

PRODUCT LIABILITY LAW IN CANADA

In the Canadian federal state system, product liability law generally falls within the jurisdiction of the provinces, although there are areas of overlap. The common law provinces (nine of the ten Canadian provinces) are predominantly similar in regard to this area of the law, and with respect to the one civil law province (Quebec), there are similarities in legal substance, although different routes are taken to accomplish these goals. This paper will focus on the law in the common law province of Ontario as the legal example. In Ontario there are three main legal foundations that create obligations of product liability: statutory law, contract law, and tort law.

STATUTORY LEGAL OBLIGATION

In Ontario, the three primary statutes governing product liability are the *International Sale of Goods Act*, the *Sale of Goods Act* and the *Consumer Protection Act*. However, there are also numerous product and market-specific provisions in a wide variety of additional statutes and legal counsel should be sought to ensure compliance with all applicable statutes. This is particularly important for high-risk market areas, such as healthcare. The statutes establish a variety of warranties that are implied into relationships, even if they are not formally set out in the contract between the parties. Although the wording of the statutes differs, there is a general principle that runs through them that the seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. The goods must be fit for their ordinary use or for any particular purpose that has been made known to the supplier. Significantly, both the *International Sale of Goods Act* and the *Sale of Goods Act* allow contracting parties to expressly exclude the application

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of the implied warranties. However, for consumer goods, the *Consumer Protection Act* specifically prohibits the exclusion of the mandatory warranties imposed by this Act.

Consumer goods is one area of major overlap between the federal and provincial jurisdictions. Of particular note is the recently enacted *Canada Consumer Product Safety Act* which has created a detailed legislative framework of liability and reporting obligations. This Act and the area of consumer product liability is elaborate and specialized and will therefore be excluded from this overview of Canadian product liability law.

CONTRACTUAL LIABILITY

Contractual liability is established pursuant to the agreement between the parties. For liability to arise, the product must be defective within the meaning of the express or implied warranties established by the agreement and that defect must have caused the injuries or damages that are claimed. An important facet in the preparation of the commercial contract is to ensure that the manufacturer's warranties and limitations on liability clauses are reflected in the contracts that flow up the supply chain to the final vendor.

TORT LIABILITY

Tort liability is based on the common law duty imposed upon those that bring products into the marketplace to take reasonable care in the circumstances of that supply. The standard of care will depend upon the product in issue, the foreseeable risks, and where the party is in the distribution chain. The courts have found that manufacturers possess the most knowledge about a product and have the duty to make the end users aware of the potential risks reasonably associated with the product, particularly where the product has an inherent danger. Ontario does not maintain a strict liability regime for its tort law and the onus remains on the claimant to prove the defect as well as to prove the causation and quantum of damages.

DAMAGES—Canada is not the United States

In regard to damages, claimants are entitled to seek compensation for both pecuniary loss (*eg.* cost of treatment / remediation or loss of income / profit) and non-pecuniary loss (*eg.* compensation for pain and suffering). There is also the possibility in certain circumstances to claim punitive and exemplary damages. However, for both punitive and exemplary damages, as well as compensation for pain and suffering, the Ontario court decisions have demonstrated that while such damages may be available, the quantum of damages is far more limited than those experienced in the United States. In particular, the courts have ruled that punitive and exemplary damages should only be considered where there has been proof of malicious, reckless or high-handed acts resulting in the loss, not in situations of mere negligence. Furthermore, while it may be possible to have a jury trial for a product liability case in Ontario, it is not the standard practice that it is in the United States.

DEFENCES

Ontario law recognizes numerous defences in the area of product liability. The main line of defence remains that of the factual dispute requiring that the claimant must prove the defect as well as the loss arising from the defect. There are also a wide variety of other defences that may arise, such as voluntary assumption of risk and contributory negligence. In addition, the statute of limitations provides a defence against claims that are not pursued within two years from the date the plaintiff discovers, or ought to have reasonably discovered, the facts that establish the claim.

INSURANCE

As a final note, most manufacturers find product liability insurance to be an essential requirement, but it is important that the insurance be properly tailored to minimize any liability gaps. Most product liability policies provide for substantial exclusions for things such as contractual liability exposure, but there may also be territorial and jurisdictional limitations that need to be reviewed.

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