no duty to recall. However, various regulatory agencies may require that a recall be undertaken with respect to defective products.

**Limitations and defences****28 Limitation periods**

What are the applicable limitation periods?

Time limits for commencing a proceeding are specified in the statutes of limitation of the provinces and territories and are not uniform across Canada. The limitation periods for actions in contract and negligence generally range from two to six years, usually from the date of discovery of the cause of action. Many jurisdictions also have ultimate limitation periods which preclude litigation for most claims after a certain period of time regardless of when a cause of action is discovered. For instance, the current ultimate limitation period in Ontario is 15 years. In Quebec, the limitation period is three years from the time the buyer becomes aware of the defect.

**29 State-of-the-art and development risk defence**

Is it a defence to a product liability action that the product defect was not discoverable within the limitations of science and technology at the time of distribution? If so, who bears the burden and what is the standard of proof?

Canadian product liability law does not recognise a specific state-of-the-art and development risk defence. The courts will generally consider the state of knowledge and technology at the time the product was manufactured or distributed to assess whether a reasonable standard of care was met in the circumstances. To evaluate whether the manufacturer exercised reasonable care, some Canadian courts have adopted a 'risk-utility approach', which calls for a balancing of

the alternatives and risks faced by the manufacturer.

In Quebec, the development risk defence is recognised to some extent. There is no liability for a safety defect if the existence of the defect could not be known according to the state of knowledge at the time the product was manufactured, sold or supplied, and if the manufacturer or supplier was not negligent in its duty to provide information when it became aware of the defect. This defence would not be available against consumer claims based on the Consumer Protection Act.

There is still a debate as to whether this defence is available in cases involving only the warranty of quality.

**30 Compliance with standards or requirements**

Is it a defence that the product complied with mandatory (or voluntary) standards or requirements with respect to the alleged defect?

Compliance with government or industry standards with respect to the alleged defect will not necessarily help a manufacturer to disprove negligence, although compliance will serve as an important consideration in arriving at any determination on liability. In Canada, the civil consequences of regulatory and statutory breaches are generally subsumed in the law of negligence and are just one of the circumstances a court can consider when assessing the applicable standard of care.

**31 Other defences**

What other defences may be available to a product liability defendant?

A product liability action may be defended on the basis that:

- the defendant did not owe a duty of care;
- there was no breach of the standard of care;
- there was no causal link between the breach of the standard of care and plaintiff's injury; or
- that the injury was not a foreseeable consequence of the defendant's conduct.

Where there is an intervening act by a third party that breaks the chain of causation between the defendant's negligence and the alleged loss suffered by the plaintiff, the defendant can claim contribution and indemnity from the third party. A defendant may also seek to reduce its own liability where the plaintiff has contributed to its own damages by pleading contributory negligence or where the plaintiff has voluntarily assumed the risk of its actions.

Furthermore, with respect to failure to warn claims, the 'learned intermediary' rule provides that where a product is subject to inspection by, or its use is under the supervision of, an expert (eg, a doctor), the manufacturer can discharge its duty to warn the ultimate consumer by informing the learned intermediary.

In Quebec cases based on the warranty of quality, the defendant may also raise that the plaintiff failed to give it notice of the defect in writing prior to making any repairs to the product, thereby depriving the defendant of its right to inspect the product and do the repairs itself. Such duty may be alleviated if the plaintiff proves that the repairs were urgent but otherwise, the claim could be dismissed solely on that basis.

**32 Appeals**

What appeals are available to the unsuccessful party in the trial court?

An unsuccessful party at trial may generally appeal as of right to the court of appeal in each Canadian common law jurisdiction and from there, with leave, to the Supreme Court of Canada. In Ontario, appeals of claims of C\$50,000 or less are appealed to the divisional court, from which an appeal lies (with leave) to the court of appeal, and with leave to the Supreme Court.

**Update and trends**

The recent enactment of the Canada Consumer Product Safety Act (CCPSA) has significantly altered federal regulation of consumer product safety. Several provisions impose new obligations on suppliers of consumer products. The Act:

- prohibits the manufacturing, importing, advertising or sale of consumer products that pose an unreasonable danger to human health and safety;
- prohibits anyone from packaging or labelling a consumer product in a manner that could reasonably be expected to create an erroneous impression that it is not a danger to human health or safety;
- sets out specific requirements relating to document retention and the reporting of incidents and test results;
- empowers Health Canada to order remedial measures, including recalls, and to conduct inspections; and
- establishes increased fines and penalties, including administrative monetary penalties.

Mandatory reporting responsibilities are engaged where an incident is deemed a 'reportable incident', meaning an occurrence or defect that may reasonably be expected to result in adverse effects including serious injury or death. A recall or any other safety measure outside Canada is also considered an incident for the purposes of the Act. An initial report must be submitted to Health Canada within two days of becoming aware that an incident is reportable. In the case of manufacturers and importers, a further report must be submitted within 10 days of becoming aware that an incident is reportable. The report must contain information about the incident itself, the products

involved, identify any other products that may be involved in similar incidents and outline what measures are proposed to be taken. These reporting obligations are coupled with increased document retention and disclosure requirements. Records must be kept by manufacturers, suppliers and retailers of consumer products for at least six years. These records must include name and address information to indicate where a product was both obtained and sold for the purpose of tracking consumer products through the supply chain to facilitate effective inspections and recalls.

The regulations to the Act include specific safety and performance requirements for certain products, for example, children's sleepwear and ice hockey helmets. Consumer products that are manufactured or sold in Canada must comply with these regulations. To ensure compliance with the Act, penalties for contravention of the Act range from administrative monetary penalties to criminal sanction (which include fines or imprisonment). The CCPSA also empowers Health Canada to order remedial measures as well as inspections and product recalls. To ensure compliance with the Act, an inspection may occur at any reasonable time by a Health Canada inspector and may include examining, testing and taking samples of consumer products. The minister of health also has the authority to stop the manufacture or sale of a product and even broader authority to take measures deemed necessary to remedy non-compliance with the Act.

While the effects of the CCPSA on product liability litigation remain to be seen, there are immediate implications for manufacturers and suppliers of consumer products in Canada which include modifying existing business practices to ensure compliance with the new obligations and requirements.

In Quebec, there is an appeal as of right to the court of appeal for cases where the amount at issue is C\$70,000 or more, but leave to appeal must be obtained in other cases. The court of appeal decision may then be appealed, with leave, to the Supreme Court.

**Jurisdiction analysis**

**33 Status of product liability law and development**

Can you characterise the maturity of product liability law in terms of its legal development and utilisation to redress perceived wrongs?

Product liability law is well entrenched in Canada as a means to compensate persons who suffer loss or injury as a result of defects in the design, manufacture and distribution of products. With the

development of class action law over the past decade in Canada, many product liability claims which would not have been advanced due to the economic limitations of individual plaintiffs are now being pursued on a class basis. Consequently, product liability law is continuing to expand and develop in Canada largely in the class action context.

Recently, the role of arbitration clauses in consumer contracts has been clarified by the courts. In response to a rise in class actions, companies have sought to incorporate arbitration clauses into consumer contracts to settle disputes. Both Ontario and Quebec's Consumer Protection Act contain a provision that invalidates arbitration clauses that attempt to preclude class proceedings. However, in the absence of such legislation, arbitration clauses are prima facie enforceable.



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**34 Product liability litigation milestones and trends**

Have there been any recent noteworthy events or cases that have particularly shaped product liability law? Has there been any change in the frequency or nature of product liability cases launched in the past 12 months?

Federal regulation of consumer product safety has recently undergone significant change with the enactment of the Canada Consumer Product Safety Act (CCPSA), which came into force in June 2011. Consumers' product suppliers, including manufacturers, importers, distributors, sellers and advertisers are now subject to increased product safety obligations.

The CCPSA represents a significant shift towards heightened regulation of consumer products in Canada. The purpose of the Act is broad and aims to protect consumers from 'danger to human health or safety' which is defined to capture any 'unreasonable existing or potential hazard posed by a consumer product during or as a result of normal or foreseeable use and that may reasonably be expected to cause death or injury or have an adverse effect on health, whether immediate or chronic'.

For further detail on the new Canada Consumer Product Safety Act, see the 'Update & Trends' section.

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**35 Climate for litigation**

Please describe the level of 'consumerism' in your country and consumers' knowledge of, and propensity to use, product liability litigation to redress perceived wrongs?

Historically, there has been significantly less product liability litigation in Canada than in the United States. This is for several reasons. Firstly, there are caps in Canada on pain and suffering damages as well as on punitive damages. Secondly, jury trials are rare in Canada and juries are confined by the caps on damages, which means there are no large jury awards such as those typically awarded in the United States. Thirdly, the 'loser pays' cost regime in Canada generally inhibits commencement of spurious litigation. Fourthly, the availability of universal health care in Canada means plaintiffs do not need to sue to recover their health-care costs.



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