

CLASS ACTIONS:
The Emerging Frontier of Products Liability
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Although class actions have existed in Quebec since the 1970's, they have only recently been introduced in Ontario and British Columbia, the legislation in each Province coming into force in January of 1993 and August of 1995 respectively. The remaining Provinces do not have class proceedings legislation.

The Class Proceedings legislation is procedural only. That is, it creates no new causes of action and in no way changes the underlying substantive law on which plaintiffs must rely to pursue their cases. However, class actions have now made it possible for groups of plaintiffs to pursue claims which would be not economically viable if pursued on an individual basis. This is in keeping with the Legislature's intent to increase access to the court system by lowering the economic, as well as social and psychological, barriers to litigation. The relevant corollary of course is that manufacturers would do well to recognize that they will face increased exposure to a variety of kinds of claims including small individual claims which may be brought on behalf of hundreds or thousands of potential plaintiffs.

Products Liability

There has already been a remarkable amount of class action litigation in the area of products liability. The first class action certified in the Province of Ontario involved breast implants. "Certification" essentially involves the court's granting of permission to plaintiff's counsel to pursue the case on a class basis. Other certified products liability class actions involve heart pacemakers, clothes dryers and jaw implants.

Products liability law suits are generally based on allegations of a "manufacturing defect", a "negligent design" or a "failure to warn".

A "manufacturing defect" occurs when the product does not comply with the manufacturer's specifications; such defects would include faulty assembly and missing parts, or foreign elements

in a 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 the design.

A "design defect" arises where the product is manufactured as intended, but the design itself is found to present an unreasonable risk of injury even when used exactly according to the manufacturer's specifications.

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 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 and the Courts have indicated that this continuous duty may imply an obligation to recall.

Products liability cases which are based upon allegations of negligent design or failure to warn would seem to be particularly well suited to class treatment. In order for a matter to move forward as a class action it is necessary that there be issues common to the members of the class and that a class action be the preferable procedure for resolving these common issues.

When one considers that products today are mass marketed with standard form package inserts and labelling which may contain warnings it would seem clear that the adequacy of the warnings would likely not need to be considered on an individual basis. In addition, if the plaintiff's claim is that the very design of the product itself was inappropriate, a class action would be an effective way to resolve the matter.

Benefit for Plaintiffs and Defendants Alike

The benefits of class actions for plaintiffs who may be able to recover damages without the risk, expense and inconvenience of individual trials may be obvious. However, there are also benefits for defendants. These largely centre upon the fact that class actions allow defendants to avoid repetitive court proceedings and enable them to obtain a class wide release if they negotiate a

settlement with plaintiffs class counsel that is approved by the courts or successfully show that their warnings and product design were adequate. In other words, they will only need to win the case, or resolve the lawsuit, once. In short, for manufacturers, class actions can eliminate the unpredictability associated with potential future litigation.

A National Class

Until recently classes have generally have been certified as "Provincial classes only". In other words, the Quebec, British Columbia and Ontario courts have assumed jurisdiction only over individuals resident or allegedly harmed in their respective jurisdictions. However, the Supreme Court of British Columbia in a decision released on February 14, 1997 allowed non British Columbia breast implant recipients to opt in to the already certified British Columbia class action. Non- British Columbia implant recipients who choose not to opt in to the class proceeding would continue to have their rights to pursue individual litigation in their home provinces (an Ontario Court also recently certified a National Class). This decision displays the potential for defendants to achieve not only a province-wide resolution to their litigation problems but in certain cases it may be possible to achieve a national resolution.