GLG

Global Legal Group

The International Comparative Legal Guide to:
Product Liability 2010

A practical cross-border insight into product liability work

Published by Global Legal Group, in association with CDR, with contributions from:

Advokatfirmaet Wiersholm, Mellbye & Bech AS
Allen & Overy Luxembourg
Arnold & Porter (UK) LLP
Bahas, Gramatidis & Partners
Beachcroft LLP
Borislav Boyanov & Co. LLC
Carroll, Burdick & McDonough International
Caspi & Co.
Clayton Utz
Crown Office Chambers
Davies Arnold Cooper LLP
DEDÁK & Partners
Dr. K. Chrysostomides & Co. LLC
Elegis
Engarde
Eversheds LLP
Fiebinger, Polak, Leon & Partner Rechtsanwälte GmbH
Greenberg Traurig, LLP
Herbert Smith LLP
Hogan Lovells
Kennedys
Lett Law Firm
Marval, O'Farrell & Mairal
McCague Borlack LLP
McGrigors LLP
Oppenheim
Pinheiro Neto Advogados
Roschier
Rudolph, Bernstein & Associates
Sidley Austin LLP
SyCip Salazar Hernandez & Gatmaitan
Tilleke & Gibbins
Walder Wyss & Partners Ltd.
White & Case LLP

CDR
Commercial Dispute Resolution

Chapter 17

Canada

Laurie Murphy

Mark Mason

McCague Borlack LLP

1 Liability Systems

1.1 What systems of product liability are available (i.e. liability in respect of damage to persons or property resulting from the supply of products found to be defective or faulty)? Is liability fault based, or strict, or both? Does contractual liability play any role? Can liability be imposed for breach of statutory obligations e.g. consumer fraud statutes?

Product liability law in Canada is governed by the common law in all provinces and territories except Quebec which is a civil law jurisdiction. While there are some differences in the legislation and case law across the common law jurisdictions, the law is fairly similar. The answers provided in this chapter are based on product liability law in the common law jurisdictions of Canada although some references to Quebec civil law are also included.

In Canada, product liability claims may be brought in tort or contract. Negligence is the most common tort-based remedy. In order to establish negligence, it is necessary to prove: (i) that the defendant owed a duty of care to the plaintiff; (ii) that the defendant breached the requisite standard of care; (iii) that the plaintiff sustained damages; and (iv) that the damages were caused, in fact and in law, by the defendant's breach. Claims in negligence generally involve allegations of negligent design, negligent manufacture and/or failure to warn.

There is no principle of strict liability in tort for product liability. Liability is fault-based. The standard of care placed on a defendant is to use reasonable care in the circumstances. The standard of care increases with the nature and extent of the risk and the probability of harm. In certain cases (involving products ingested or otherwise added to the body or products which pose an unreasonable danger or are dangerous in themselves), the standard of care applied is so high that it has been described as approximating strict liability.

Breach of warranty is the most common contract-based remedy. Claims for breach of contract or breach of warranty may be based on an express warranty, an implied warranty and/or a statutory warranty. Implied warranties may be founded on the common law or codified in provincial/territorial sale of goods or consumer protection legislation. The statutory implied warranties include warranties of merchantable quality and reasonable fitness. Legislation in some provinces also includes an implied warranty of durability for a reasonable time. Liability in contract for breach of the statutory implied warranties is strict. Even in the absence of privity of contract, a claim for breach of collateral warranty may be made on the basis of representations to induce a sale made by a party such as a manufacturer or distributor.

In Canada, there is no nominate tort of breach of statute and the civil consequences of breach of statute are subsumed in the law of negligence. Breach of statutory obligations may be evidence of negligence and provides a useful standard of reasonable conduct. In some instances, liability can be imposed for breach of statutory obligations where a statute specifically provides for a right of action, as is the case with some consumer protection and sale of goods statutes.

1.2 Does the state operate any schemes of compensation for particular products?

None of the provincial, territorial or federal governments offer compensation for particular products except for Quebec which has a no-fault compensation scheme for vaccine-related injuries.

1.3 Who bears responsibility for the fault/defect? The manufacturer, the importer, the distributor, the "retail" supplier or all of these?

Liability in negligence (if proven) may potentially extend to all parties who are involved in the production of the product (including designers, manufacturers, sub-manufacturers of component parts/parts suppliers, assemblers, bottlers and packagers), and all parties in the chain of distribution of the product (including importers, wholesalers, distributors and retailers), as well as parties outside the chain of distribution (including installers and repairers, inspectors, certifiers, users, occupiers as well as those who recommend a product). Manufacturers may also be liable for the negligence of parts and packaging suppliers.

Liability in contract (if breach is proven) may extend to anyone with whom the plaintiff can establish privity of contract, subject to any exclusions of liability. In some cases, a plaintiff may have a contractual remedy against the manufacturer, even in the absence of privity, on the basis of breach of a collateral warranty where the manufacturer made representations in its sales brochure to induce the plaintiff to purchase the product and those representations were inaccurate.

Liability may be excluded or transferred depending on the terms of any contractual agreements among the parties.

1.4 In what circumstances is there an obligation to recall products, and in what way may a claim for failure to recall be brought?

Subject to limited exceptions, product recalls in Canada are generally carried out on a voluntary basis (see question 8.1

regarding proposed changes). Food and agricultural products are subject to mandatory recall orders under section 19 of the *Canadian Food Inspection Agency Act* where a regulated product "poses a risk to public, animal or plant health". Regulatory agencies may also request a recall on a voluntary basis.

A common law duty to recall a product has not been recognised in Canada. However, a failure to recall may constitute a breach of the standard of reasonable care in an appropriate case and may be pleaded as an allegation of negligence together with failure to warn and failure to rectify.

1.5 Do criminal sanctions apply to the supply of defective products?

Criminal and quasi-criminal sanctions may be imposed for failure to comply with the provisions of various statutes and regulations governing product safety including the *Hazardous Products Act, Food and Drugs Act and the Motor Vehicle Safety Act*. Criminal sanctions are also possible for offences under the *Criminal Code* (including criminal negligence and fraud) and under the *Competition Act* (including false and misleading representations).

2 Causation

2.1 Who has the burden of proving fault/defect and damage?

The plaintiff has the burden of proving each of the elements of negligence on a balance of probabilities. However, the plaintiff does not have to prove causation with scientific precision; it can be inferred on the basis of common sense. While the legal or ultimate burden remains with the plaintiff, in some cases the plaintiff's evidence will justify an inference of causation in the absence of evidence to the contrary adduced by the defendant. It has been held that an inference of negligence against a manufacturer is practically irresistible where the defect arose during the manufacturing process controlled by the defendant.

2.2 What test is applied for proof of causation? Is it enough for the claimant to show that the defendant wrongly exposed the claimant to an increased risk of a type of injury known to be associated with the product, even if it cannot be proved by the claimant that the injury would not have arisen without such exposure?

The basic test for determining causation in negligence cases is the "but for" test, recently affirmed by the Supreme Court of Canada in *Resurfice Corp. v. Hanke*, [2007] 1 S.C.R. 333, 2007 SCC 7 (CanLII). The plaintiff must establish (on a balance of probabilities) that the injury would not have occurred but for the negligence of the defendant. The law has recognised exceptions to the basic "but for" test, where denying liability by applying a "but for" approach would offend basic notions of fairness and justice.

The "material contribution" test applies in special circumstances. Two requirements must be satisfied for the material contribution test to be properly applied. First, it must be impossible for the plaintiff to prove that the defendant's negligence caused the plaintiff's injury using the "but for" test due to factors outside of the plaintiff's control (for example, current limits of scientific knowledge). Second, it must be clear that the defendant breached a duty of care owed to the plaintiff, thereby exposing the plaintiff to an unreasonable risk of injury, and the plaintiff must have suffered that form of injury. One situation requiring an exception to the "but for" test is where it is impossible to say which of two tortious sources caused the injury. Another situation may be where it is impossible to prove what a particular person in the causal chain would have done had the defendant not committed a negligent act or omission.

2.3 What is the legal position if it cannot be established which of several possible producers manufactured the defective product? Does any form of market-share liability apply?

The general rule is that liability can only be found if a plaintiff establishes that a causal link exists between its damages and the defendant's wrongful conduct. Unless the burden is shifted or market share liability is found to apply, the plaintiff will not be able to meet its burden and the claim will be dismissed. While the concept of market share liability has been referred to in some Canadian cases and is provided for in some statutes, it has not been adopted in Canada.

Market share liability is permitted under Ontario's *Tobacco Damages and Health Care Costs Recovery Act, 2009*, S.O. 2009, c. 13 and similar statutes across Canada. The legislation allows the provinces to directly sue tobacco companies for past and ongoing tobacco-related health care costs and allows for apportionment of liability by market share.

2.4 Does a failure to warn give rise to liability and, if so, in what circumstances? What information, advice and warnings are taken into account: only information provided directly to the injured party, or also information supplied to an intermediary in the chain of supply between the manufacturer and consumer? Does it make any difference to the answer if the product can only be obtained through the intermediary who owes a separate obligation to assess the suitability of the product for the particular consumer, e.g. a surgeon using a temporary or permanent medical device, a doctor prescribing a medicine or a pharmacist recommending a medicine? Is there any principle of "learned intermediary" under your law pursuant to which the supply of information to the learned intermediary discharges the duty owed by the manufacturer to the ultimate consumer to make available appropriate product information?

A failure to warn may give rise to liability in tort (negligence). At common law, a manufacturer has a duty to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge. The duty to warn is owed to all those who may reasonably be affected by potentially dangerous products and is not limited to parties to the contract of sale The dangers must be reasonably foreseeable risks. There is no duty to warn about obvious dangers that would be apparent to any reasonable person. Liability in duty to warn cases may also be imposed on suppliers, distributors, vendors and retailers (among others). A duty to warn may be excluded by contract, subject to provincial consumer protection legislation.

Where a duty to warn arises, the warning must be adequate. The warning 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, the warning should be in terms commensurate with the gravity of the potential hazard, and it should not be neutralised or negated by collateral efforts on the part of the manufacturer. The nature and scope of the duty to warn varies with the level of danger entailed by the ordinary use of the product. The duty to warn is a continuing duty.

As a general rule, the duty to warn is owed directly by the

manufacturer to the ultimate consumer. However, in limited circumstances, a manufacturer may discharge its duty to warn the consumer by providing an adequate warning to a "learned intermediary". The "learned intermediary rule" is an exception to the manufacturer's duty to warn the consumer. The learned intermediary must be fully apprised of the risks associated with the use of the product and its knowledge (of the product and its risks) must approximate that of the manufacturer.

Generally, the "learned intermediary" rule applies either where a product is highly technical in nature and is intended to be used only under the supervision of experts, or where the nature of the product is such that the consumer will not realistically receive a direct warning from the manufacturer before using the product. In the first case, an intermediate inspection of the product is anticipated and in the second case, a consumer is placing primary reliance on the judgment of the intermediary and not the manufacturer.

The learned intermediary rule has been applied to prescription drugs and medical devices. However, one provincial appellate court has held, in *obiter dicta*, that the rule does not apply to oral contraceptives and that the manufacturer had a duty to warn the ultimate consumer as well as prescribing physicians.

3 Defences and Estoppel

3.1 What defences, if any, are available?

The defences that may be available to deny or reduce liability in a product liability case include: expiry of a limitation period; inability to prove any of the essential elements of the cause of action; learned intermediary rule (in duty to warn claims – see question 2.4); voluntary assumption of risk by the plaintiff; obvious and apparent danger; misuse of product; alteration of product; intervening act; intermediate examination; other contributory negligence on the part of the plaintiff and contractual limitations of liability.

3.2 Is there a state of the art/development risk defence? Is there a defence if the fault/defect in the product was not discoverable given the state of scientific and technical knowledge at the time of supply? If there is such a defence, is it for the claimant to prove that the fault/defect was discoverable or is it for the manufacturer to prove that it was not?

A "state of the art/development risk defence" has not been specifically recognised in Canadian product liability law. Generally, the court will consider evidence of the state of scientific and technical knowledge at the time a product was designed, manufactured or distributed in determining whether the defendant failed to meet a reasonable standard of care. The burden is on the plaintiff to prove these essential elements of its cause of action.

In determining whether a manufacturer's design is negligent, courts have often taken a 'risk-utility' approach (which weighs the risks of harm against the utility and costs of reducing or preventing the risk by an alternative design). One of the factors considered is the availability of a safer design that would have prevented the injury.

A state of the art/development risk defence has been recognised under Quebec civil law and is partially codified in respect of extra-contractual matters in the Civil Code of Quebec.

3.3 Is it a defence for the manufacturer to show that he complied with regulatory and/or statutory requirements relating to the development, manufacture, licensing, marketing and supply of the product?

Compliance with regulatory and/or statutory requirements is not a defence however such compliance may be used as evidence of a reasonable standard of care. In *Canada v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, 1983 CanLII 21 (S.C.C.), the Supreme Court of Canada held that the statutory formulation of the duty may afford a specific and useful standard of reasonable conduct.

3.4 Can claimants re-litigate issues of fault, defect or the capability of a product to cause a certain type of damage, provided they arise in separate proceedings brought by a different claimant, or does some form of issue estoppel prevent this?

Generally, the doctrine of issue estoppel prevents a party from relitigating an issue that has been clearly decided in a previous proceeding between the same parties or their privies. Different claimants can generally relitigate issues of fault, defect or the capability of a product to cause a certain type of damage in separate proceedings. Issue estoppel would generally not apply because the proceedings do not involve the same parties. However, a claimant may be prevented from relitigating an issue decided in a previous proceeding not involving the same parties on the grounds of the doctrine of abuse of process by relitigation. This doctrine has been applied to prevent relitigation in circumstances where the strict requirements for issue estoppel (such as mutuality of parties) are not met but where allowing litigation to proceed would violate principles of judicial economy, consistency, finality and the integrity of the administration of justice. Both issue estoppel and abuse of process by relitigation require that the same issue/same question be raised in both proceedings (which is arguably not the case with a similar but not the *very* same product). Where neither of these doctrines is available, the determination of a similar issue in the first proceeding may have persuasive value.

3.5 Can defendants claim that the fault/defect was due to the actions of a third party and seek a contribution or indemnity towards any damages payable to the claimant, either in the same proceedings or in subsequent proceedings? If it is possible to bring subsequent proceedings is there a time limit on commencing such proceedings?

Apportionment legislation in the common law provinces and territories generally provides that where damages have been caused or contributed to by the fault or neglect of two or more persons, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent. The legislation also provides that where any other tortfeasor is, or would if sued have been, liable for the damage suffered by the plaintiff, a defendant may claim contribution or indemnity from that other tortfeasor. A claim for contribution and indemnity can be made in the same proceeding (by way of a crossclaim against a co-defendant or third party claim) or in a subsequent proceeding (in a separate action).

There is a time limit for such claims. For example, in Ontario the subsequent claim must be brought within two years from the day on which the first tortfeasor was served with the claim in respect of which contribution and indemnity is sought.

3.6 Can defendants allege that the claimant's actions caused or contributed towards the damage?

Apportionment legislation in the common law provinces and territories generally provides that if fault or negligence is found on the part of the plaintiff that contributed to the damages, the damages shall be apportioned in proportion to the degree of fault or negligence found against the parties. Typically, apportionment legislation also includes a provision that if it is not possible to determine the respective degree of fault or negligence as between the parties then they will be deemed to be equally at fault or negligent.

4 Procedure

4.1 In the case of court proceedings is the trial by a judge or a jury?

There is no constitutional right to a jury trial in civil proceedings. The availability of a civil jury trial is set out in each jurisdiction's statute governing court proceedings and rules of practice. Generally, a party may request a jury trial in most types of actions. However, there are varying statutory exceptions which provide that certain actions may not be tried by a jury (including claims for equitable relief) and that the court may order that all or part of an action be tried without a jury. In practice, civil proceedings are more often tried by a judge than a jury. There is no right to a jury trial in federal court matters or in Quebec.

4.2 Does the court have power to appoint technical specialists to sit with the judge and assess the evidence presented by the parties (i.e. expert assessors)?

Most Canadian jurisdictions permit the use of court-appointed experts (however, in practice the court's power is rarely exercised). The rules of practice in these jurisdictions generally provide that a judge, on motion by a party or on his or her own initiative, may appoint independent experts to inquire into and report on any question of fact or opinion relevant to an issue in the action. The expert's report is provided to every party and the expert may be cross-examined at trial. The role of the court-appointed expert is that of a witness as opposed to an advisor to the court.

4.3 Is there a specific group or class action procedure for multiple claims? If so, please outline this. Is the procedure 'opt-in' or 'opt-out'? Who can bring such claims e.g. individuals and/or groups? Are such claims commonly brought?

Most Canadian jurisdictions have enacted class proceedings legislation which sets out the procedural requirements for class actions. One or more representative plaintiffs may commence a proceeding under the legislation on behalf of the members of a proposed class. The representative plaintiff must then bring a motion to certify the proceeding as a class proceeding. The class proceedings legislation in the common law provinces generally provides the following requirements for certification: (a) the pleadings disclose a cause of action; (b) there is an identifiable class of at least two people that would be represented by the representative plaintiff; (c) the claims of the class members raise common issues; (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and (e) there is a representative plaintiff who would fairly and adequately represent the interests of the class, has produced a workable plan and does not have a conflict of interest with other class members on the common issues.

If an action is certified as a class proceeding, the common issues will be determined at a "common issues" trial followed by a determination of the individual issues. The certification order will set out the manner in which class members may opt out of the class proceeding and a date after which class members may not opt out. A judgment on common issues will bind all class members who do not opt out of the proceeding.

Class actions are common and are expected to become more prevalent.

4.4 Can claims be brought by a representative body on behalf of a number of claimants e.g. by a consumer association?

The rules of practice in each jurisdiction govern the availability of representation orders. Generally, a judge may, in a proper case, appoint one or more persons to represent any person or class of persons who are unborn or unascertained or who may have an interest in or may be affected by the proceeding and who cannot be readily ascertained, found or served. An association which is a corporation/natural person may be appointed as a representative plaintiff on behalf of its members.

4.5 How long does it normally take to get to trial?

The length of time required for an action to reach trial varies by jurisdiction and depends on the number of parties involved, the complexity of the matter and the number of interlocutory steps undertaken. On average, civil actions take three to four years from issuance of proceedings until trial. Class actions will generally take longer to reach the trial stage.

4.6 Can the court try preliminary issues, the result of which determine whether the remainder of the trial should proceed? If it can, do such issues relate only to matters of law or can they relate to issues of fact as well, and if there is trial by jury, by whom are preliminary issues decided?

The rules of civil practice in each of the provinces and territories generally provide for the bringing of motions to determine issues of law which may dispose of all or part of the proceedings before trial. A party may make a motion to the court for summary judgment on the basis that there is no genuine issue requiring a trial with respect to a claim or defence. A party may also bring a motion for the determination, before trial, of a question of law raised by a pleading or to strike out a pleading on the ground that it discloses no reasonable cause of action or defence. A defendant may move to have an action stayed or dismissed on grounds of lack of jurisdiction, lack of legal capacity, another pending proceeding or the action is frivolous, vexatious or an abuse of process. A party may also, on a motion, state a question of law in the form of a special case for the opinion of the court based on an agreed statement of the material facts and the relief sought. In actions where trial will be by jury, these pre-trial motions will generally be decided by any judge (or other judicial officer with jurisdiction) in advance of the trial or by the trial judge if returnable at the commencement of trial.

4.7 What appeal options are available?

Appellate remedies are set out in each jurisdiction's statute governing court proceedings. Appeals from final orders of judges of the provincial and territorial superior courts generally lie to the courts of appeal in each province and territory without leave to appeal. Appeals from the provincial and territorial courts of appeal lie, with leave, to the Supreme Court of Canada, Canada's final court of appeal.

4.8 Does the court appoint experts to assist it in considering technical issues and, if not, may the parties present expert evidence? Are there any restrictions on the nature or extent of that evidence?

It is rare for the court to appoint its own expert (see question 4.2 above) because the parties will usually retain their own experts to testify. The rules of practice and evidence acts in each jurisdiction as well as the common law of evidence govern the admissibility of expert evidence. The preconditions to calling an expert generally include service of an expert report in compliance with the content requirements and the time limits set out in the rules. A proposed expert must be qualified to give the expert opinion evidence in question and the proposed expert evidence must be relevant to some issue in the case and necessary to assist the trier of fact. The number of expert witnesses called by each party may also be limited unless leave is obtained.

Some jurisdictions have recently amended or will be amending their rules of practice to expressly set out the duty of an expert and to require an acknowledgement of the expert's duty in the expert's signed report. These amendments generally state that the duty of an expert is to provide objective opinion evidence related only to matters within its area of expertise and to provide additional assistance as the court requires and that this duty to the court prevails over any obligation to the party.

4.9 Are factual or expert witnesses required to present themselves for pre-trial deposition and are witness statements/expert reports exchanged prior to trial?

Subject to limited exceptions, factual or expert witnesses are not required to present themselves for examination before trial. The rules of practice generally permit the examination for discovery of non-parties (other than expert witnesses) where there is reason to believe they have information relevant to a material issue in the action, with leave (granted only in exceptional circumstances). The rules of practice also generally permit the taking of evidence of a person (including expert witnesses) before trial for use at the trial in lieu of calling the witness at trial, with leave of the court or on consent. In addition, factual or expert witnesses who provide evidence by way of affidavit on an interlocutory motion may be cross-examined on the affidavit.

The rules of practice generally provide that parties are required to exchange expert reports prior to trial. While witness statements are usually considered privileged and not producible, the rules of practice generally require disclosure of the names, addresses and relevant information of potential witnesses before trial.

4.10 What obligations to disclose documentary evidence arise either before court proceedings are commenced or as part of the pre-trial procedures?

Pre-action discovery, also referred to as a "*Norwich* order", may be ordered against a person in order to identify a wrongdoer and to obtain information about wrongdoing so that the applicant may bring an action. While the rules of practice in some Canadian jurisdictions permit pre-action discovery, most provinces rely on the court's equitable jurisdiction and power to grant an interlocutory injunction or make a mandatory order. It is an extraordinary and exceptional order and is rarely made.

The requirements for disclosure of documents are set out in the rules of practice of each jurisdiction. In most jurisdictions, parties are required to disclose all relevant documents that are or have been in their possession, power or control and must also disclose the existence of privileged documents and the grounds for which privilege is claimed. Documentary disclosure is made in the form of an affidavit of documents which must usually be served within a prescribed time following the close of pleadings or as agreed between the parties. Parties are required to produce all relevant non-privileged documents. In addition, parties have a continuing obligation to disclose requiring a supplemental affidavit of documents if additional documents are subsequently discovered or acquired. In Quebec, parties are only required to produce documents upon which they intend to rely at trial.

The rules of practice also generally provide for production for inspection of a non-privileged document from a non-party in exceptional circumstances where the court is satisfied that the document is relevant to a material issue in the action and it would be unfair to require the moving party to proceed to trial without the document.

4.11 Are alternative methods of dispute resolution available e.g. mediation, arbitration?

Mediation and arbitration are two of the more common dispute resolution techniques. In addition to voluntary mediation, mandatory mediation has been incorporated into the rules of practice of many provinces. Parties may include mandatory arbitration clauses in their contracts or may agree to submit to arbitration after disputes arise. Arbitrations are governed by provincial/territorial arbitration legislation and may be subject to consumer protection legislation prohibiting mandatory arbitration clauses in consumer agreements.

5 Time Limits

5.1 Are there any time limits on bringing or issuing proceedings?

Yes, see question 5.2 below.

5.2 If so, please explain what these are. Do they vary depending on whether the liability is fault based or strict? Does the age or condition of the claimant affect the calculation of any time limits and does the Court have a discretion to disapply time limits?

The time limits for commencing proceedings are set out in the general limitation statutes as well as other specific statutes of each jurisdiction. These time limits are not identical across Canada. The limitation periods for contract and tort actions generally range from two to six years from the day the claim was discovered. Many of the limitation statutes contain ultimate limitation periods after which no proceedings may be commenced even if the claim has not been discovered (subject to certain exceptions). In Ontario, the ultimate limitation period is 15 years.

The running of a limitation period is generally suspended while a

person is a minor or is incapable of commencing a proceeding due to a physical, mental or psychological condition (and the minor or incapable person is not represented by a litigation guardian). The court's discretion to extend the time for commencing an action will be dependant on the wording of the limitation statute and how it has been interpreted in the case law as well as the extension, suspension or other variation permitted by or under another statute in individual jurisdictions.

5.3 To what extent, if at all, do issues of concealment or fraud affect the running of any time limit?

Generally, issues of concealment or fraud will affect the running of any time limit by postponing the limitation period until the claim was discovered, i.e. until the person knew or ought to have known of the fraud, the defendant's identity and that a proceeding would be an appropriate remedy.

6 Remedies

6.1 What remedies are available e.g. monetary compensation, injunctive/declaratory relief?

The primary remedy in product liability cases is monetary compensation (damages). Injunctive/declaratory relief may be a potential remedy.

6.2 What types of damage are recoverable e.g. damage to the product itself, bodily injury, mental damage, damage to property?

In tort, damages are recoverable for personal injury and property damage caused by the defect (other than damage to the product itself except in limited circumstances raised below).

In personal injury cases, plaintiffs can recover non-pecuniary (general) damages - including pain and suffering, loss of amenities of life, loss of life expectancy and psychiatric illness - and for pecuniary (special) damages - including loss of income, loss of earning capacity, business profits and medical expenses. An upper limit for non-pecuniary damages has been set by the Supreme Court of Canada and indexed for inflation is currently approximately $324,000. Punitive damages are also recoverable (see question 6.4 below). In addition, depending on the jurisdiction, certain family members of persons injured or killed may be able to recover damages resulting from injury or death including damages for loss of guidance, care and companionship.

Damages for economic loss, including damages to the product itself, may be recoverable where the plaintiff has suffered, or there is a foreseeable risk or threat that the plaintiff will suffer, injury or property damage caused by a defective product. Damages for psychiatric injury are recoverable if it was reasonably foreseeable that a person of ordinary fortitude would suffer serious injury as a result of the defendant's negligence.

6.3 Can damages be recovered in respect of the cost of medical monitoring (e.g. covering the cost of investigations or tests) in circumstances where the product has not yet malfunctioned and caused injury, but it may do so in future?

The recoverability of medical monitoring costs has not been resolved in Canada. However, Canadian courts have certified class actions in which representative plaintiffs have claimed damages for the cost of medical monitoring indicating that the issue is arguable and should not be excluded at the certification stage.

6.4 Are punitive damages recoverable? If so, are there any restrictions?

Punitive damages are recoverable in product liability cases. However, they are awarded only in exceptional cases where the defendant's conduct is so malicious, oppressive and high-handed that it offends the court's sense of decency. Punitive damage awards are rare and there have been very few awards in product liability cases.

6.5 Is there a maximum limit on the damages recoverable from one manufacturer e.g. for a series of claims arising from one incident or accident?

There is no maximum limit on the damages recoverable from one manufacturer (subject to the limit on non-pecuniary damages in personal injury cases discussed at question 6.2 above).

6.6 Do special rules apply to the settlement of claims/proceedings e.g. is court approval required for the settlement of group/class actions, or claims by infants, or otherwise?

Court approval is required for the settlement of a class action. The court must be satisfied that in all the circumstances the settlement is fair, reasonable and in the best interests of the class as a whole.

Court approval is also required for the settlement of a claim made by or against a person under disability (defined as a person who is a minor, mentally incapable or an absentee). The court's duty is to protect the party under disability and to ensure that the settlement is in the best interests of that party. Approval is usually required whether or not a proceeding has been commenced in respect of the claim. All settlement funds must generally be paid into court unless a judge orders otherwise.

6.7 Can Government authorities concerned with health and social security matters claim from any damages awarded or settlements paid to the Claimant without admission of liability reimbursement of treatment costs, unemployment benefits or other costs paid by the authorities to the Claimant in respect of the injury allegedly caused by the product. If so, who has responsibility for the repayment of such sums?

Generally, government authorities can seek recovery of amounts paid to an injured person from the tortfeasor/responsible party where there is a statutory and/or contractual right of subrogation. Alternatively, they may seek recovery of such amounts directly from the injured person where there is a statutory or contractual obligation to repay or an assignment. In some instances, there is also a statutory obligation on the responsible party (where it has reason to believe that benefits have been paid) to ascertain whether an amount would be repayable by the claimant under its statutory obligation and to deduct the amount from the tort award/settlement and remit it to the authority. Some examples follow.

The provincial and territorial health insurance legislation across Canada generally provides their respective health insurers with a right of subrogation to recover costs of past and future health care services provided to an injured person as a result of a tortfeasor's

negligence or other wrongful conduct. An injured person who commences an action to recover for loss or damages against the tortfeasor is obligated to include a subrogated claim on behalf of the provincial or territorial health insurer for the cost of the health care services. No release or settlement of a claim for damages for personal injuries in a case where the injured person has received health care services is binding on the provincial and territorial health insurers unless approved. The tortfeasor(s)/defendant(s) (or their liability insurers) in the action are responsible for the payment of the subrogated claim as awarded or as negotiated in a settlement.

Similarly, if an employee has suffered an injury in the course of employment and receives compensation benefits under provincial or federal workers compensation statutes, all rights to recover such benefits from the responsible party or parties are transferred to the government agency which paid the benefits.

Employment insurance legislation requires repayment of any benefits by a plaintiff in the event that monies are recovered in a judgment for loss of income during the same period and also requires the responsible party to deduct and remit such amount to the government authority where it has reason to believe that benefits have been paid.

In Ontario, disability support legislation provides for a statutory right of subrogation (which is not generally exercised) and requires as a condition of eligibility for income support, an agreement to reimburse and, in many cases, an assignment.

7 Costs / Funding

7.1 Can the successful party recover: (a) court fees or other incidental expenses; (b) their own legal costs of bringing the proceedings, from the losing party?

Subject to some exceptions, costs are at the discretion of the court and a number of factors may be considered in addition to the result in the proceeding. The general rule is that the loser pays the successful party's costs (usually only a portion of its actual costs). In Ontario, costs are generally payable on two scales. In most cases, costs are awarded on a lower partial indemnity scale which usually amounts to approximately 60% of actual costs (subject to the overriding principle that costs must be fair and reasonable). In certain circumstances, costs are awarded on a higher substantial indemnity basis which is 1.5 times what would otherwise be awarded on a partial indemnity scale. Disbursements are generally recoverable in accordance with a tariff and include additional disbursements "reasonably necessary for the conduct of the proceeding" provided they are not excessive and have been charged to the client.

7.2 Is public funding e.g. legal aid, available?

Legal aid programmes are available in all provinces and territories. See question 7.3 below.

7.3 If so, are there any restrictions on the availability of public funding?

Availability of legal aid is based on financial eligibility criteria and case type/coverage restrictions and varies by jurisdiction. Legal aid is not generally available for civil cases. Partial funding for class actions may be available in some provinces.

7.4 Is funding allowed through conditional or contingency fees and, if so, on what conditions?

Contingency fee arrangements are generally permitted in Canada. They are subject to regulatory provisions which vary by jurisdiction and may require court approval.

7.5 Is third party funding of claims permitted and, if so, on what basis may funding be provided?

Third party funding agreements are novel in Canada. Such agreements raise issues of maintenance and champerty, which are generally prohibited, and may violate public policy. Maintenance is the giving of assistance or encouragement to a litigant by a third party with an improper motive. Champerty is an agreement between the third party and a litigant whereby the third party advances or funds the litigation in exchange for a portion of the litigation proceeds. A champertous agreement involves an improper motive and the possibility of gain following the disposition of the litigation. The question of whether a particular agreement is champertous will depend on the application of the elements of champerty to the circumstances of each case. A court will look at the conduct of the parties involved and the propriety of the motive of an alleged champertor.

8 Updates

8.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Product Liability Law in Canada.

The Canada Consumer Product Safety Act is proposed federal legislation that will modernise the regulatory regime for consumer products in Canada. The purpose of the legislation is to "protect the public by addressing or preventing dangers to human health and safety" posed by consumer products. Some of the significant new powers given to regulators include mandatory recalls, inspection, right to enter premises, seizure and increased fines and penalties. Other key features of the proposed legislation include mandatory reporting of certain "incidents" and increased record keeping requirements on the part of manufacturers, importers and sellers. The proposed legislation had previously been introduced in Parliament in January 2009 and began making its way through the legislative process but died on the Order Paper in December 2009 when Parliament was prorogued. It reintroduction into Parliament is expected anytime.

An emerging issue in Canadian product liability law is the availability of waiver of tort as a cause of action or restitutionary remedy. In a claim based on waiver of tort, a plaintiff gives up the right to sue in tort but seeks to recover on the basis of restitution claiming the defendant's gains from the wrongful conduct. Waiver of tort has been certified as a common issue in class proceedings however it has not been fully considered at trial.

Another emerging issue is the tort of spoliation. Historically, Canadian courts have ruled that spoliation could not form the basis of an independent tort but gave rise only to an evidentiary inference and other procedural remedies against the spoliator. Several recent rulings from lower courts have suggested that spoliation could form an independent cause of action where a plaintiff is unable to prove other torts as a result of the defendant's intentional destruction of evidence. To date, no court in Canada has had the opportunity of providing a definitive ruling regarding what circumstances, if any, would give rise to spoliation as an independent tort.

Acknowledgment

This chapter was prepared with the assistance of Gosia Bawolska (Associate and Member of McCague Borlack LLP's Product Liability practice group), Lisa Chuyow and Erin Atkinson (Articling Students).

Laurie Murphy

McCague Borlack LLP
Suite 2700, 130 King Street West
Toronto, Ontario
Canada M5X 1C7

Tel: *+1 416 860 8390*
Fax: *+1 416 860 0003*
Email: *lkmurphy@mccagueborlack.com*
URL: *www.mccagueborlack.com*

Laurie Murphy's practice includes conducting legal research, drafting facta and legal opinions, and advising on other research projects dealing with a range of issues in civil litigation. Prior to devoting her practice solely to research and writing, Ms. Murphy practiced civil litigation with an emphasis on insurance and commercial litigation. Her practice included matters involving municipal liability, occupiers' liability, product liability, professional negligence, motor vehicle insurance, libel and slander, property insurance, civil sexual abuse claims and class actions.

Ms. Murphy received both a Bachelor of Arts (1989) and a Bachelor of Laws (1992) from the University of Toronto.

She has co-authored numerous articles on various legal topics and has presented seminars on legal research.

Ms Murphy was called to the Ontario Bar in 1994, and is a member of the Canadian Bar Association and The Advocates' Society.

Mark Mason

McCague Borlack LLP
Suite 2700, 130 King Street West
Toronto, Ontario
Canada M5X 1C7

Tel: *+1 416 860 1029*
Fax: *+1 416 860 0003*
Email: *mmason@mccagueborlack.com*
URL: *www.mccagueborlack.com*

Mark Mason is a Partner and Head of McCague Borlack LLP's Subrogation and Product Liability practice groups. He represents clients throughout North America on a wide range of subrogation and product liability cases. He has trial, appellate, arbitration, and mediation experience, and he has acted as counsel in matters before all levels of court in Ontario, the Supreme Court of Canada, and various administrative bodies and regulatory tribunals.

Mr. Mason is a member of the Law Society of Upper Canada, the Ontario and Canadian Bar Associations, the Advocates' Society and the National Association of Subrogation Professionals. He has written widely on subrogation and product liability issues including co-authoring a chapter on product recall in Canada in an international text on product recall.

McCague Borlack LLP
Barristers & Solicitors

McCague Borlack LLP is the largest insurance law firm in Canada. Since its inception in 1994, it has grown such that it now offers its clients a broad base of legal services. The firm's product liability practice group is one of the most recognisable of its kind, offering unparalleled expertise in this area. Its lawyers regularly represent clients at all levels of the Canadian courts, as well as at mediation and arbitration. McCague Borlack LLP has the depth of experience necessary to assist its clients in obtaining the most successful outcomes possible. McCague Borlack LLP is the founding member of the Canadian Litigation Counsel ("CLC"), a nationwide association of independent law firms whose purpose is to provide litigation services throughout Canada.

Please contact Mark Mason for product liability enquiries.