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Products Liability Litigation:
A Practical Checklist for Plaintiff's Counsel

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Products Liability Litigation: Recent Developments

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I. INTRODUCTION

Products liability claims can be framed in either tort or contract. Liability in a contract action can arise out of express or implied warranties made by the vendor of the product. Most Canadian jurisdictions, including Ontario, have Sale of Goods legislation which contains implied warranties. These normally refer only to the product's merchantability and its general fitness for purpose.

Contractual liability can only arise where all parties involved in the lawsuit were privy to the contract. Further, the Sale of Goods legislation often restricts the circumstances under which the implied warranties may be used to impose liability (eg. if the buyer has conducted an inspection of the product which ought to have revealed the defect).

Thus the claim most often available to a plaintiff will be based upon a cause of action sounding in tort (i.e. negligence, fraud, strict liability).

These possibilities, along with recent legislative changes (eg. the introduction of the *Class Proceedings Act, 1992*¹) and common law developments require counsel to consider a wide range of legal, strategic and tactical options at the very outset of the litigation.

¹ S.O. 1992, c.6

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In what follows, we present an outline of practical considerations which must be addressed by plaintiff's counsel.

II. PRODUCTS LIABILITY CAUSES OF ACTION

It is generally recognized that there are four ways to establish a products liability cause of action. Liability in a product case can arise out of:

- (a) statute;
- (b) defective product design;
- (c) manufacturing defect; or
- (d) failure to warn.

A. Statutory Causes of Action

Of particular importance in the common law provinces is the *Sale of Goods Act*², which establishes certain independent causes of action:

1. Fitness for Purpose

The *Sale of Goods Act* provides:

Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to its fitness for any particular purpose.³

² in Ontario, R.S.O. 1990, c. S.1

³ R.S.O. 1990 c. S.1, s.15

Case law interprets the section as covering ordinary and usual purposes of a product as well as the buyer's special purposes. The provision represents a warranty of fitness of products for their ordinary uses, even when as in the case of clothing or hot water bottles, there can reasonably be considered only one purpose for the products.^{4 5}

2. Merchantable Quality

The *Act* also provides:

Where goods are bought by description from a seller who deals in goods of that description (whether the seller is the manufacturer or not), there is an implied condition that the goods will be of merchantable quality, but if the buyer has examined the goods, there is not implied condition as regards defects that such examination ought to have revealed.⁶

The current position on "sale by description" is that the phrase includes any sale in which any description whatsoever is provided to the buyer expressly or by implication. The practical result is that virtually every sale made in the ordinary course of business will be covered.⁷

The phrase "merchantable quality" is not defined by statute. However, case law has made it clear that "saleability" is not the only test. For example, according to *Bristol Tramways*,

The phrase in s. [15.2] is, in my opinion, used as meaning that the article is of such quality and in such condition that a reasonable man acting

⁴ *Grant v. Australian Knitting Mills Ltd.* [1936] A.C. 85 (P.C.)

⁵ *Preist v. Last* [1903] 2 K.B. 148 (C.A.)

⁶ R.S.O. 1990, c. S.1, s. 15

⁷ *Leitz v. Saskatoon Drug and Stationery Co.*, [1980] 5 W.W.R. 673)

reasonably would after a full examination accept it under the circumstances of the case in performance of his offer to buy that article.⁸

Although judicial comment upon these provisions has been extensive, at a minimum it should be noted that liability for breach of these warranties is strict in that it is no defense for the seller to show that reasonable care was used or that the defect was not discoverable.⁹

A host of other statutes ought to be consulted (eg. the *Consumer Protection Act*¹⁰; the *Landlord and Tenant Act*¹¹; and *Occupiers' Liability Act*¹²; etc.). In the hands of thoughtful counsel, even statutes which do not explicitly create causes of action often mandate standards of care which can be used as the basis for establishing a common law claim. According to Fleming,

Any recovery of damages for injury due to [a violation of the statutes] must, therefore, rest on common law principles. But though the penal statute does not create civil liability the court may think it proper to adopt the legislative formulation of a specific standard in place of the unformulated standard of reasonable conduct . . .¹³

⁸ *Bristol Tramways Co. v. Fiat Motors Ltd.* [1910] 2 K.B. 831 (C.A.)

⁹ *Leitz, supra.*

¹⁰ R.S.O. 1990 c. C.31

¹¹ R.S.O. 1990 c. L.7

¹² R.S.O. 1990 c. O.2

¹³ Fleming, *The Law of Torts* (1987), quoted in *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; cf. also *Cunningham v. Moore*, [1972] 3 O.R. 369 affirmed [1973] 1 O.R. 357. In this case, the Court held that the *Act* indicated an intention to drastically change the preexisting law and thus to establish a ground for civil liability.

B. Manufacturing Defect

*Donoghue v. Stevenson*¹⁴ is the paradigm products liability case arising out of a manufacturing defect. A "manufacturing defect" occurs when the product does not comply with the manufacturer's specifications. These defects include faulty assembly, missing parts and foreign elements (e.g. a snail) in the product. In short, there is nothing defective about the design of the product; rather, a defect arises as a result of the product not being built in accordance with that design.

When an injury occurs as a result of a "manufacturing defect", common law courts have little difficulty imposing liability. The production process is presumed to be controlled by the manufacturer and the court will draw a virtually un rebuttable presumption of negligence once it has been established that the product did not comply with the manufacturer's own specifications. This *de facto* standard of strict liability is based upon the assumption that the defect must have been caused by a problem in the manufacturing process or by the negligence of an individual involved in manufacturing the product. Liability rests with the manufacturer in either case the plaintiff should not be required to show how the defect arose.¹⁵

C. Negligent Design

A claim to establish liability on the basis of a design defect will be more difficult to establish. A "design defect" arises where the product is manufactured as intended but the design itself is found to present an unreasonable risk of injury when used according to the design.

Although Ontario courts have occasionally flirted with the notion of a "strict liability"

¹⁴ [1932] A.C. 562 (H.L.)

¹⁵ *Grant, supra.* and also *McMorran v. Dominion Stores Ltd.* (1977), 14 O.R. (2d) 559.

standard in negligent design cases ¹⁶, the current consensus is that liability will not be imposed for a design defect in the absence of negligence. There is a twofold test that must be satisfied in order to establish negligent design. First, it must be shown that a design defect is in fact present and second, that the defendant had actual or constructive knowledge of that design defect.¹⁷

1. Design Defect

Two tests have been used to determine the presence of a design defect:

a. The Consumer Expectation Test

Ontario courts have often applied a test which refers to what a reasonable consumer would have expected in all of the circumstances. For example, a design defect has been defined as presenting "a serious risk and hazard to the reasonably knowledgeable and prudent consumer".¹⁸

b. The Risk Utility Test

Sometimes courts have used an analysis which would require a plaintiff to show that the design presented an excessive risk given feasibility and cost of potential alternatives. The factors which are considered using this test include the utility of the product to both the individual and the public, the probability and severity of the injury, the availability and costs of a safer design and the consumer's

¹⁶ *Biancale v. Petro-Lon Canada Ltd.*, unreported decision of the Honourable Mr. Justice Henry, (Ont. S.C.) [released March 19, 1986]

¹⁷ *Nicholson et al v. John Deere Ltd.* (1986) 34 D.L.R. (4th), affirmed 57 D.L.R. (4th) 639 Ontario C.A.

¹⁸ *Nicholson, supra.*

ability to avoid injury by careful use of the product and the manufacturer's ability to spread costs related to pursuing the potential alternatives. This risk utility analysis has been more frequently used in the United States.¹⁹

Although compliance with industry standards is often led as evidence dismissive of a negligent design claim, it is no defence to say that the product in question is as safe as others in the industry. In short, if a safer design was reasonably available, then compliance with the custom of the industry will not be a defence.²⁰

c. Time of Analysis

The general position is that whether or not a product was defectively designed is to be assessed in accordance with the standards existing at the time of manufacture ²¹, however, in certain circumstances, the date of product distribution may be relevant.²²

2. Knowledge of the Defendant

Evidence of either actual knowledge of the design defects or knowledge the manufacturer should have had under the circumstances will satisfy the second sub-test.

The evidentiary difficulties facing a plaintiff attempting to establish liability on the basis

¹⁹ *Wentway Canada Ltd. v. Laidlaw Transport Ltd. et al*, 1989 49 C.C.L.T. 150 (Ont. H.C.J.)

²⁰ *Murphy v. Atlantic Speedy Propane Limited* (1979) 35 N.S.R. (2d) 422 (T.D.).

²¹ *Wentway, supra.*

²² F.M. Waddams, *Products Liability*, Third Edition, Carswell, 1993 at page 44.

of a design defect are significant. Not only will an expert opinion be required (and the fields of expertise are narrow in products cases thus reducing the number of individuals qualified to give an opinion) but, in addition, the plaintiff's expert will need to rely upon information which is in the exclusive possession of the defendant. A full appreciation of the strength of the case will not be possible until documentary discovery has been completed. Further, it will be critical for plaintiffs' counsel to ensure that all possible sources of the defendants' documents have been revealed (i.e. not only formal research documents including clinical trials and experiments but also memos between quality assurance personnel and marketing and sales representatives, along with computer data and communications with other industry players).

D. Failure to Warn

Allegations of negligent design will generally be combined with allegations of a failure to warn and liability may be imposed for failure to warn even if not for negligent design. It may be that the manufacturer will be found liable for failing to disclose risks associated with the use of the product. In fact, there is a "continuous duty" not only to warn of risks known at the time of sale, but also risks subsequently discovered:

Once a design is found to be knowingly lacking in the area of safety or inherently dangerous for the reasonably prudent and careful consumer of a product, the burden upon the manufacturer is a heavy one ensuring that the danger is brought home to the consumer.²³

The Ontario Court of Appeal in *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*²⁴ picked up on this duty and explained its development:

The *rationale* is that one who brings himself in a relation with others through an activity which foreseeably exposes them to danger if proper care is not observed must exercise

²³ *Nicholson, supra*, at page 547.

²⁴ (1986) 54 O.R.(2d) 92 (C.A.) at 102

reasonable care to safeguard them from danger. It can now be taken as a legal truism that the duty of reasonable care which lies at the foundation of the law of negligence commonly comprehends a duty to warn of danger, the breach of which will, when it is the cause of the injury, give rise to liability

Once a duty to warn is recognised, it is manifest that the warning must be adequate. It should be communicated clearly and understandably in a manner calculated to inform the user of the nature of the risk and the extent of the danger; it should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralized or negated by collateral efforts on the part of the manufacturer. The nature and extent of any given warning will depend on what is reasonable having regard to all the facts and the circumstances relevant to the product in question.

In *Buchan v. Ortho Pharmaceutical*, the plaintiff suffered a stroke which left her partially paralysed, shortly after she started taking oral contraceptives manufactured and distributed by the defendant. The evidence established that the stroke was caused by the oral contraceptives and that the defendant was aware of the risk of stroke. The judgment for the plaintiff was affirmed.

Most recently, the Supreme Court of Canada commented upon the rationale for the manufacturers duty to warn in *Hollis v. Dow Corning Corp.*:

When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufactures concerning the dangers inherent in the use of the products, and are therefore put at risk if the product is not safe. The duty to warn serves to correct the knowledge imbalance between the manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the product.

The nature and scope of the manufacturer's duty to warn varies with the level of danger entailed by the ordinary use of the product. Where significant dangers are entailed by the ordinary use of the product, it will rarely be sufficient for manufacturers to give general warnings concerning those dangers; the warnings must be sufficiently detailed to give the consumer a full indication of each of the specific dangers arising from the use of the product.

In the above case, the plaintiff received breast implants, manufactured by the defendant corporation and implanted by a surgeon. One of the implants ruptured, requiring removal and

further surgery. The literature accompanying the product warned of rupture during surgery, but not of post-surgical except from abnormal squeezing or trauma. The plaintiff's action against the manufacturer succeeded at trial on the basis of *res ipsa loquitur*; the action against the surgeon was dismissed. The manufacturer's appeal was dismissed, but on the ground that, though not negligent in the manufacture of the product, it was liable for failure to warn, since the evidence showed that it had received reports of about 50 cases of ruptures at the time of the plaintiff's implant. The plaintiff's appeal against the surgeon was allowed and a new trial was ordered. On further appeal to the S.C.C., the court held that the manufacturer had a duty to warn the medical profession of potential dangers, including those coming to its notice after manufacture and distribution of the product.

The duty to warn arises at the moment the defendant acquires knowledge of the risks associated with the use of the product (i.e. before or after the sale).²⁵

The Ontario Court of Appeal has also suggested that the duty to warn may be extended to include an obligation to correct the problem.²⁶ The duty to recall a dangerous product has been frequently recognized in the United States.

The *Buchan* case also described three categories of warnings:

The duty to warn can best be described in relation to the thing that is being warned against, of which in product liability cases three categories exist: (1) warnings about dangers resulting from negligent design or manufacture; (2) warnings about dangers involved in using the product in certain circumstances or in certain ways, and (3) warnings about inherent, unavoidable risks to the unusually susceptible consumer ("thin-skulled") of the generally safe product.²⁷

²⁵ *Rivtow Marine Ltd.* [1974] S.C.R. 1198

²⁶ *Nicholson, supra.*

²⁷ (1984) 46 O.R. (2d) 113 (H.C.J.) at 131

The nature of the warning that is required is that it must be comprehensible to the average consumer:

The duty to warn clearly necessitates a warning comprehensible to the average consumer which conveys the nature and extent of the danger to the mind of a reasonably prudent person. The warning given here fails by any reasonable standard to adequately apprise oral contraceptive users of the nature or extent of the risks inherent in the use of the drug...

A manufacturer is not liable to a user if it gives a clear warning of, including precautions to be taken against, danger from the use of its product, and the user suffers damage by carelessly disregarding that warning and those instructions.²⁸

The "Learned Intermediary" Rule

The general rule is that the duty to warn is owed directly to the ultimate consumer. However, in exceptional circumstances, a manufacturer may satisfy this duty to the consumer by providing a warning to a "learned intermediary". In *Hollis v. Birch* the Supreme Court applied the "learned intermediary" doctrine, thus making it unnecessary for Dow Corning to directly warn the breast implant recipient. However, the Court imposed a broad duty of disclosure on the manufacturer to supply appropriate information to medical practitioners. The Supreme Court stated further that where a manufacturer fails to fulfil this duty of disclosure, the plaintiff need only satisfy the (less stringent) subjective test in demonstrating a causal link between injuries sustained in the failure to warn.²⁹

In adopting a subjective test, the Court reflected the prior reasoning of the *Buchan* Court,

²⁸ *Lem v. Barotto Sports Ltd. et al* (1976) 69 D.L.R. (3d) 276 (Alta.C.A.)

²⁹ *Hollis v. Dow Corning* (1996) 129 D.L.R.(4th) 609 (S.C.C.)

which noted that the relationship between doctor and patient (in which the objective test remains applicable to causation issues) is different from that of manufacturer and patient. Bluntly a physician's role is to protect patient's health while breast implant manufacturers exist to sell their medical products. Accordingly, there is an incentive for a manufacturer to accentuate the product's value, while de-emphasizing its risks. This aspect of the relationship, along with the resource and information advantages enjoyed by the manufacturer, were used by the Court to justify a subjective test.³⁰ The test therefore became: would Ms. Hollis herself had consented to the procedure had she been adequately warned of the risk.³¹

III. PRODUCTS LIABILITY COMBINED WITH OTHER CAUSES OF ACTION

One flourishing area of litigation involves liability for faulty medical devices. Such claims often involve alternative theories of liability due to the human element associated with the use of the device. For example, a neuroradiological catheter which ruptures intracranially during surgery seems, at first blush, to point directly at the manufacturer of the catheter. Closer scrutiny reveals not only a potential products liability claim against the manufacturer of the syringe used in the operation, but also against the medical professionals and hospital involved. Obviously, this sort of lawsuit combines actions in two of the most complex and difficult areas of the law: products liability and medical negligence.

³⁰ *Hollis v. Dow Corning* (1996) 129 D.L.R. (4th) 609 (S.C.C.) at p. 36

³¹ For an excellent discussion of the Hollis decision see "An Overview of *Hollis v. Dow Corning Corporation* - The Supreme Court of Canada Breast Implant Decision - How it has wide ranging and serious implications for the conduct of anyone who produces a potentially dangerous product for sale in Canada and the legal liability of producers if certain matters are not taken care of in advance, by Eugene Meehan.

In the United States, motor vehicle litigation sometimes includes allegations of negligence against not only the "at-fault" motorist, but also the manufacturers of safety devices, component parts, and even the vehicles themselves.

IV. CHOOSING THE RIGHT DEFENDANTS

As in any litigation, identification of proper parties is critical. Products liability lawsuits necessarily will address the varied parties who have played a role in placing the "dangerous product" into the stream of commerce. Some of these players will be necessary defendants.

Potential defendants will not be restricted to manufacturers, but will also include wholesalers and distributors. Wholesalers and distributors will ordinarily be liable only for statutory breaches (eg. *Sale of Goods Act* warranties) and causes of action rooted in a failure to properly warn.

"Learned Intermediaries" such as doctors may need to be included in cases involving medical products. Certainly, the practical experience of plaintiff's counsel is that the defendants will include medical professionals in these cases if the plaintiff does not do so. Manufacturers will defend themselves on the assertion of their right to rely upon warnings passed on by "learned intermediaries".

Other potential defendants which ought to be considered include regulatory authorities, individual employees of manufacturers or suppliers, repair persons, installers and users of products. For example, liability has been imposed on users of inflammable floor sealer and

Products liability cases often involve latent defects and ongoing harm. They are distinguishable from cases where the damage and harm are immediately obvious and known to a plaintiff. They sometimes involve concealment of relevant information by manufacturers and address substantial medical issues. For these reasons, *limitation* arguments are often subtle and complex.

VI. CHOOSING THE RIGHT PROCEDURE

We live in a mass consumer society, where large multinational corporations market their products in huge volumes across national boundaries lowered by various free trading agreements. As a result, products, accompanied by any design or manufacturing defects, tend to be distributed on a wide basis.

In any case where there are large numbers of potential plaintiffs, counsel may question the feasibility of acting on behalf of a single plaintiff.

A. Single Plaintiff

When retained on behalf of one individual, counsel may be faced with the possibility that a defendant is willing and able to defend the action utilizing every possible procedural and substantive roadblock, and every possible route of appeal, in order to prevent an adverse judgment. Furthermore, unless the particular area of litigation has already been developed, plaintiff's counsel will have to undertake the effort and expense of nurturing experts and conducting ground-breaking discovery, all of which could be crippling expensive for the client, if not for the law firm itself.

Even in cases where a solitary plaintiff has retained counsel, consideration must be given

to the possibility of group action in one form or another. Three primary strategies are available to the individual plaintiff if she finds herself in a situation where multiple claimants would be beneficial. The plaintiff herself could attempt to gather other potential claimants through support groups and friends; the plaintiff could instruct counsel to be alert for other potential claimants; or the plaintiff could instruct counsel to begin a class action.

B. Multiple Plaintiffs

Acting on behalf of a group allows counsel to analyze a variety of individual fact situations before committing to a particular course of action. Similarly, group action permits potential claimants and claimants' counsel to spread the risk of proceeding across an acceptable number of individuals. It also allows counsel to pick a "test case" from within the ranks of clients, thus presenting the best possible case early in the process and establishing a culture of plaintiff victory in the public, potential jurors, and the judiciary, not to mention the defendants themselves. Perhaps most importantly, acting on behalf of a group of claimants provides counsel, and each individual plaintiff, with a powerful negotiating tool. In fact, in situations where multi-claimant clusters are present, one risk taken by single plaintiffs is that the defendants may not be particularly interested in settling with those outside the groups.

1. Group Action

The authors are aware of numerous examples of group actions successfully being brought in products liability cases, among them cases of medically acquired HIV, asbestos claims, and silicone gel breast implant actions.

In Australia, hundreds of HIV-positive haemophiliacs and transfusion

recipients received proper compensation following huge jury verdicts in favour of a few selected plaintiffs. The law firm handling the cases was retained individually by more than five hundred infected individuals, and was able to choose the best cases from the liability and causation standpoints, while holding the vast bulk of the cases in reserve. American asbestos litigation has often proceeded along similar lines.

Acting for groups of plaintiffs can generate, at least for the plaintiffs, many of the economies of scale envisioned by the drafters of the *Class Proceedings Act, 1992*.³⁷

2. Class Action

Ontario is one of only three provinces in Canada to introduce class proceedings legislation (the others being Quebec and British Columbia). In any jurisdiction where a class action is possible, it must be considered for a number of reasons.

There were three fundamental goals behind the *Class Proceedings Act, 1992*³⁸: judicial economy; accessibility of the court system; and behaviour modification of actual or potential defendants.

While the very existence of the *Act* may serve to accomplish the third goal (behaviour modification), it is judicial economy and access to the courts that have

³⁷ S.O. 1992, c.6

³⁸ *Ibid.*

been of primary importance to this point in the history of the Act.

Certainly in this era of fiscal restraint and understaffed courthouses, lawyers, judges, and taxpayers alike have an interest in promoting litigation efficiencies.

In the products liability cases currently certified as class actions³⁹ in Ontario, the Courts have emphasised the importance of providing access to the Court system. The Courts have recognized that there are social, psychological, and economic barriers to litigation and that the *Class Proceedings Act, 1992* was designed to overcome these barriers.

The efficiencies of this procedural device can be passed on to the defendants, which ultimately benefits each individual claimant due to the greater availability of funds to pay claims.

VII. CONCLUSION

The preceding material is only an outline of the considerations plaintiff's counsel must address in a products liability claim. It is increasingly clear that products liability lawyers will need to rely on the expertise of other specialists or entertain research that is, strictly speaking, outside the realm of products liability law. For example, in the age of the global market, issues

³⁹ *Bendall and Wise v. McGhan and Dow* (1993), 14 O.R. (3d) 734 and *Gosso v. CUI Corporation* (1994) [unreported].

Nantais et al v. Telectronics Proprietary (Canada Limited) et al. (1985) not as yet reported (Div. Ct.)

of forum and *forum non conveniens* will play a role. In addition, there may be unusual problems of collection, including the cross-border enforcement of judgments, the effect of extra-jurisdictional class actions, and collections within bankruptcy proceedings.