

Product Liability Law In Canada:

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A. Introduction

Product liability law in Canada shares many features with the law of the United States. However, as discussed below, there are some distinctions.

In Canada the categories of product liability are not closed, but most product liability cases involving manufacturers fall into one or more of the following categories:

1. Negligent Design of a Product
2. Negligent Manufacture of a Product
3. Breach of Warranty
4. Negligent Failure to Warn.

We examine each of these separately, recognizing that any particular case generally involves allegations falling into more than one category.

B. Categories of Liability

1. Negligent Design of a Product

Negligent design is often alleged where a product, although manufactured to specification, fails, for example, because it was not suitable for the purpose for which it was intended, not sufficiently resistant to external elements, nor able to withstand reasonable wear and tear.

The primary issue in most negligent design cases is whether the design met the standard that would reasonably be expected in the particular industry, given the state of the art at the time of the design and manufacture of the product. In short, the Courts will hold a manufacturer to "state of the art" design principles and techniques, at a minimum.

It can be difficult for a plaintiff to establish negligent design, in the absence of a glaring error, because of the problem of establishing the design did not meet the "state of the art" at the appropriate point in time. However, as a practical matter, if a component is not able to withstand exposure to those elements that should have been expected given the nature of a product and its intended use, the courts will presume the design was negligent. That presumption can be rebutted by establishing the product was used in extreme operating conditions which could not have been foreseen at the time of manufacture.

It is also a defence to a claim of negligent design that the failed product was used for a purpose for which it was not designed.

2. Negligent Manufacture of a Product

A manufacturer has a duty to take reasonable care in the manufacture of its product, including all its component parts. Failure to take such reasonable care can result in liability to the ultimate user or consumer. The duty of a manufacturer that assembles a product is not limited to those parts of the product which it manufactures itself. The duty extends to all component parts supplied by sub-manufacturers or others engaged in the assembly of the product. If a plaintiff proves the existence of a defect and that damage resulted therefrom, a presumption of negligence will arise which the manufacturer must rebut with cogent evidence.

In general it is somewhat easier for a plaintiff to prove negligent manufacture since the standard which the product must meet is usually clearly defined by specifications.

Negligent manufacture is often alleged where, although designed properly, a component failed because it was constructed from improper or inadequate materials, or was installed incorrectly, or the wrong sub-part was installed, etc. When such a defect arises in a manufacturing process controlled by the defendant, the inference of negligence is almost incapable of rebuttal. In this regard, although Canadian Courts may shy away from expressly adopting the American "strict products liability" standard, as a practical matter Canadian law is not far removed.

Aviation claims for negligent manufacture are typically easier to prove for another reason. In Canada when an aviation accident occurs there is usually a detailed investigation by the Transportation Safety Board. While these investigations do not purport to assign civil fault, the investigators frequently undertake a detailed analysis of failed components, including their history. In the result, potential litigants have ready access to information that will assist them in assessing their respective liability positions without having to undergo the expense of engaging experts, at least at that point in time. This is usually of greater benefit to plaintiffs who often do not have the resources to retain experts at the outset to undertake complex technical analysis.

Finally, liability can extend to others in the distributive chain when they can be shown to be negligent even though they played no role in the manufacture of the product. Importers, wholesalers and distributors can be found liable if the circumstances are such as to imply a duty to the ultimate end user. These parties may be able to set off a portion of any damages they may have to pay by making a claim against the manufacturer.

3. Breach of Warranty

In Canada, warranties may be express provisions in a contract, or may be implied in such contracts by operation of statutory provisions contained in provincial statutes governing the sale of goods. Canada does not have a Uniform Commercial Code and nor do the courts of Canada embrace the concept of implied warranties going beyond the contractual environment.

i) Express Warranties

Typically a contract for the sale of an aircraft or aircraft component will contain terms whereby the manufacturer warrants its product. Such terms generally provide for repair or replacement of a defective component. It is open to a manufacturer to include terms

that purport to limit the scope of these express warranties, exclude implied warranties or all other liability.

There are other types of warranties as well that commonly appear in aviation contracts - such as service life warranties, turn-around warranties for maintenance, maintenance cost warranties and product reliability warranties. These warranties may also play a role in determining questions of liability for manufactured goods.

ii) Implied Conditions - Sale of Goods Statutes

With the exception of Quebec all provinces in Canada have statutes which codify certain aspects of the common law of sale of goods in a similar fashion to, but more limited way than the Uniform Commercial Code in the United States. The Quebec Civil Code is a statute containing all laws in Quebec that are within the jurisdiction of the province, and accordingly, contains statutory provisions governing the sale of goods.

Into all contracts of sale are implied conditions that the product sold be of merchantable quality and fit for the purpose for which it was intended. As indicated above, it is common in agreements for the purchase and sale of aircraft to exclude implied terms, but it must first be noted that most provincial statutes refer to certain fundamental terms as 'conditions' and not warranties.

In Anglo-Canadian common law there is a distinction between a warranty and a condition. A condition is a significant term in a contract, whereas a warranty is a secondary term. Breach of a condition entitles a party to rescind the contract, whereas breach of a warranty gives a party the right to sue for damages. However, after execution of the contract, all conditions are converted into warranties.

While this can become important in litigation involving manufacturer and operator it is important to note that aircraft transactions are often structured as leases, and not sales, in which case the Sales of Goods statutes would not apply.

iii) Contractual Limitation Clauses

Agreements of purchase and sale commonly contain clauses which purport only to exclude "warranties". Such clauses have been held by Canadian courts to be insufficient to exclude conditions implied by the above mentioned provincial statutes. Such implied conditions have been held to be terms that go to the root of the contract.

Apart from excluding implied conditions, a contract for the sale of goods, or any other commercial contract, may state explicitly that one party or another is exempt from liability, or its liability will be limited in certain circumstances. As a basic rule courts will uphold contractual limitation clauses, particularly where the agreement involves commercial entities of a similar size. There are, however, considerable statutory and common law restrictions placed on the party seeking to enforce a term limiting its liability arising out of some breach of the agreement.

In some provinces there is legislation which prohibits the exclusion of liability in certain consumer transactions. For instance, under the Ontario Consumer Protection Act, it is not permissible to exclude from a consumer sale the implied terms under The Sale of Goods Act. There is similar legislation in several other provinces in Canada.

Canadian courts also apply a number of common law rules which greatly restrict the circumstances in which a party will be able to rely on a clause limiting liability.

For instance, it is a well established principle in Canadian law that a party that breaches a fundamental term in a contract will not be necessarily relieved from liability by virtue of an exemption or limitation clause - even where that clause is clear and unambiguous. While there is debate as to when a party will be able to avoid the effect of a limitation clause, it is clear that when it is either unconscionable or unfair to enforce such a limitation of liability, the court will refrain from doing so.

While historically Canadian Courts have applied the doctrine of freedom of contract to enforce limitation clauses, the recent judicial trend in Canada has been to limit the circumstances in which a party is able to enforce a clause which purports to exclude warranties or a clause which limits liability. In addition to statutory provisions, common law doctrines of strict construction and fundamental breach have, in some circumstances have resulted in the imposition of liability on a party to a contract that has claimed the benefit of a clause excluding liability.

4. Negligent Failure to Warn

One important area of liability for aircraft manufacturers arises from the common law duty to warn of potential problems with products.

This can arise either at the time the product is supplied to the end user or at some point later. The manufacturer of any product carries with it the on-going obligation of the manufacturer to provide users with all up-to-date information required to permit the safe use of the product. This has long been accepted as part of the business in the aviation industry, where amendments to maintenance manuals, technical service bulletins and airworthiness directives are a part of the on-going business of manufacturers, carriers and government regulators.

That is not to say that liability issues cannot arise where, for instance, maintenance manuals contain an error, or otherwise fail to provide adequate information, or even if a manual contains ambiguous instructions.

In the aviation industry, it is frequently the operators' which first experience problems with aircraft components. Typically, such operators will generally report this information to the manufacturer. As the recipient of such information from one of many sources, a manufacturer may issue updated information either through a technical service bulletin or an amendment to the aircraft maintenance manual. However, considerable care must be taken to ensure such technical information is adequate.

A case which illustrates this point is the 1991 British Columbia case of *Can-Arc Helicopters v. Bell Helicopters Textron*. The plaintiffs were Can-Arc Helicopters Ltd. (lessee) and Heavylift Helicopters (N.Z.) Ltd. (owner of a Bell 214B helicopter, referred to as "VXC"). The defendants were Avco Corp. (engine manufacturer) and Standard Aero Ltd. (service agent of Avco carrying on the business of repair and overhaul of turbine engines and accessories).

The defendant Avco Corp. was the designer, manufacturer and distributor of the Lycoming T5508D engine and its replacement components, including accessory drive

gearboxes and accessory drive input bevel gears. Such an engine, gearbox and bevel gear were components of VXC when it crashed on October 11, 1987.

VXC was operated by an employee of the plaintiff Can-Arc, and was engaged in a logging operation. While in a climb, it suffered a sudden loss of power, forcing an emergency landing. Subsequent investigations demonstrated that the loss of power was caused by the failure of the bevel gear. Its toothed facing, or web, had been sheared away from its shaft, causing the shut-down of the engine's fuel pump.

Expert evidence adduced at trial indicated that the fracture or shearing of the bevel gear was caused by "a multiple initiation fatigue mode of progressive cracking", i.e. cracking of the gear in several places. More specifically, the cracking occurred on the surface of the web-to-shaft fillet of the bevel gear, which had on its surface, a layer of hard chromium plating. Avco records indicate that part of the shaft of the bevel gear was chromium plated during manufacture to compensate for undersized machining. This was an acceptable practice in some circumstances but in this instance, it was not. The effect of adding such plating here was to create a design hazard because plating usually in a state of tensile stress develops cracks that act as stress concentrators. Those stresses, combined with the stresses of operation tend to cause fatigue cracking in the base of the plated part. Avco's records indicated that there had been a total of eight failures of the same bevel gears, three of which were confirmed to have had chromium plating added to the web-to-shaft fillets.

The court held that the failure of the gear was due to its negligent manufacture, with the possibility that its design also contributed to the failure. The gear was negligently manufactured because Avco's own specifications for chromium plating called for none to be applied on the web-to-shaft fillet because of the inherent relative weakness of that area.

In defence, Avco maintained that it gave users of its engines appropriate and necessary warnings and advice regarding the bevel gear. It did so by issuing a service bulletin to its engine users.

Service Bulletin 32 had come into existence as a result of the crash of another helicopter caused by the failure of the same bevel gear (also manufactured by Avco) which failed in VXC believed to be due to the application of chromium plating on the fillet radius.

The wording of Service Bulletin 32 called for a one time inspection of the bevel gear to ensure all engines and gearboxes incorporate the improved accessory drive bevel gear "Revision N" model. Part D of the Service Bulletin is the "Compliance" section and it was to the wording of this section that the court directed its attention in determining whether the defendant Avco gave adequate warning and sufficiently clear instructions regarding the replacement of the gear to persons in the position of the plaintiff, particularly users who brought their engines into an Avco service agent's facilities to be tested but not necessarily to be repaired or overhauled.

The difficulty with the wording was that compliance provisions (in other bulletins) may contain, for example, a "hard-time" compliance provision which stipulate a number of hours of operation within which compliance with the bulletin should be accomplished (ex. not later than 300 operating hours after receipt of this bulletin). Other bulletins may

require compliance upon return to a service centre without fixing a time limitation (e.g. to be accomplished at first return to a service centre for repair or overhaul). In the case at hand, the compliance section read: "It is recommended that this Service Bulletin be accomplished on all installed gearboxes at next return to an authorized service centre..." VXC, was returned to the defendant Standard Aero for an engine test in Aero's test cell. This event occurred at a date later to the issuance by Avco of Service Bulletin 32. However, at the time of the test (which indicated that the engine was running normally), the helicopter was returned to Can-Arc without compliance with the Service Bulletin, ie. the bevel gear was not inspected and replaced with a Revision N model in accordance with the bulletin.

The issue for the court became whether the wording of the bulletin contained adequate warning of, and proper directions with respect to, the dangers posed by the pre-Revision N bevel gears and whether, given the information contained in it, the plaintiff should have taken some action pursuant to it. It is important to note that the court had already found that the bevel gear was negligently manufactured and that Avco, because of previous failures, was already aware of problems associated with the older bevel gears.

On the balance of the evidence, the Court held the wording of the bulletin did not constitute an adequate warning and sufficiently clear instructions to persons in the position of the plaintiff, particularly users who brought their engines into a servicing agent's facilities to be tested but not necessarily to be repaired or overhauled.

The court applied the following principles : "...a manufacturer is not liable to a user if it gives clear warning of, including precautions to be taken against, danger from the use of its product, and the user suffers damage by carelessly disregarding that warning and those instructions."

In addition, the court noted the nature of the warning which must be given. In short, it must be adequate in that it is communicated clearly and understandably and 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.

As stated, Service Bulletin 32 did not meet the above tests. One, the wording used was less precise and imperative in tone than that used in other "non-quantified time" service bulletins which Avco had issued prior. Two, it used the phrase "it is recommended that this service bulletin be accomplished" rather than the phrase which is set out in most of its bulletins, namely, "to be accomplished". Three, the wording was confusing; was the bevel gear only to be replaced if the engine was brought in for repair or overhaul or, when it was brought in for a test? The court was of the opinion that in Service Bulletin 32, Avco did not adequately deal with the type of situation faced by the plaintiff in this case. The compliance direction should have been more urgent and explicit in tone, perhaps even using a hard-time requirement due to the gravity of the consequences.

C. Other Liability Issues

The following discussion examines some sundry issues that often arise in product liability cases in Canada.

1. Subrogation

There is a principle in Anglo-Canadian insurance law that prevents an insurer from maintaining a subrogated action against a party insured under the contract through which the loss was paid. This is true whether the party is named as an insured or is an unnamed insured. This principle was stated most prominently by the Supreme Court of Canada in *Commonwealth Construction v. Imperial Oil*, (1976), 69 D.L.R. (3d) 558.

The principle behind the rule is that the parties are considered to have jointly and severally placed the insurance for both their benefits and have allocated the cost between them. Subsequent cases which have considered *Commonwealth Construction* have held that it is necessary to examine the contract which creates the obligation to insure to determine the true intention of the parties.

This is important in the aviation context. Commonly, aircraft transactions are structured as leases, and not sales, for tax and accounting reasons. Provisions which require lessees of aircraft to place insurance for the benefit the lessor-manufacturer are common and can have a significant impact on the liability analysis in accident cases. A similar analysis would follow in the event of a conditional sale.

In *Bow Helicopters v. Bell Helicopters Textron* (1981), 125 D.L.R. (3d) (Alta. C.A.) Bow leased a helicopter from the manufacturer, Bell. The helicopter was damaged, allegedly because of negligent manufacture by Bell. The lease required Bow, as lessee, to obtain hull insurance naming Bell as its interest may appear. After a crash, the repair costs were paid by the hull insurer which then brought a subrogated claim in the name of Bow against Bell to recover the sum paid out.

The lease also required Bow to obtain from its insurers a waiver of subrogation against Bell, which it did.

The lease did not contain any provisions which purported to exclude the liability of Bell for negligent manufacture. The Alberta Court of Appeal found in favour of Bell, on the authority of the *Commonwealth Construction* decision. It found that the lease requirement to name Bell as an insured and obtain a waiver of subrogation was sufficient to preclude a subrogated action. Bow had no action against Bell and, therefore, Bow's insurers could not stand in its shoes and take proceedings against Bell manufacturers, to recover their loss.

Prior to the decision in *Bow v. Bell* there was some question whether the obligations to place insurance and to obtain a waiver of subrogation were restricted to the relationship of Bow with Bell in its capacity as lessor of the helicopter. The decision makes it clear that the contractual obligation is not so limited and extended in that case to Bell in its capacity as designer, manufacturer, assembler and distributor of the helicopter as well. As a result Bow and its insurers were precluded from taking recovery proceedings against Bell in any capacity.

2. Apportionment of Fault

All provinces have statutes which permit apportionment of fault as between tort-feasors, including the plaintiff, if the negligence of such other parties can be proved. For instance, in Ontario the Negligence Act permits the Court to assign fault on a percentage basis. A defendant found 40% at fault must pay 40% of the plaintiff's damages.

A complication arises if one defendant found to be at fault has insufficient assets or insurance to satisfy its portion of the judgment. In such cases, if a solvent defendant is found jointly and severally liable with the insolvent defendant, the solvent defendant is liable for 100% of the damages, even if its portion of the fault was only 1%.

The apportionment rules differ from province to province but several continue to have a "deep pocket" rule. This rule is extremely important for a manufacturer which utilizes components supplied by others, as steps must be taken to ensure such manufacturers and suppliers carry adequate coverage to protect themselves in the event of an action arising out of a mishap involving the assembled product.

3. Worker's Compensation Schemes

All provinces in Canada have legislative schemes that provide benefits for injured workers. Most schemes, provide that workers injured while in the course of their employment are entitled to benefits from the plan, but are not entitled to sue their employer. In some situations they are also precluded from seeking damages from third parties.

4. Derivative Claims by Plaintiff's Family Members

Most provinces have a statute which permit members of an injured or deceased plaintiff's family to bring a action for loss of care, guidance and companionship and, in the case of a non-fatality, for provision of housekeeping and other services to the injured person.

These actions are derivative of the main action, and if the main action fails, the derivative actions also fail.

Claims for loss of care guidance and companionship typically range between \$5,000 and \$10,000 but can be higher, where for instance the claimant is a young child of a deceased parent.

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