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Product Liability in Canada: Principles and Practice North of the Border

David S. Morritt

Sonia L. Bjorkquist

PRODUCT LIABILITY IN CANADA: PRINCIPLES AND PRACTICE NORTH OF THE BORDER

DAVID S. MORRITT†
SONIA L. BJORKQUIST††

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† David S. Morritt, LL.B., B.C.L. (Oxon.), of the Ontario Bar, is a former law clerk to the Honourable Mr. Justice Estey of the Supreme Court of Canada, and is currently a partner with Osler, Hoskin & Harcourt LLP in Toronto and Chair of the firm's Product Liability Group.

†† Sonia L. Bjorkquist, B.A. (Honours), LL.B., of the Ontario Bar, is a former law clerk at the Court of Appeal for Ontario and is currently an associate with Osler, Hoskin & Harcourt LLP in Toronto.

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I. INTRODUCTION

In Canada, as in the United States and other jurisdictions, product liability law has developed to promote product safety and provide compensation in appropriate cases to parties suffering injury or loss from the use of a product. The principles applied in Canada to achieve these objectives are flexible, and they have evolved in an effort to balance the interests of those who manufacture and sell products with the need for due protection of those who use them.

On a broader scale, product liability law seeks to enhance the benefits accruing to society from product development, manufacture, sale and use by creating incentives to produce products free of defects and with appropriate warnings concerning any dangers associated with the reasonable use of the product. The risk of liability for those placing products on the market in Canada has increased with the complexity and availability of products, broader government regulations and legislative intervention, newer procedures such as class actions, and increased judicial activism in spreading risks away from individual product users.[1] HIV-infected donated blood, breast implants, all-terrain vehicles, toy crossbows, fireproofing products and cigarettes are some of the many products that have come under judicial scrutiny in recent litigation in Canada.

Although Canada and the United States share some features and approaches in common, there are important differences in the ways in which product liability claims are handled in the two countries. These include the general rejection in Canada of strict liability standards, litigation procedures that have only recently evolved to permit class actions and which effectively confine the discovery process, the very rare use of juries, and low judicially-imposed limits on the amounts that can be awarded for general damages and punitive damages. Our objective in this paper is to canvass some of the more important aspects of product liability law and factors af-

1. *E.g.*, *Pittman Estate* v. *Bain* (1994), 112 D.L.R. (4th) 257 (Ont. Gen. Div.).

fecting product liability litigation to describe where we are currently in Canada and where we seem to be headed. We will attempt to do this in a way which allows comparison between the law and procedures as they have evolved in Canada and the United States.

II. THE CANADIAN LEGAL SYSTEM

Under the Canadian Constitution, legislative jurisdiction over property and civil rights is granted to the Provincial Legislatures and not the Parliament of Canada. As a result, product liability legislation in Canada is largely the responsibility of the provinces.[2] Individual provinces have inevitably adopted slightly different provisions in their sale of goods legislation and consumer protection statutes,[3] leading in turn to subtle differences in case law at the trial level and the courts of appeal in the various provinces as these statutes come to be interpreted.

The Supreme Court of Canada is the final appeal court in the country, hearing cases of national importance or those involving significant public issues for which leave to appeal has been granted. Through the selection of appropriate cases, the Supreme Court establishes the general trends and principles of the common law, which in turn guide the development of products liability jurisprudence in the provinces. As in Australia, but unlike in the United States, the structure of the Canadian appellate system effectively produces a uniform common law throughout the country.[4]

The Supreme Court of Canada and other Canadian courts have historically drawn guidance from the leading authorities of the courts of the United Kingdom and Australia, but are increasingly considering American jurisprudence and legal writing in shaping the modern common law of Canada. In the product liability arena, this has created some interesting debates, perhaps most significantly in relation to the merits of strict liability theory. The acceptance of strict liability in much of the United States stands in sharp contrast to the former British Commonwealth jurisdictions'

2. Notably, however, Canada's *Constitution Act, 1867,* U.K. 30 & 31 Victoria, c. 3, s. 91 ascribes to the federal government jurisdiction over a number of matters that touch on product liability, including the power to regulate trade and commerce between provinces and between Canada and foreign countries.

3. This paper does not consider the civil law of the province of Quebec but instead focuses on the common law jurisdictions in Canada.

4. J. STAPLETON, *Comparing Australian Product Liability with EU and US,* IBA Section on Business Law Conference (September 1999: Barcelona, Spain).

continued reliance on traditional negligence principles requiring proof of lack of reasonable care. Whether the Canadian common law or provincial legislation will move to a standard of strict liability is undoubtedly one of the most interesting questions for everyone affected by product liability law in Canada as we enter the twenty-first century.

III. THE LEGAL PRINCIPLES GOVERNING PRODUCT LIABILITY IN CANDADA

A. *Contract And Statute-Based Claims*

1. *Traditional Contract Principles*

Consumers originally sought protection from injuries resulting from product use through express contractual warranties that the goods could be used for the purpose for which they were sold without risk of harm. If an injury resulted from an appropriate use of a product, the manufacturer or supplier of the product could be held liable for breach of warranty even though the injury could not be linked to a failure on its part to take reasonable care. Essentially, if the manufacturer or supplier made a representation as to the product's quality with contractual intent, a buyer could recover for the product's failure to live up to that representation.[5] However, because contract principles were being applied, a condition precedent to liability and recovery was the existence of a contractual relationship between the injured person and the defendant. This often left anyone injured by a product other than the original purchaser without recourse. Further, the requirement of a contractual relationship also made it difficult to take action against the product's manufacturer if the product was not purchased directly from the manufacturer.[6]

In spite of these deficiencies, contract principles continue to be important particularly in claims between businesses where purchase orders or other documented contractual terms are used to define the respective rights and liabilities of the parties. As in other jurisdictions, Canadian product liability litigation often involves a

5. *E.g.*, Heilbut, Symons & Co. v. Buckleton, [1913] A.C. 30 (H.L.). *See also* S.M. WADDAMS, PRODUCT LIABILITY (Toronto: Carswell, 1993).

6. The privity principle is often attributed to the early case of Winterbottom v. Wright (1842), 152 E.R. 402 (Ex. Pl.).

"battle of the forms" between a product's vendor and purchaser as each side attempts to have the Court apply the terms from its standard document. Unfortunately, it is often the case that there has been no actual agreement between the parties as to the terms on which the product will be transferred, and this only becomes clear after a dispute has arisen.

Recognizing the limitations of contract protection, the courts eventually began to expand the concept of breach of warranty to allow injured parties to sue on the basis of breach of an implied warranty. The theory developed that purchasers were entitled to have certain guarantees as to the quality of merchandise, and vendors or manufacturers should stand behind their products,[7] which in turn led to legislative intervention.

2. *Statutory Assistance To Purchasers And Consumers*

The acceptance of implied warranties was ultimately codified in England in the *Sales of Goods Act, 1893*.[8] This became a model for the sale of goods legislation adopted in various Canadian common law provinces. Typically, these statutes contain provisions to the following effect:

> "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."[9]

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7. C.A. WRIGHT, A.M. LINDEN & L.N. KLAR, CANADIAN TORT LAW, at 16-2 note 1 (9th ed., Markham: Butterworths Canada Ltd., 1990). *See also* Matthew Lewans, *Subjective Tests and Implied Warranties: Prescriptions for Hollis v. Dow Corning and ter Neutzen v. Korn*, 60 SASK. LAW REV. 209 (1996).

8. 56 & 57 Vict. c. 71.

9. *Sale of Goods Act*, R.S.O. 1990, c. S.1, § 15. The Ontario Act is similar to Sale of Goods legislation adopted in other common law provinces: R.S.B.C. 1996, c. 410, § 18 (British Columbia); R.S.A. 1980, c. S-2, § 17 (Alberta); R.S.S. 1978, c. S-1, § 16 (Saskatchewan); R.S.M. 1987, c. S.10, § 16 (Manitoba); R.S.N.W.T. 1998, c. S-2, § 16; R.S.Y. 1986, c. 154, § 15 (Yukon Territory); R.S.P.E.I. 1988, c. S-1, § 16 (Prince Edward Island); R.S.N.S. 1989, c. 408, § 17 (Nova Scotia); R.S.N. 1990, c. S-6, § 16 (Newfoundland); and R.S.N.B., 1973, c. S-1, § 15 (New Brunswick).

In addition, most jurisdictions have adopted a further provision requiring goods sold by description to be of merchantable quality.

Sale of goods legislation establishes implied conditions and warranties independent of any express contractual warranties or any intention on behalf of the seller. In imposing a general requirement of fitness for purpose and merchantable quality, the sale of goods statutes come close to establishing a standard of strict liability that is otherwise not embraced in Canada.[10] The statutes appear to create liability even where the seller used reasonable care or where the seller could not detect the defect at the time of sale. However, a plaintiff must generally prove that a product contained a defect before he or she will succeed in establishing that goods are not of merchantable quality or were not fit for purpose.[11] Interestingly, as with the interpretation of consumer protection statutes, the courts in Canada – as in Britain[12] – have used this requirement of "defect" to retreat from the apparent standard of strict liability by infusing the analysis of whether a defect existed with traditional considerations drawn from the law of negligence. This, coupled with the ability that parties generally have to contract out of the warranties otherwise implied by the sale of goods legislation, commonly results in the legislation having little impact or practical value to product users.

As a result, most Canadian jurisdictions have now enacted consumer protection legislation in an attempt to fill the gaps left by the sale of goods statutes. The provinces of Quebec, Saskatchewan and New Brunswick were the first to enact such legislation, having done so in the late 1970s. Saskatchewan enacted its *Consumer Product Warranties Act*[13] to reflect the recommendations of the Ontario Law Reform Commission in its 1972 report on consumer warranties.[14] The Law Reform Commission had recommended enactment of a statutory cause of action by a purchaser against a manufacturer for breach of implied warranties. The Saskatchewan legislation created statutory warranties that exposed both the retail seller and the manufacturer to liability, and expanded the eligibility of plaintiffs

10. Waddams, *supra* note 5, at 70.

11. Strandquist v. Coneco Equipment, [1999] Carswell Alta. 1179 (Alta. C.A.).

12. Jane Stapleton, *Products Liability in the United Kingdom: The Myths of Reform*, 34 TEX. INT'L L.J. 45 (1999).

13. R.S.S., c. C-30 (1978).

14. Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods*, 1972.

to include anyone who was reasonably expected to use, consume or be affected by a consumer product who was injured by it. The law of Saskatchewan is thus reasonably close to a strict liability regime, except that it only provides for recourse against a select few of the potentially responsible parties. Wholesale sellers, distributors, importers and others are left out of the equation. In New Brunswick, the *Consumer Product Warranty and Liability Act, 1978*[15] extends liability to all suppliers for injury or economic loss as a result of a consumer product. New Brunswick's legislation is based largely on the provisions of section 402A of the American *Restatement of the Law (Second)* on Torts.[16]

Despite the Law Reform Commission report on consumer warranties in 1972, it was not until the end of 1991 that Ontario introduced its own *Consumer Protection Act.*[17] This statute extends the protection afforded by Ontario's sale of goods legislation to all consumer sales, meaning any contract for the sale of goods made in the ordinary course of business to a purchaser for the purchaser's consumption or use.[18]

3. Using Contract Terms To Avoid Or Limit Liability

Provincial sale of goods statutes generally allow the parties to a contract of sale to remove or vary any right, duty or liability that would otherwise arise by operation of law. The parties can alter or avoid an implied warranty or condition in three ways: by express agreement; by the course of dealing between the parties; or by usage, if the usage binds both parties.[19] Recognising how often this left consumers without the benefit of statutory warranties, Ontario's *Consumer Protection Act*[20] provides that parties cannot exclude or waive the protection it affords.[21]

Contractual freedom continues to prevail, however, when it comes to the application of common law liability principles. A re-

15. R.S.N.B., c.C-18.1 (1978).
16. RESTATEMENT (SECOND) OF TORTS § 402A (1974).
17. R.S.O., C.c.31 (1990).
18. *Id.* at § 34(1). It does not include: sales to a purchaser for resale; sales to a purchaser when the purchase is in the course of carrying on business; sales to an association of individuals, a partnership or corporation; or sales pursuant to a bankruptcy and insolvency. *Id.*
19. *E.g.,* Sale of Goods Act (Ontario), *supra* note 9 § 53; Sale of Goods Act (British Columbia), *supra* note 9 § 56.
20. R.S.O., C.c.31 (1990).
21. *Id.* § 34(2).

cent Supreme Court of Canada decision involving purely economic loss and the assessment of the scope of the duty to warn of potential risks has set an interesting precedent with respect to contractual limitations of liability. Although the principle that contract will "trump" tort was established years before in Canada, the Supreme Court took the analysis one step further in rejecting a narrow approach to the interpretation of limitation of liability terms. In *Bow Valley Husky (Bermuda) Ltd.* v. *Saint John Shipbuilding Ltd.*,[22] the Supreme Court of Canada considered the effect of a warranty provision that stated that the defendant's liability with respect to certain products extended only to the installation thereof. The clause further stated that the sole risk and responsibility for the product was otherwise to be assumed by the owner, and the contract provided, in general, that the remedies set out in the contract were exclusive. The courts below and the dissenting judge on this point at the Supreme Court found that, as the contract did not directly address the co-extensive duty to warn, it was not excluded by the contract. The majority of the Supreme Court of Canada held, however, that by explicitly assuming certain named liabilities, the parties had effectively excluded all other grounds of liability. Because liability for failure to warn was not listed in the matters for which the defendant assumed responsibility, the defendant was not liable for failure to warn of dangers associated with the use of the product.

This precedent confirms the protection available to manufacturers and product suppliers through carefully considered contractual provisions, and it limits the flexibility of the courts in the future to intervene where contracts operate to limit tort duties that would otherwise be well-established. With this decision, the Supreme Court has signalled its approval of contractual freedom, a concept which appears likely to continue to hold an important place in Canadian product liability law in the future.

B. Liability Through Tort Principles

While injured parties still commonly rely on contract principles or on warranties implied by statute in asserting product liability claims, greater attention has more recently been placed on tort principles to allocate risks appropriately and to protect consumers.

22. Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd., [1997] 3 S.C.R. 1210 (hereafter "Bow Valley Husky (Bermuda)").

Although it is not uncommon to find lawsuits asserting causes of action based on intentional acts such as fraudulent misrepresentation or concealment, most product liability cases in Canada involve an assessment of whether actionable negligence has caused a recoverable loss.

Pursuant to the common law in Canada, a party will be liable for negligence to another who suffers damage where a duty was owed to the injured party to exercise reasonable care, that duty was breached, there was a causal connection between the breach of duty and the injury, and damages were suffered that were foreseeable and not too remote. A duty is owed to an injured party if the injured party is closely-enough connected to the acts or product that he or she ought reasonably to have been in the contemplation of the producer as being potentially affected by any defect in the product. In order to recover, a plaintiff must prove that he or she has suffered damages as a result of a reasonable and foreseeable use of a defective product, that the party sued (usually the manufacturer) was responsible for the defect in the product, and that the defect resulted from a failure to take reasonable care. Plaintiffs are not required to prove exactly how the defect occurred. However, the present standard imposed upon the manufacturer or other party with control over the product is one requiring "reasonable care in the circumstances"[23] to avoid defects. If such care has been taken, liability will not be imposed even though the court finds that the product contained a defect that caused the injuries suffered by the plaintiff.

Although easily stated, it is often difficult to identify what the standard of "reasonable care in the circumstances" actually requires in a given case. The care required of a manufacturer, or the other parties involved in providing a product to a user thereof, will vary with the potential for and gravity of the danger inherent in the use of a product, the degree of skill and sophistication of the product's intended users, and the nature of the product's reasonable or foreseeable uses.

1. Who Can Be Liable?

The party most commonly sued is the product manufacturer. Also at risk of liability, however, are assemblers or installers of a product, sub-manufacturers whose products are incorporated into

23. Phillips v. Ford Motor Co., [1971] 2 O.R. 637, 653 (C.A.).

a larger product, importers, wholesalers, distributors and retailers.[24] In appropriate cases, liability may be apportioned between a manufacturer and another person at fault.[25] For example, in *Watson* v. *Buckley,*[26] distributors of hair dye were held liable for injuries suffered as a result of use of the dye where the product was distributed under the distributor's name. Even though the initial negligence leading to the product defect was the fault of the manufacturer, the court held that the distributor also owed a duty of care to consumers, which it breached in failing to test the dye.[27]

If it appears that the defect may have arisen after the product left the manufacturer, an injured user will have to look past the manufacturer to other parties, such as an importer or distributor who had care and control of the product prior to its purchase. This often gives rise to cross-claims among all of the parties who handled the product prior to the consumer, with each party trying to prove that any defect in the product was caused by acts of the other parties (including the plaintiff). In each case, all potential causes of any defect found in the product must be investigated. For example, even a sealed product may be rendered defective by subsequent handlers if improperly stored. The manufacturer's duty may have been discharged fully if appropriate storage instructions were given and reasonable control was exercised in choosing participants in the distribution chain.

Before liability can be imposed, the court must ordinarily identify the party responsible for the defect that caused the plaintiff's injury. In certain cases, however, it may be difficult to identify the manufacturer of the product causing injury, and American class action cases are instructive as to how a remedy can be fashioned to assign liability. In *Sindell* v. *Abbott Laboratories,*[28] for example, class actions were instituted by women whose mothers had taken a drug during pregnancy. Although the evidence showed that that drug may have caused certain defects, there was no evidence identifying

24. *E.g.,* Phillips v. Ford Motor Co., id. at 53 ("persons who supply, distribute, sell or import a product owe a similar duty of care to the ultimate consumer to ensure that the product does not contain defects which result from the negligence of such supplier, distributor, vendor or importer").

25. *E.g., Ontario Negligence Act,* R.S.O., c. N.1, § 1 (1990); Meilleur v. U.N.I.-Crete Canada Ltd. (1985), 32 C.C.L.T. 126 (Ont. H.C.).

26. [1940] 1 All E.R. 174.

27. *See also* Murray v. Sperry Rand (1979), 23 O.R. (2d) 456 (H.C.) (holding a distributor liable for statements in advertising material it adopted).

28. 26 607 P.2d 924 (1980).

which manufacturer had made the drug that was administered to each mother.[29] The court concluded that it was appropriate to apportion liability among the manufacturers of the drug based on their respective share of the market for that product, unless they could show that they did not supply any of the product.[30] It is likely that such an approach would be accepted in an analogous case in Canada to avoid claims otherwise being defeated, particularly as class actions become more common, as discussed below.

In common with American proceedings, a "shotgun" approach is often taken by Canadian plaintiffs when naming defendants, which, in turn, adds costs, complexity and delay to the process. There seems to be little likelihood that this will change as long as a requirement to prove negligence remains. Also contributing to the multiplicity of parties in Canadian proceedings is the fact that documentary and oral discovery can usually be obtained only from parties to the action, and the perception that even a party against whom the claims are tenuous may be a source of some settlement funds.

2. *Who Is Protected?*

Prior to the 1937 decision of the House of Lords in *Donoghue* v. *Stevenson,*[31] where a drink manufacturer was held liable for injuries sustained by a plaintiff who was given the drink by a friend, the duty of care of a manufacturer had not been extended beyond the purchasers of its products. In *Donoghue* v. *Stevenson,* the House of Lords held that a manufacturer had a duty to consider those persons closely affected by its actions and extended the scope of potential liability to foreseeable third parties. Since *Donoghue* v. *Stevenson,* manufacturers are required to take reasonable care to avoid a risk of harm not only to the initial consumer, but also to persons who might reasonably be foreseen to be at risk of being affected by the use of the product. As Professor Waddams, a leading Canadian academic, notes, "pedestrians rely just as much on the safety of cars as do drivers and passengers."[32] Examples of the application of this extended duty include *T.W. Hand Fireworks Co.,*[33] where the court

29. *Id.*

30. *E.g.,* Hall v. Du Pont de Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y 1972) (holding manufactures liable on an industry-wide basis).

31. [1932] A.C. 562 (H.L.).

32. Waddams, *supra* note 5, at 24.

33. [1963] 1 O.R. 443 (H.C.).

held that a fireworks manufacturer owed a duty of care to a spectator at a fireworks display because it was reasonably foreseeable that the spectator could be injured if the fireworks were defective,[34] and *Nicholson* v. *John Deere Ltd.*,[35] where the court held that a manufacturer ought to have in contemplation purchasers of used machines when designing its warnings.[36]

3. What Is An Actionable Defect?

In the product liability context in Canada, a defect is a characteristic of a product that renders it unreasonably dangerous to the user of the product. Taking all relevant factors into account - including the way the product is presented, the use to which it may reasonably be expected to be put, the characteristics of the potential users of the product, the state of the art with respect to the product, its costs, etc. - a product is defective when it does not provide the level of safety that a person is reasonably entitled to expect. The simplest type of defect is a production or manufacturing defect which occurs when a product, designed to be free of defects, leaves the manufacturer's premises in a condition not intended by the manufacturer. While a defect is only actionable when it results from the exercise of something less than reasonable care, liability is usually difficult to avoid where an injury results from this type of defect.

More complex issues arise where the allegation made is of a defect in the design and not the manufacture or handling of the product. "Design defects" arise where the product leaves the manufacturer's premises in the condition intended, but the design of the product itself is deficient in the sense that the product falls short of a "reasonable standard."[37] Determination of the requisite standard against which the design should be tested requires identification of reasonable expectations of safety against which the product is appropriately judged. In *Gallant* v. *Beitz*,[38] for example, the court held that a car manufacturer owed consumers a duty to take reasonable care to design a vehicle that was "reasonably crashworthy."[39] Simi-

34. *Id.*
35. (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), *aff'd* 57 D.L.R. (4th) 639 (Ont. C.A.).
36. *Id.* at 550.
37. Phillips v. Ford Motor Co., [1971] 2 O.R. 637, 653 (C.A.).
38. (1983), 42 O.R. (2d) 86 (H.C.).
39. *Id.*

larly, in *Rentway Canada Ltd.* v. *Laidlaw Transport Ltd.*,[40] the court held that a headlight electrical circuit in a transport truck was defective where damage to the circuit caused both headlights to be extinguished instead of just one.[41] The risk-utility analysis undertaken by the court in finding a defect led it to consider factors such as: the probability of damage to the electrical circuit; the gravity of the potential danger to the truck's driver, other drivers, and passengers as a result of both headlights going out; the cost of wiring the circuits differently; and the utility of having both headlights on one circuit.[42]

In *Baker v. Suzuki Motor Co.*,[43] a motorcycle rider was injured when his bike caught fire on impact with a truck.[44] The Alberta court framed the issue as "whether the gasoline escaped from the tank because Suzuki did not use care and skill, by taking steps reasonably available to it, to avoid the injury to Baker."[45] In dismissing the action against Suzuki, the court offered some guidance as to the factors to be considered in assessing whether a manufacturer has taken reasonable care.[46] The court analysed the expert evidence put forward by the manufacturer to show that each of the design criticisms was in fact necessitated by a desire to prevent more likely types of injuries, and that extensive testing had been done during the design process.[47] The court also thought it relevant that there were no internally or externally set standards that had been breached and that no other designs were put forward that could have eliminated the problem.[48] Although this type of accident was found to be foreseeable, liability was not imposed on Suzuki, as the plaintiff had failed to show that Suzuki knew of the specific flaw and ignored an accepted and available safety feature.[49]

Liability may be imposed in Canada not only for those defects of which the defendant was aware, but also for defects of which it ought to have known. In *Cominco Ltd.* v. *Westinghouse Canada Lim-*

40. (1989), 49 C.C.L.T. 150 (Ont. H.C.), *aff'd* [1994] O.J. No. 50 (C.A.).
41. *Id.*
42. *Id.*
43. (1993), 17 C.C.L.T. (2d) 24 (Alta Q.B.).
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 264 (holding that it was not enough for a plaintiff simply to show a defect and causation, but rather the plaintiff was also required to prove that the manufacturer could have avoided the accident with the use of reasonable care).

ited,[50] for example, the court held that a manufacturer ought to have foreseen that an electrical cable presented a fire hazard when placed in close proximity to another cable.[51]

To assist in assessing the requisite standard of care, courts have looked to the availability of alternate designs, the industry standard for similar products, and perceived consumer expectations.[52] In most cases, the design will be assessed in relation to the industry standard at the time the product was manufactured. If, however, the product would no longer be considered safe or "state of the art" at the time of its distribution or sale, it is likely that the court may move the standard of care required to the higher level which incorporates new information or developments.[53] Recent Canadian authorities confirm that manufacturers should assume that they have a positive duty to incorporate all reasonable recent safety innovations into the design of their products, and that they must seriously consider the advisability of stopping shipment or recalling products which have been manufactured or sold by the time a possible safety concern or innovation improving safety is identified.[54]

Further, when designing a product, a manufacturer is required to anticipate that the product may be used for something other than for its intended purpose. For example, a manufacturer of a packing case was held liable when a worker injured himself by standing on the case.[55] However, a manufacturer is not required to foresee and guard against all possible uses of its product.[56] In situations of "misuse," a number of American cases suggest that the scope of the manufacturer's duty is determined by whether the unintended use was foreseeable.[57] Although there is significant over-

50. (1981), 127 D.L.R. (3d) 455 (B.C.S.C.), *varied (aff'd on this point)* 147 D.L.R. (3d) 279 (B.C.C.A.). *See also* Nicholson v. John Deere (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), *aff'd* 57 D.L.R. (4th) 639 (Ont. C.A.).

51. *Id.*

52. In the case of *Moore* v. *Cooper Canada Ltd.* (1990), 2 C.C.L.T. (2d) 57 (Ont. H.C.), for example, the court dismissed an action by a plaintiff with a broken neck against a manufacturer of a hockey helmet on the basis that the helmet was not designed to protect the neck, there had been no express or implied promise that it would do so, and the plaintiff admitted he did not *expect* it to do so.

53. S.G. McKee, *Is Your Product 'State of the Art' and What Difference Does it Make?*, 10(3) BUSINESS & THE LAW 17 (1993).

54. Tabrizi v. Whallon Machine Inc. (1996), 29 C.C.L.T. (2d) 176 (B.C.S.C.); Dow Corning Corp. v. Hollis and Birch, [1995] 4 S.C.R. 634.

55. Hill v. James Crowe (Cases) Ltd., [1978] 1 All E.R. 812 (Q.B.).

56. *E.g.*, Austin v. 3M Canada Ltd. (1974), 7 O.R. (2d) 200 (Co. Ct.).

57. T.M. Dufort, *ATV Products Liability Claims Dismissed*, 10(3) BUSINESS & THE LAW 57 (1993).

lap, the applicable duty in Canada appears to be narrower, as demonstrated, for example, by the decision of the British Columbia court in *Stiles* v. *Beckett*.[58] In that case, the court dismissed a plaintiff's claim that the design of an all-terrain vehicle was defective because it had stability limits beyond which its operation could become unsafe. The court held that the manufacturer was not liable for all foreseeable injuries arising from the misuse of its product, without regard to how careless or dangerous the use. The court applied an objective standard of a "reasonable operator" using common sense in assessing whether the use in issue was foreseeable. Liability does not arise if the plaintiff's injury was caused by a use to which the product would not have been put by a reasonable operator using common sense. This objective element of the test clearly offers some protection to product manufacturers and allows the courts flexibility in coming to a fair resolution. As a result, it seems likely to continue to have a place in the applicable negligence principles in product liability cases in Canada.

4. Strict Liability

An alternative to the use of negligence principles for assigning liability is the application of the standard of "strict liability." Underlying strict liability is the basic principle that the party producing a product is liable for any damage caused by a defect in that product. As strict liability is conceptualised in Canada, the enquiry is not directed at conduct or fault, but rather to a determination of whether the product was defective and whether that defect caused the injury alleged. While such an approach finds support in the United States, it is the subject of significant debate in Canada. The Canadian system currently continues to require an element of fault, rather than simply assigning liability for product-caused injuries and determining appropriate compensation.[59] Representative of the Canadian approach is the frequently-quoted statement of the Ontario Court of Appeal in *Philips v. Ford Motor Co.*:

> [o]ur Courts do not, in product liability cases, impose upon manufacturers, distributors or repairers, as is done

58. (1993), 22 C.P.C. (3d) 145, *aff'd* (1996), 45 C.P.C. (3d) 144 (C.A.).

59. Systems stressing compensation as the overriding factor generally assert that innocent victims should receive compensation from businesses (or their insurers) who profit from the sale of the product that caused the damage, regardless of whether the business was at fault. D.W. Boivin, *Strict Product Liability Revisited*, 33 OSGOODE HALL L.J. 487 (1995).

> in some of the States of the American union, what is virtually strict liability. The standard of care exacted of them under our law is the duty to use reasonable care in the circumstances and nothing more.[60]

In certain cases, the judicial rejection of strict liability has left injured plaintiffs with little or no recourse for recovery. In *Baker* v. *Suzuki Motor Co.*,[61] the court made reference to this point in concluding that the defendants were not liable for the plaintiff's injuries from a motorcycle accident:

> This is a hard decision for Baker, a most sympathetic person. He has been grievously injured in an accident for which he bears absolutely no personal responsibility. However, unless and until the law in Canada changes to impose strict liability on the manufacturer of motorcycles for all injuries received in collisions, no recovery could be made in the circumstances of this case.[62]

Although Canadian courts continue to demonstrate reluctance to impose liability on a party in the absence of negligence or a breach of a contractual or statutory obligation, the principles underlying strict liability can increasingly be found in provincial sale of goods and consumer protection statutes, suggesting a trend toward the acceptance of strict liability standards by some provincial legislators.[63] For example, statutes have been enacted in Saskatchewan, New Brunswick and Quebec that impose a standard approaching strict liability on the manufacturers of consumer products.[64] And, as discussed above, provincial sale of goods statutes

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60. Philips v. Ford Motor Co., [1971] 2 O.R. 637 at 653 (C.A.). *See also* Guimond Estate v. Fiberglas Canada Inc. (1999), 207 N.B.R. (2d) 355 (N.B. Q.B.), *aff'd* [1999] Carswell NB 499 (N.B.C.A.).

61. (1993), 17 C.C.L.T. (2d) 24 at 283 (Alta Q.B.).

62. *Id.*

63. This trend finds support from legal commentators as well. *E.g.*, A.M. LINDEN, CANADIAN TORT LAW (5th ed. 1993). "It is time for the Canadian law of product liability to relieve our injured consumers from the onerous burden of proving fault, and to require our manufacturers to stand behind their defective products, whether they were negligently produced or not" *Id.* at 577; S.M. Waddams, *Strict Products Liability*, in F.E. McArdle, ed., The Cambridge Lectures 1987 (Montreal, Yvon Blais, 1987); G. Vokelich, *Strict Products Liability 'Just(ice) Out of Reach' – A Comparable Canadian Survey*, 33 U.T. FAC. L. REV. 46 (1975); *see also Hollis* v. *Dow Corning Corp. & Birch*, 16 C.C.L.T (2d) 140 (B.C.C.A. 1993), *aff'd* [1995] 4 S.C.R. 634 (S.C.C.) noting in *obiter* that the question of whether strict liability can be applied in certain product liability cases was an "intriguing" one.

64. *Saskatchewan Consumer Products Warranties Act*, R.S.S., c. C-30, § 5 (1978); *New Brunswick Consumer Product Warranty and Liability Act 1978*, R.S.N.B., c. C-18.1, § 27 (1978); *Quebec Consumer Protection Act*, 1978, S.Q., c.64, § 53 (1991).

seek to impose on sellers of goods a standard approaching strict liability without consideration of the seller's fault or diligence. The Ontario Law Reform Commission proposed in 1979 that Ontario adopt legislation imposing strict liability on business suppliers (including manufacturers, importers, wholesalers, distributors and retailers) for personal injuries and non-business property losses caused by defects in their products.[65] This proposal has not been acted on to date and it seems unlikely that it will be adopted in the foreseeable future. Although the standards now imposed by the courts appear to establish a higher due diligence obligation for those putting products on the market than in the past, advocates of change have developed little momentum in support of strict liability in Canada.

C. *The Obligation To Warn of Risks*

1. *The Obligation Generally*

For companies placing products on the market, minimising the risk of liability requires a continual process of evaluation of products, systems and controls to ensure that defects are avoided, and that standards throughout the development, production and shipment of the product are demonstrably high. All risks associated with reasonable use of the product should be identified, and reasonable care should be taken to warn users of the dangers or risks associated with the use of the product.

The importance of warnings has recently been emphasised by the Supreme Court of Canada in the context of a breast implant case, in *Dow Corning Corporation* v. *Hollis and Birch*:[66]

> "When manufacturers place products into the flow of commerce, they create a relationship of reliance with consumers, who have far less knowledge than the manufacturers 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 manufacturers and consumers by alerting consumers to any dangers and allowing them to make informed decisions concerning the safe use of the

65. Ontario Law Reform Commission, *Report on Products Liability*, Ministry of the Attorney General (Ont.) 1979.

66. [1995] 4 S.C.R. 634 at 653 (S.C.C.) ("*Dow Corning*").

product."[67]

In certain circumstances, warnings will suffice to preclude liability.[68] A warning will not, however, absolve a manufacturer of liability in Canada if a dangerous product could have been designed or manufactured without the same risk of harm being associated with its use. In the case of *Nicholson* v. *John Deere Ltd.*,[69] for example, the court noted that "[a] manufacturer does not have the right to manufacture an inherently dangerous article when a method exists of manufacturing the same article without risk of harm. No amount of or degree of specificity of warning will exonerate him from liability if he does."[70]

The purpose of a warning is to inform of the potential risks associated with the use of a particular product. This can be further divided into two functions: first, to educate the user as to the risks so that he or she can decide how to use the product in the safest way; and, second, to enable a potential user to make an informed choice as to whether or not to use the product at all. Although there is an expectation that consumers will read and pay heed to warnings or instructions, a manufacturer cannot assume that directions will be followed. Thus, a manufacturer can be held liable if the dangers of failing to follow directions are not sufficiently communicated to the user.[71]

For certain types of products, warning labels are required by statute.[72] With other products, the risks are so apparent that no warning on the product is required. For example, in *Deshane* v. *Deere & Co.*,[73] the Ontario Court of Appeal held that a manufacturer of harvesters had no duty to warn operators of the dangers

67. *Id.*; *see also* Vaughan Black and Dennis Klimchuk, *Case Comment on Dow Corning Corp. v. Hollis and Birch*, 75 CAN. BAR REV. 355 (1996).

68. *E.g., Holt* v. *P.P.G. Industries Canada Ltd.* (1983), 25 C.C.L.T. 253 at 264 (Alta. Q.B.) noting that "the trend in Canadian/English courts is to allow an inference of negligence to be more readily drawn particularly as against a manufacturer," the Court held that the label warning of flammability on the cleaning solvent was adequate given the professional expertise of the intended users.

69. (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), *aff'd* 57 D.L.R. (4th) 639 (Ont. C.A.).

70. *Id.* at 550.

71. Lambert v. Lastoplex Chems. Co., [1972] S.C.R. 569 at 574-75 (S.C.C.).

72. *E.g.,* Hazardous Products Act, R.S.C., c. H-3 (1985); Food and Drugs Act, R.S.C., c. F-27 (1985). Note, however, that compliance with statutory standards will not necessarily satisfy the common law duty to warn, as was the case in *Buchan v. Ortho Pharmaceutical (Can) Ltd.* (1986), 54 O.R. (2d) 92 (C.A.) ("*Buchan v. Ortho Pharmaceutical*").

73. (1993), 17 C.C.L.T. (2d) 130 at 149 (Ont. C.A.).

inherent in the use of the machine, as the dangers were "obvious and known to the consumer."[74]

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. A warning must be a prominent and clear communication that is effective in alerting users to the danger involved. It should not be so extensive or technical as to bury the user in a myriad of details or divert attention away from the more significant or probable risks.[75] Guidance on what should be included in an adequate warning was given by the Ontario Court of Appeal in *Buchan* v. *Ortho Pharmaceutical,*[76] as follows:

> 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 circumstances relevant to the product in question.[77]

Not surprisingly, Canadian courts have long held that the manufacturers of products that are ingested or otherwise placed in the body are subject to a very high standard of care and are required to take particular care in the clarity and completeness of any warnings associated with the products.[78]

Warnings should be given not only of possible dangers, but also of the likelihood of those dangers occurring, the seriousness of the consequences, and the steps to be taken to avoid or minimise the consequences of a danger that has materialised. In the case of *Meilleur* v. *U.N.I.-Crete,*[79] for example, an Ontario court held both the manufacturer and distributor of an industrial product partly re-

74. *See also* Stiles v. Beckett (1993), 22 C.P.C. (3d) 145, *aff'd* (1996), 45 C.P.C. (3d) 144 (C.A.) holding that Honda did not have a duty to warn the ATV users of dangers that were obvious, known to the plaintiffs and avoidable by the exercise of common sense.

75. T. Dunne Q.C., *Disclaimers: Can Liability for Products that Cause Harm be Avoided?*, The Advocates Society 24 at 32 (1987).

76. (1986), 54 O.R. (2d) 92 (C.A.).

77. *Id.*

78. *Dow Corning,* [1995] 4 S.C.R. 634 at 653 (S.C.C.); Zeppa v. Coca-Cola Ltd., [1955] 5 D.L.R. 187 at 191-93 (Ont. C.A.); Heimler v. Calvert Caterers Ltd. (1975), 8 O.R. (2d) 1 at 2 (Ont. C.A.).

79. (1985), 32 C.C.L.T. 126 (Ont. H.C.).

sponsible for injuries suffered by the plaintiff on the basis that they failed to warn of specific risks or signal the urgency of remedial measures in the case of an accident.

The duty to warn extends not only to known dangers at the time of manufacture, but also to reasonably foreseeable defects or dangers that ought to have been known to the manufacturer.[80] The duty is a continuing one, requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered.[81] To comply with statutory requirements or to minimise the risk of product liability litigation and liability, it may also be necessary to institute recall programs.[82] There is some authority in the United States suggesting that a manufacturer has a continuing duty to advise consumers of new safety innovations that could decrease any risks associated with the product. While it remains unclear whether this obligation currently applies in Canada, the imposition of such a duty in appropriate cases would be consistent with the recent trend in case law towards heightened consumer protection.

A manufacturer may also have a duty to warn particularly sensitive or vulnerable users of dangers where a number of people would likely be affected by serious consequences.[83] The duty to warn can also extend to dangers arising from reasonably foreseeable misuse of the product,[84] and may extend past the first purchaser of a product to subsequent purchasers. In the case of *Nicholson* v. *John Deere Ltd.*,[85] for example, the court found a warning inadequate on the basis that "the manufacturer ought to have foreseen and anticipated that the kinds of warnings appearing both on the decal and in the manual were not likely to reach a large number of consumers, particularly those of used units."[86]

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80. *E.g.*, Cominco Ltd. v. Westinghouse Canada Ltd. (1981), 127 D.L.R. (3d) 455 (B.C.S.C.), *varied (aff'd on this point)* 147 D.L.R. (3d) 279 (B.C.C.A.) holding that the manufacturer should have warned the user that an electrical cable presented a fire hazard when placed in close proximity to another cable.

81. *Dow Corning*, [1995] 4 S.C.R. 634 at 635-36 (S.C.C.); Rivtow Marine Ltd. v. Washington Iron Works, [1974] S.C.R. 1189 at 2000 (S.C.C.).

82. Recalls are explicitly required by statute in certain cases. *E.g.*, Motor Vehicle Safety Act, R.S.C., c. M-10, § 8 (1985).

83. Waddams, *supra* note 5, at 48.

84. Stiles v. Beckett (1993), 22 C.P.C. (3d) 145, *aff'd* (1996), 45 C.P.C. (3d) 144 (C.A.).

85. (1986), 34 D.L.R. (4th) 542 (Ont. H.C.), *aff'd* 57 D.L.R. (4th) 639 (Ont. C.A.).

86. *Id.*

If a warning is found by a court to be in some way inadequate, liability may still be avoided if the court determines that an adequate warning would not have served to prevent the harm,[87] or would not have been followed by the claimant. In *Buchan* v. *Ortho Pharmaceutical*,[88] the Ontario Court of Appeal adopted a subjective test for causation; the question posed by the court was whether this particular plaintiff's decision to use the product would have been different had an adequate warning been provided.[89] If the more common objective test for causation was used, the inquiry would have focused on what the impact of the warning would have been on a "reasonable person" in determining whether a different warning would have prevented injury. Interestingly, the majority of the Supreme Court of Canada in *Dow Corning Corporation* rejected the British Columbia Court of Appeal's application of an objective test and instead endorsed the Ontario Court of Appeal's reasoning in *Buchan v. Ortho Pharmaceutical* in adopting a subjective test for causation in claims against a manufacturer for failure to warn.[90]

The duty to warn may also vary depending upon the training, skill or expertise of the parties who will be reading the warning. Where expert users are involved, the requirement to warn may be lower because of that expertise. In *Holt* v. *P.P.G. Industrial*,[91] for example, where an experienced printer was injured by a flash explosion caused when fumes of a cleaning solvent were ignited by a printing press, the court held that the warning on the label was sufficient given the professional expertise of the users.[92] In contrast,

87. *E.g.*, Davidson v. Connaught Labs. (1980), 14 C.C.L.T. 251 (Ont. H.C.) where, although holding that the manufacturer of rabies vaccine should have given more detailed warnings of the possible side effects of the vaccine and that the warning was therefore inadequate, the plaintiff had no recourse against the manufacturer because the doctors would not have passed on such information. *See also* Baker v. Suzuki Motor Co. (1993), 17 C.C.L.T. (2d) 24 at 283 (Alta Q.B.) dismissing the claim, the court relied on the fact that "there is no evidence to show that the absence of such a warning contributed to this accident."

88. (1986), 54 O.R. (2d) 92 (C.A.).

89. *Id.*

90. *Id.*; *See also Dow Corning*, [1995] 4 S.C.R. 634 at 674-5 (S.C.C.). In *Dow Corning*, Sopinka J., with McLachlin J. concurring, wrote a vigorous dissent opposing the adoption of the subjective test of causation. *Id. See also* Denis W. Boivin, *Factual Causation in the Law of Manufacturer Failure to Warn* 30 OTTAWA L. REV. 47 (1998-99); *Double Bar Ranching Ltd. v. Bayvet Corp.*, [1996] 10 W.W.R. 673 (Sask C.A.); and *Zaba v. Saskatchewan Institute of Applied Science and Technology*, [1977] 8 W.W.R. 414 (Sask C.A.)

91. (1983), 25 C.C.L.T. 253 at 264 (Alta. Q.B.).

92. *Id.*

in *Lambert* v. *Lastoplex*,[93] although the professional engineer using the product (lacquer sealer) had some knowledge of the danger involved, the manufacturer's warning was found to be insufficient as, even coupled with the user's training, it did not acquaint the plaintiff with the full extent of the risk created.[94]

2. *The Learned Intermediary Defence*

In general, manufacturers must warn consumers of the risks inherent in the ordinary use of their products. Different considerations can apply where a qualified individual stands between the manufacturer and the product user. For example, for many years American courts have accepted that an informed prescribing physician was in a better position to assess and communicate the relative risks and benefits of a drug to patients in individual cases, reducing the obligation that the manufacturer would otherwise have to warn the patients directly.[95]

This approach was not adopted in Canada until 1986, when the Ontario Court of Appeal first applied the learned intermediary rule in *Buchan* v. *Ortho Pharmaceutical*.[96] On the facts of that case, however, the Court of Appeal held that it was not enough that the physician be informed of the dangers associated with the use of birth control pills; the format of the warning must be such that the risk is also clear to the patient. Broader disclosure was seen as appropriate in this case on the basis that a patient using birth control pills exercises greater independence in determining whether or not to use the product than with other types of prescription drugs.

In 1995, in *Dow Corning*,[97] the Supreme Court of Canada recognised that the learned intermediary rule could play a role in establishing the interrelated duties among a manufacturer, physician and patient. The Court accepted that, in certain circumstances, a manufacturer may satisfy its obligations to warn the ultimate consumer by warning the physician of the risks inherent in the use of the product. This applies where the consumer is placing primary reliance on the judgment of the learned intermediary rather than

93. [1972] S.C.R. 569 at 574-75 (S.C.C.).
94. *Id.*
95. *E.g.*, Sterling Drug Inc. v. Cornish, 370 F. 2d 82 (8th Cir., 1966); *Reyes v. Wyeth Lab.*, 498 F. 2d 1264 (5th Cir., 1974); Plummer v. Lederle Lab., Div. of Am. Cyanamid Co., 819 F. 2d 349 (2nd Cir., 1987).
96. (1986), 54 O.R. (2d) 92 (C.A.).
97. *Dow Corning*, [1995] 4 S.C.R. 634 at 674-5 (S.C.C.).

on the manufacturer, which is commonly the case when patients are evaluating the suitability of prescription drugs. The Supreme Court made it clear, however, that this principle applies only where the intermediary's knowledge approximates that of the manufacturer. The primary duty to give a clear, complete and current warning remains on the manufacturer.[98] This led the Supreme Court to reject the defence on the facts of the case because Dow Corning had failed to adequately warn physicians of the risk of post-surgical rupture and the adverse health impact of silicone gel leakage.[99]

The decision of the Supreme Court in *Dow Corning* is important, however, for its endorsement of the potential application of the learned intermediary rule in other appropriate contexts:

> While the "learned Intermediary" rule was originally intended to reflect, through an equitable distribution of tort duties, the tripartite informational relationship between drug manufacturers, physicians and patients, the rationale for the rule is clearly applicable in other contexts. Indeed the "learned intermediary" rule is less a "rule" than a specific application of the long-established common law principles of intermediate examination and intervening cause developed in *Donoghue v. Stevenson* and subsequent cases...Generally, the rule is applicable 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.[100]

The Supreme Court of Canada subsequently rejected a manufacturer's learned intermediary defence in *Bow Valley Husky (Bermuda)* because the product in question was not highly technical and its application did not require expert supervision[101]. The Supreme Court also held that it was not unrealistic to expect the manufacturer to have warned the ultimate consumer directly, despite the fact that numerous other informed suppliers were in-

98. *Id.* at 660-61. If direct-to-patient advertising or promotion is done, or if the product acquires notoriety, it is likely that the ability of a product manufacturer to rely on the learned intermediary defence will be reduced.

99. Walker Estate v. York-Finch Gen. Hosp. (1999), 43 O.R. (3d) 461 (Ont. C.A.) granting judgment against the Red Cross to individuals who received HIV tainted blood as a result of transfusions.

100. *Dow Corning,* [1995] 4 S.C.R. at 659-60.

101. [1997] 3 S.C.R. 1210.

volved in the construction of the drilling rig.[102] The court found that the manufacturer had the opportunity and the duty to warn the end user directly and its obligations were not discharged through its communications with the proposed intermediary.[103] Although the defence was not accepted on the facts,[104] the decision nonetheless again recognises the availability of the learned intermediary defence in appropriate cases in Canada beyond the medical setting. It also confirms, however, that the learned intermediary principle is an exception to the general rule requiring manufacturers to warn ultimate consumers directly – an exception that will only be available in the clearest of cases.

D. Limits on Liability And Damages

1. The Recoverability Of Damages For Economic Loss

Canadian courts have long recognized the necessity of defining some limits to the extent of liability that follows negligent acts. The warning of "liability in an indeterminate amount for an indeterminate time to an indeterminate class", written by Cardozo C. J. in *Ultramares Corp. v. Touche,*[105] has been adopted in many Canadian decisions, including recent judgments of the Supreme Court of Canada.[106] Various techniques have been used by Canadian courts to avoid such a result, ranging from emphasising the need for a close relationship between the parties before a duty of care arises to using public policy concepts to draw the boundaries of liability and recoverability.[107]

Representative of this is the line that has historically been

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102. *Id.*
103. *Id.*
104. *Id.*
105. 174 N.E. 441 at 444 (N.Y.C.A. 1931).
106. *E.g.,* Hercules Mgmts. Ltd. v. Ernst & Young, [1997] 2 S.C.R. 165 at 192; *Bow Valley Husky (Bermuda),* [1997] 3 S.C.R. at 1239.
107. As Mr. Justice Estey notes in *B.D.C. Ltd. v. Hofstrand,* [1986] 1 S.C.R. 228 at 243 (S.C.C.):

> No doubt the courts of this country will continue to search for reasonable and workable limits to the liability of a negligent supplier of manufactured products or services...In this search courts will be vigilant to protect the community from damages suffered by a breach of the 'neighbourhood' duty. At the same time, however, the realities of modern life must be reflected by the enunciation of a defined limit on liability capable of practical application, so that social and commercial life can go on unimpeded by a burden outweighing the benefit to the community of the neighbourhood historic principle.

drawn between damages for injury to an individual or property and purely economic loss suffered as a result of negligence, with the former being recoverable but not the latter. However, consistent with the general trend in Canada towards greater accountability, in 1973, the Supreme Court of Canada held in the case of *Rivtow Marine Ltd.* v. *Washington Iron Works*[108] that damages for consequential economic loss flowing from a manufacturer's negligence were recoverable in principle. In doing so, the court allowed recovery to a lessee of a defective crane for profits lost while the crane was out of use. The court based its finding of liability on the fact that the defendants had an ongoing relationship with the plaintiffs and should have warned the plaintiffs of the defects when discovered. The court noted that the manufacturer would not have been liable for the plaintiff's economic losses because of negligence in the design or manufacture of the crane alone. The extension of recoverability to economic losses was limited to situations where there was sufficient proximity between the parties, that proximity having been found in *Rivtow* because the manufacturer should have foreseen the potential harm that would be suffered by the plaintiff as a result of its failure to warn. As stated by Mr. Justice Ritchie:

> This is not a case of a negligent manufacturer whose defective or dangerous goods have caused damage to some unknown member of the general public into whose hands they have found their way. These respondents knew that the cranes were going to be used by the appellant and the exact use to which they were to be put.[109]

Thus, *Rivtow* left in doubt whether pure economic loss would be recoverable simply on the basis that a manufacturer had negligently produced a defective product.[110]

Although the trend in England during the 1980s and early 1990s was to back away from recovery for economic as opposed to physical loss, the Supreme Court of Canada rejected this movement

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108. [1974] S.C.R. 1189.

109. *Id.* at 1196.

110. As the Saskatchewan Court of Appeal noted in *University of Regina* v. *Pettick* (1991), 77 D.L.R. (4th) 615 at 635, "*Rivtow* stands for the proposition that economic loss is recoverable in tort when it flows from a category of duty which properly encompasses economic loss, such as a duty to warn rather than a duty to manufacture without defects." *Id.* The court went on to find that a designer and fabricator of a badly designed roof system on a gymnasium that left the building unsafe were liable for the owner's economic loss. *Id.*

in *Canadian National Railways* v. *Norsk Steamships.*[111] Instead, the Supreme Court expanded the recoverability of economic loss by allowing recovery for pure economic losses suffered by one party as a result of damage to another party's property. This has become known in Canada as "relational economic loss." In *Norsk*, a barge struck a bridge over the Fraser River, causing the bridge to be out of operation for several weeks. The Canadian National Railway ("CNR") was prevented from using the bridge to transport goods and suffered economic loss as a result. The CNR was successful in a negligence action brought to recover that economic loss. Three separate judgments were written at the Supreme Court, foreshadowing the difficulty that the judges would have in reaching a common position in subsequent economic loss cases. The *Norsk* case established that recovery for pure economic loss may be available but, given the 3:3:1 split in the Court, left in doubt when it would be appropriate to make such an award.[112]

The Supreme Court of Canada had the opportunity to consider *Norsk* in the context of a product liability claim in *Winnipeg Condominium Corp.* v. *Bird Construction.*[113] A condominium corporation sued the original architects and builders of their building for economic loss on the basis of negligent design. The Supreme Court noted that the case before it differed from *Norsk* in that it dealt not with relational economic loss, but with the negligent supply of shoddy and, in this case, dangerous goods or structures. The Supreme Court observed that the degree of danger to persons or other property created by the negligent construction of a building was a cornerstone of the policy analysis that was required to determine whether the cost to repair the building was recoverable. The court ultimately held that there were compelling policy reasons to impose tortious liability on contractors for the cost of repair of this type of defect. The Supreme Court noted that there was a relationship of close proximity in this type of situation even without contractual privity. The Court further held that contractors, including subcontractors, architects and engineers, who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the

111. [1992] 1 S.C.R. 1021.
112. [1992] 1 S.C.R. 1021.
113. [1995] 1 S.C.R. 185, *rev'g* (1993), 15 C.C.L.T. (2d) 1 at 9 (Man. C.A.).

health and safety of the occupants. Where negligence is established and the defects manifest themselves before there is any damage to persons or property, the contractors will still be held liable for the reasonable cost of repairing the defects to render the building safe. These costs are recoverable economic loss under the tort law of Canada.

In 1997, the Supreme Court of Canada again had occasion to consider *Norsk* in the context of a product liability claim. In *Bow Valley Husky (Bermuda),*[114] the Supreme Court unanimously repeated its concern about extending indeterminate liability for economic loss. The court recognized that the class of people who could foreseeably lose money as a result of a product defect was potentially enormous, with a ripple effect as interconnected economic interests are affected.[115] The court emphasized that relational economic loss could only be recovered in specific circumstances, by reference to categories geared to making the law predictable in this area. While the court noted that the categories are not closed, economic losses are recoverable where the claimant has a possessory or proprietary interest in the damaged property, or where the relationship between the claimant and the property owner is a joint venture. The result is that, after several mis-starts, the Supreme Court has seriously limited the recoverability of relational economic losses, principally for policy reasons. The focus on public policy issues in defining the proper extent of liability that produced this result is likely to continue to influence Canadian courts in setting boundaries on product liability in the foreseeable future.

2. *General Damages*

Sale of goods legislation in the common law provinces generally allows an injured plaintiff to recover as damages "the estimated loss directly and naturally resulting in the ordinary course of events from the breach of warranty."[116] For breach of warranty of quality, the user is entitled *prima facie* to the difference between the value the goods would have had if they had been in accordance with the warranty and their actual value in light of the particular breach.[117] Damages for breach of the warranty of quality take the form of ex-

114. [1997] 3 S.C.R. 1210.
115. *Id.*
116. Ontario's *Sale of Goods Act, supra* note 9, § 51(2); *see also* British Columbia's *Sale of Goods Act, supra* note 9, § 56(2).
117. *Id.*

pectation damages; the user is to be put in the position he or she would have been in if the goods were of the expected quality.

It is in the area of general damages that one of the most significant differences in approach between Canada and the United States can be seen. In 1977, the United States Interagency Task Force on Product Liability observed that American damages awards are composed largely of damages for loss of enjoyment of life and for pain and suffering.[118] Shortly thereafter, in *Andrews v. Grand & Toy Alberta Ltd.*,[119] a case involving a twenty-one year old man who was rendered a quadriplegic in a traffic accident, the Supreme Court of Canada took the important step of capping non-pecuniary damages awards as follows:

> If damages for non-pecuniary loss are viewed from a functional perspective, it is reasonable that large amounts should not be awarded once a person is properly provided for in terms of future care for his injuries and disabilities....
>
> The amounts of such awards should not vary greatly from one part of the country to another. Everyone in Canada, wherever he may reside, is entitled to a more or less equal measure of compensation for similar non-pecuniary loss....
>
> I would adopt as the appropriate award in the case of a young adult quadriplegic like Andrews the amount of $100,000. Save in exceptional circumstances, this should be regarded as an upper limit of non-pecuniary loss in cases of this nature."[120]

With adjustment for the impact of inflation, the upper limit for the most serious cases has risen to approximately $250,000 today. Although Canadian non-pecuniary damages awards are not quite as uniform as they are in Australia or the United Kingdom, with their application of the Judicial Studies Board's *Guidelines for the Assessment of General Damages in Personal Injury Cases*,[121] the upper limit clearly makes it much easier to predict the likely award for a given injury in Canada than in the United States. The impact of

118. Interagency Task Force on Product Liability, Final Report (1977), p. VII-64.

119. [1978] 2 S.C.R. 229 at 262, 263 and 265.

120. Andrews v. Grand & Toy Alta. Ltd., [1978] 2 S.C.R. 229 at 262, 263 and 265.

121. (4th ed. 1998). Stapleton, *Comparing Australian Product Liability with EU and US*, *supra* note 4, at 10.

the different approach in Canada was dramatically demonstrated in 1995, when a jury in Nevada awarded a plaintiff close to $4,000,000 plus $10,000,000 in punitive damages for injuries sustained from leaking breast implants,[122] while the Supreme Court of Canada, in the same year, confirmed a damages award giving a Canadian plaintiff $100,000 for similar injuries.[123]

3. Punitive Damages

Damages awards in products liability cases in Canada have historically been small in comparison to the awards made in the United States. Part of the disparity in the size of awards can be attributed to the difference in approach taken to punitive damages.[124] The Supreme Court of Canada has held that punitive damages should only be available in cases where the defendant is deserving of punishment due to harsh, reprehensible, malicious or vindictive conduct.[125] Even where such conduct is present, the awards that have been made for punitive damages have been relatively small.

As a result, punitive damages are often claimed but are rarely awarded in product liability cases and are recoverable only where a defendant's conduct is wanton, reckless and outrageous.[126] Although legislated caps on punitive damages have not been adopted in Canada as they have in some parts of the United States, looking forward, it is unlikely that we will see frequent or large punitive damage awards in product liability cases in Canada.

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122. This judgment was reversed in part and affirmed in part on appeal. The punitive damage award was vacated while the judgment of the district court on the claim of negligent undertaking was affirmed: Dow Chem. Co v. Mahlum, 114 Nev. 1468; 970 P. 2d 98 (1998). Green, *Dodging the Impact of U.S. Product Liability Claims*, 2 CANADIAN INTERNATIONAL LAWYER 58 (1996).

123. *Dow Corning*, [1995] 4 S.C.R. 634 at 635.

124. For an interesting analysis of the impact of punitive damage awards in the United States, see Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, WIS. L. REV. 237 (1998).

125. Vorvis v. Ins. Corp. of British Columbia, [1989] 1 S.C.R. 1085 (S.C.C.).

126. Buchan v. Ortho Pharm.(1996), 54 O.R. (2d) 92 (C.A.); Blacquiere v. Canada Motor Sales Corp. (1975), 10 Nfld. & P.E.I.R. 178, 17 A.P.R. 178 (P.E.I.S.C.). In *Vlcheck v. Koshel*, [1989] 1 W.W.R. 469, *aff'd* 32 B.C.L.R. (2d) xxxi (C.A.), the British Columbia Court of Appeal stated that punitive damages were recoverable where the defendant was reckless to such a degree that its conduct indicated complete indifference to the consequences of its actions. It was not necessary to prove intention to cause injury to the plaintiff. *Id.*

IV. Other Factors Affecting Product Liability In Canada

A. *The Court Process and Alternative Dispute Resolution*

Each Canadian province has a separate court system with its own governing rules of civil procedure. Product liability actions are brought in these courts, with a right of appeal to the Supreme Court of Canada with leave, and not in Canada's Federal Court system. Although changing to some extent, litigation in Canada has historically followed procedures that are more confined than those adopted in much of the United States.

For example, in most of the provinces in Canada, pre-trial discovery is available only of a single representative of each party to the lawsuit. The witness produced by a party assumes an obligation to make enquiries of others who are within the party's control, and to relay that information to the other side. Depositions are not permitted to obtain evidence more broadly from individuals who have information on the matters in issue. Similarly, counsel's first opportunity to question directly the experts relied on by the other side occurs at trial, although counsel has some forewarning of the expert's position through a written report that must be delivered a limited time in advance of the trial.

Recognising that many cases turn on the documents, most Canadian jurisdictions impose obligations on the parties to deliver all of the documents that are in their possession, control or power that are relevant to any of the issues in the case. Documents are generally defined in Canada to include information recorded or stored in any form or by means of any device. The obligation to produce documents can be a particularly large burden on manufacturers in product liability cases, where it is common for plaintiffs to challenge everything about the product from its original design and testing through to its manufacture, storage and shipment. The electronic interconnection of related companies is magnifying this problem by allowing an argument to be made that Canadian corporate defendants have an obligation to download or otherwise produce electronically-stored documents and information to which they have access, regardless of their geographic location. As a result, it is prudent for corporations in Canada and the United States to limit, in writing, the extent to which related corporations are entitled to obtain copies of electronically-stored information from each other so that they are not found to have the information within their control or power.

Most of the provincial court systems in Canada have introduced innovations such as case management and mandatory or optional mediation to respond to the criticisms of cost, delay and complexity to which they have subjected for a number of years. In part, this has been done to offset the popularity of alternative dispute resolution ("ADR") and to borrow the better features of various ADR techniques. For example, mandatory mediation at an early stage has been introduced for all actions, including product liability cases, in Toronto and Ottawa.[127] Mediation, neutral evaluations and arbitrations are also being used in product liability settings to attempt to facilitate a resolution or reach a private binding decision. Since product liability cases often arise in the context of a contractual relationship, it is important that consideration be given to the inclusion of an arbitration provision. Arbitrations in Canada can be either domestic or international, and Canadian courts have demonstrated great deference to arbitration provisions in recent years, with ambiguities generally being resolved in favour of a finding that the dispute must be arbitrated and not litigated.[128]

B. Judges And Juries

To an outside observer, the effect of the civil jury system on product liability litigation in the United States has been profound. The threat and reality of huge jury awards in cases involving defective products stands in sharp contrast to the reluctance of Canadian judges to make substantial non-pecuniary damage awards, even in the face of grievous personal injury. Jury trials in civil cases are rare in Canada. Almost all product liability cases in Canada have been and will in the future be decided by Judges alone within a provincial Superior Court system. This produces a consistency and predictability of result which may stand in contrast to systems in which jury trials are more common.

Also tempering the impact of juries in Canada is the fact that, like judges, juries are restricted in the amounts that can be awarded to injured parties as general or punitive damages, as discussed above. Further, in common with jurisdictions in Australia that allow jury trials for product liability cases, the decisions of Canadian

127. *Ontario Rules of Civil Procedure*, R.R.O. 1990, Regulation 194, as amended, Rule 24.1 – Mandatory Mediation, and Rule 77 – Civil Case Management.

128. Re Automatic Sys. Inc. and Bracknell Corp. (1994), 18 O.R. (3d) 257 (Ont. C.A.).

juries do not receive the same level of deference as they do on appeal in the United States. While deferring somewhat to findings of fact, decisions both on liability and damage quantification are subjected to close scrutiny at the appellate level.

C. *Class Actions And Multi-Party Claims*

As demonstrated by the many class action proceedings that have been asserted in the United States, product liability issues are often particularly well-suited to class actions and multi-party claims. Businesses mass produce many products and a defect in the design of a product almost invariably affects more than a single user. Though a manufacturing defect may be more confined, it is still common for more than one item to be affected before the defect is identified and corrected.

Although class proceedings are common and well-established in the United States, they are relatively new in Canada and in Australia.[129] However, with the recent introduction of legislation allowing class proceedings in three Canadian provinces,[130] plaintiffs are already demonstrating a willingness to prosecute product liability claims more frequently by way of class action. Even though class action legislation has not been passed in all Canadian jurisdictions, the Ontario Superior Court has held that individuals outside of the province can be non-resident class members, thus expanding the scope of class proceedings where they are currently authorised.[131] Moreover, all jurisdictions in Canada now allow for types of "representative proceedings" in their rules of civil procedure, which allow multiple parties to be represented by one plaintiff in a procedure more or less analogous to class proceedings.[132]

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129. The Federal Court in Australia has allowed class actions since March 4, 1992.

130. Quebec passed *An Act Respecting the Class Action*, R.S.Q. c. R-2.1 in 1978; Ontario passed the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 in 1992 and British Columbia passed the *Class Proceeding Act*, R.S.B.C., c.50 in 1995.

131. Nantais v. Telectronics Proprietary *(Canada) Ltd.* (1995), 25 O.R. (3d) 331 at 347 (Gen. Div.); *application for leave to appeal dismissed* (1995), 25 O.R. (3d) 331 at 347 (Div. Ct.).

132. *Alberta Rules of Court*, Alta. Reg. 390/68 as amended, s. 42 (common interest); *British Columbia Supreme Court Rules*, B.C. Reg. 221/90 (representing proceeding); *Manitoba Court of Queen's Bench Rules*, Man. Reg.553/88, R. 12 (class actions); *Rules of Court of New Brunswick*, N.B. Reg. 82-73 (class actions), R. 14; *Newfoundland Rules of the Supreme Court*, 1986, Nfld. Reg. 1986, c. 42, Sched. D., R. 7.11 (representative proceeding); *Rules of the Supreme Court of the Northwest Territories*, N.W.T. Reg. R-010-96, R. 62 (common interest); *Nova Scotia Rules of Practice, Civil Procedure*

The new class action legislation introduced in Ontario in 1992 made class actions a more attractive vehicle for individual plaintiffs to pursue claims against corporate defendants, particularly large corporations.[133] Canadian courts have described the three main goals of class action legislation as judicial economy, increased access to the court, and behaviour modification of actual or potential wrongdoers.[134] With these goals in mind, courts are more readily certifying plaintiffs as a "class" with common issues to be litigated against corporate defendants.[135] The legislation does not require common issues to be predominant (as in some other jurisdictions), so the class can be certified even if the claimants have suffered varying losses or have been affected in different capacities.

The potential benefits to plaintiffs of proceeding by way of class action are obvious. While the high cost of litigation has traditionally deterred parties in Canadian jurisdictions from proceeding with smaller meritorious claims or larger claims of more dubious merit, the new legislation effectively removes many financial obstacles. Although a common practice in the United States, class action legislation has allowed litigation to proceed for the first time in many Canadian jurisdictions on a contingency fee basis. As a result, plaintiffs do not have to pay ongoing retainers for legal fees and may ultimately have to pay their lawyers only if they are successful in settling or prosecuting the claim. In that event, the legal fees come out of the settlement or judgment proceeds, so that plaintiffs may never themselves have to pay legal fees during the

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Rules, 1999, Re. 2, R. 509 (representative proceeding); *Ontario Rules of Civil Procedure*, O.Reg. 194, R. 12 (class proceedings); *P.E.I. Rules of Civil Procedure*, P.E.I. Reg. EC496/97, R. 12 (representative proceeding) and *Saskatchewan Queen's Bench Rules;* Sask. Reg. Section 1-745, R. 70.

133. *Class Proceedings Act*, 1992, S.O., c.6 (1992); *Law Society Amendment Act (Class Proceedings Funding)*, S.O. 1992, c.7 (1992).

134. Bendall v. McGhan Med. Corp. (1993), 14 O.R. (3d) 734 (Gen. Div.), *leave to appeal refused* [1993] O.J. 4210 (Ont. Div. Ct.); Abdool v. Anaheim Mgmt. Ltd. (1995), 21 O.R. (3d) 453.

135. Bendall v. McGhan Med. Corp. (1993), 14 O.R. at 734 (silicon breast implants); Nantais v. Telectronics Proprietory (Canada) Ltd. (1995), 25 O.R. (3d) 331, *leave to appeal denied* (1995), 40 C.P.C. (3d) 263 (Ont. Div. Ct.) (leads for pacemakers); Harrington v. Dow Corning Corp. (1996), 22 B.C.L.R. (3d) 97, *aff'd* (1999), 179 D.L.R. (4th) 326 (B.C.C.A.) (breast implants); Campbell v. Flexwatt Corp., (1996), 25 B.C.L.R. (3d) 329, *aff'd* (1997), 44 B.C.L.R. (3d) 343 (B.C.C.A.) (radiant ceiling heating panels); Chace v. Crane Canada Inc. (1996), 26 B.C.L.R. (3d) 339, *aff'd* (1997), 44 B.C.L.R. (3d) 264 (B.C.C.A.) (toilet tanks); Ontario New Home Warranty Program v. Chevron Chem. Co. (1999), 46 O.R. (3d) 130 (Ont. Sup. Ct.) (high temperature plastic vents for furnaces).

litigation.

In addition, plaintiffs proceeding by way of a class action may effectively escape the usual cost consequences if they are unsuccessful at trial. As discussed in more detail below, in Canada, a party who is unsuccessful in litigation, whether as a plaintiff or defendant, will normally be ordered to pay some amount to the successful party in respect of the legal fees incurred by the successful party in the case. In the context of a class action, however, the legislation allows for a public fund to finance disbursements and costs if the plaintiffs ultimately lose at trial. In addition, the court has the discretion to decline to order an unsuccessful plaintiff to pay the legal fees of a successful defendant. The effect of these rules may be to encourage individuals to believe that they have little to lose in commencing or joining into class action litigation when they otherwise might not have pursued a claim alone.

From the corporate defendant's perspective, defending class action litigation can be a time-consuming and expensive exercise that is fraught with uncertainty. With the fear of mass exposure from an adverse judgment coupled with the inability to recover legal fees even if successful, class proceedings inherently encourage corporate defendants to attempt to settle claims rather than defend them. As experience in Australia and other jurisdictions indicates, most class actions never reach the stage of a judgment being issued. When faced with a class action and the magnified potential consequences of an adverse verdict, corporate defendants who routinely defend individual claims vigorously are forced to consider a settlement as perhaps the best exit from a difficult situation.[136]

D. Cost Awards And Contingency Fees

The cost of litigation in Canada has acted as a significant deterrent to product liability claims. There are two aspects to the impact of costs on litigation in Canada. First, in common with Australia[137] and the United Kingdom, Canadian provinces have been reluctant to follow the United States' lead in allowing lawyers to handle cases on a contingency fee basis. Indeed, even arrangements pursuant to which the requirement to pay a fee is dependent on success in the case have been greeted with little enthusiasm in Canada. As a result, most litigants are required to fund the costs of

136. Stapleton, *supra* note 4, at 12.
137. *Id.* at 9.

a case on an on-going basis. Second, as noted above, the general rule in Canada is that an unsuccessful party in litigation is required to reimburse the successful party for some of its legal costs.

There is little doubt that these two factors have contributed to the development of a less litigious environment in Canada. Their impact has been felt particularly in the product liability context, which often involves individuals with potential claims against large corporations. Product liability negligence claims are often difficult to prove, may require expert evidence, and can be extremely expensive, given the quantity of documentation and information routinely produced by defendants to demonstrate reasonable care in the design and manufacture of their products. Such cases are often vigorously defended because of the potential impact of an adverse ruling for the product generally. Further, the result is often difficult to predict in advance, particularly in view of the rejection of a strict liability approach in Canada.

On the other side of the equation, litigation is usually equally or more expensive for the defendant, and the Canadian rules with respect to the recoverability of legal costs are designed to create an incentive to settle litigation as early as possible. The award of costs made in favour of a successful party in litigation generally represents about one half of the actual fees incurred. As a result, even a party anticipating success in litigation has an economic reason for attempting to resolve the lawsuit. The Ontario *Rules of Civil Procedure*[138] further promote compromise by creating potential cost award benefits from the making of offers to settle. A plaintiff who is successful at trial, who made an offer to settle in an amount that is equal to or less than the court's award, is entitled to recover costs at the normal rate up to the date of the offer and a greater percentage of the legal costs incurred after the offer was made. Where an offer is made by a defendant and the plaintiff, while successful, does not obtain judgment for a greater amount than the offer, the defendant is required to pay a portion of the plaintiff's costs only to the date of the offer and the plaintiff is required to reimburse the defendant for a portion of its costs thereafter. The effect of these rules is to encourage the making of reasonable offers and to put pressure on the recipient of an offer to give serious consideration to settling the action.

With the evolution of class action procedures in Canada, con-

138. R.R.O 1990, Regulation 194, Rule 49 – Offer To Settle.

tingency fee arrangements have gained a foot-hold which may grow to a role in litigation generally. At the present time, as a relatively new innovation in Canada, they remain of limited use and subject to strict guidelines. In most parts of Canada, contingency fee agreements are generally only available in class proceedings and, even then, they must be specifically approved by the court in each case. The adoption of contingency fee arrangements in class actions will enable Canadian jurisdictions to experience their effect and to evaluate the concerns that have historically prevented acceptance of this type of fee agreement. Contingency fees have been seen by many lawyers and members of the general public as the avenue to an increasingly litigious society. It is unlikely, therefore, that the approach to costs and fees that is generally accepted in Canada will change in the foreseeable future. However, because product liability claims are so well-suited to class proceedings, the availability of contingency fees and the lower risk of a cost award being made against a plaintiff in a class action will likely lead to class proceedings being brought in respect of alleged product defects that in the past would have remained unchallenged by individual litigants.

E. The Effect Of The Public Health Care System

For plaintiffs, the smaller size of damage awards in Canada has been at least partially offset by the benefits received from our universal health care system. Canadians injured by faulty products are protected from having to pay medical costs and may also qualify, if injured at work, under public workers' compensation programs. For the most part, provincial health care plans cover medical expenses for injured parties so that they do not have to pay themselves for the cost of their health care. This has the effect of significantly reducing the incentive for an injured person to commence a product liability claim unless other substantial damages have been incurred. The impact of public medical coverage in deterring litigation has been important[139] and has similarly been

139. B.A. Thomas & L.G. Theall, *Product Liability and Innovation: A Canadian Perspective*, 21 CANADA-UNITED STATES LAW JOURNAL 313, 314 (1995): "Canadians have available to them a network of medical, health, and social security programs which reduce the need to litigate. We also have government-sponsored Workers' compensation providing 'without fault' rehabilitation, retraining and a guarantee of income for people who suffer work-related injuries." *Id.*

witnessed in the United Kingdom and Australia,[140] which also have universal health care programs.

Although provincial insurers are entitled to bring subrogated claims to recover benefits paid out to injured parties, as a practical matter, they do not often commence litigation where the injured party has not done so. As a result, those responsible for the defective product are frequently not required to reimburse the public health care system for the costs of care except in the most serious of cases.

F. Product Liability Insurance

Given the potential impact of a large damages award, the sufficiency of their product liability insurance is very important to manufacturers, suppliers and distributors. Careful attention must be paid to the terms in insurance contracts to ensure that there are no unexpected gaps in liability coverage, or in the types of damages awards that fall within the policy. Adequate product liability insurance can be costly, but a well-considered policy can ultimately save a company from economic hardship in the face of a daunting judgment or settlement.

In the United States, an interagency task force was established in the late 1970s to investigate complaints of unreasonably expensive product liability insurance. The task force recognised the disparate impact of insurance costs on small manufacturers, but found in general that insurance premiums were less than one per cent of total sales and that the widespread complaints were more alarmist than real.[141] In 1991, the American Law Institute confirmed that insurance concerns were largely unjustified and that there was no ongoing "crisis" warranting intervention.[142] Regardless, a number of American states took steps to try to address these issues. In Canada, the absence of a strict liability standard, the cap on general damage awards, and the approach taken to punitive damages discussed above have effectively combined to reduce the economic burden of lost product liability cases, and have avoided the devel-

140. Stapleton, *supra* note 4, at 11.

141. United States Department of Commerce, Interagency Task Force on Product Liability, Final Report (1977), III-6, at III-55 and VI-18; see S. Waddams, *supra* note 5.

142. American Law Institute, Reporters Study, *Enterprise Responsibility for Personal Injury*. vol. 1, at 6 (1991). *See also* Waddams, *supra* note 5, at 207 (commenting on the American "Insurance Crisis").

opment of a perception of an insurance or damage award "crisis" in Canada.

V. CONCLUSION

The principles governing the imposition of liability for a product-related injury or loss continue to evolve in Canada. The trend in Canada continues to be towards the imposition of high standards on parties putting products on to the market. This is occurring, however, within an environment that focuses on awarding compensatory damages rather than large amounts for general and punitive damages, and on broader recovery for injury or damage to individuals or property than for economic losses.

It remains to be seen whether the recent introduction of class actions and contingency fees will lead to more product liability litigation in Canada, though it seems likely that this will be the case. These innovations have had significant testing in the United States, and it is to be hoped that Canadian courts, lawyers and litigants can benefit from that experience. Similarly, Canadian product liability principles and practice appear to be working effectively to promote product safety and protect product users, with appropriately defined impact on product development, manufacture and sale. Although certain differences are unlikely to change, such as the divergent approaches taken to the right to trial by jury, we believe that the Canadian experience can also be instructive as the law and procedures affecting product liability continue to evolve in jurisdictions in the United States. In the end, our objectives are the same, and both countries will benefit from taking an international perspective on the continued development of this important area of the law.