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Product Liability Aspects of the Risks of Technological Change--A Canadian Perspective

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MR. ZAKAIB: The topic for our discussion today will be technological change and product liability. I thought, since this involves product liability and some issues relating to products and technology, I should bring in for you some of the digital tools that we use in Canada. I have a palm pilot, my digital phone, and a digital voice recorder. I do not use any of them very well, but I try. And, of course, we are going to give you a digital show today.

The theme of this Article will be the impact of technology on product liability and vice versa. More and more manufacturers and service providers in Canada are finding themselves in very uncomfortable circumstances. In some instances, innovation in products and services is leading to some judicial scrutiny and potential liability based on our legal discovery principals. That risk of judicial scrutiny and liability is impacting, in some cases, the implementation and development of technological change. As has always been the case in Canada, the effects of litigation in the United States are having an impact on Canada and are spilling over into the Canadian environment. This Article is intended to set the stage by talking a bit about the Canadian discovery process and its impact on various industries.

There are some distinctions between Canada and the United States which are important to point out to set the context of the kind of environment we face in product liability law. First of all, in Canada, very few cases go to trial with a jury. This is distinctly different from product liability cases in the United States. In fact, fewer than twenty percent of cases in Canada are tried with a jury. In provinces like Quebec, there are no jury trials in civil matters. In British Columbia, it is very difficult to get a jury trial. Ontario uses the jury system more, but not very often in product liability cases.

Another important distinction between Canada and the United States is that, in Canada, the judiciary is appointed, not elected. There are very wide

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documentary discovery obligations in Canada, particularly in the jurisdiction of Ontario. Yet another very significant difference is that Canada does not allow strict liability as grounds for compensation. There has been a lot of debate in Canadian law about whether strict liability should be imposed in products cases, but so far there has not been a case where strict liability has been imposed, except where there is a contractual nexus. By that I mean sale of goods cases where you can point to a contractual relationship between the plaintiff and the defendant.

Canadians have some concerns about documents that are being produced in Canadian litigation cases, because of these wide discovery obligations that are ending up in some U.S. cases. The concern stems from organizations such as the American Trial Lawyers Association, and their counterpart in Ontario, the Ontario Trial Lawyers Association. Members who participate and can get documents have to reciprocate by giving documents, and so we have some concerns about how this is impacting on some of our cases.

The last point is an important distinction between the United States and Canada. A trilogy of cases took place in the 1970s which capped the limit on general damages at $100,000 (Canadian) for pain and suffering. By reason of inflation, that number is now around $286,000. Some will argue it is a bit higher, but I hold that it is around $286,000.

We should give you a little bit of background on the Canadian discovery obligations, particularly in Ontario. There is a positive obligation to produce documents, particularly under Ontario Rule 30.02(1), which states that “every document relating to any matter in issue in an action that is or has been in possession, control or power or party to the action shall be disclosed, as provided [in Rule 30], whether or not privilege is claimed in respect of that document.”¹ This is done with an affidavit of documents, meaning Parties are positively required to gather all the documents, list them, and particularize them in an affidavit. They can distinguish between documents that they are prepared to produce to the other side, those that they used to have but no longer possess, and those that they will not produce because of a claim of privilege.

The other important thing to note is that when a Party claims privilege on documents in Ontario, they have to particularize the reasons for the claim, making it very wide. The Canadian rules also comprehensively describe what a document is. Under Rule 30.01(1)(a), a document “includes a sound recording, videotape, film, photograph, chart, graph, map, plan, survey, book of account, and any information recorded or stored by means of any device.”² Under the rule, then, electronic data and e-mails will be discoverable. Digital

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¹ Ontario, Rules of Civil Procedure, r. 30.02(1).
² Ontario, Rules of Civil Procedure, r. 30.01(1)(a).
information and document images are discoverable. The definition recognizes a wide variety of documents, and therefore expands even further what product manufacturers have to produce in a product liability claim.

The other important rule is 30.02(2), stating that “every document relating to any matter in issue in an action in the possession, control, or power of a party shall be produced,” and that is the mandatory word, “for inspection if requested . . . unless privilege is claimed.” This causes product manufacturers to have to produce documents and make them available to the other side in a litigation, unless they can assert a claim for privilege. The privilege claim is the listing of documents in schedule B of the affidavit of documents. The affidavit is then signed by a party and certified by the solicitor. In other words, the party and the solicitor have to certify that an exhaustive search has been undertaken.

Again, when you are claiming privilege on documents, you have to specify the grounds of privilege, and there are a limited number of grounds for privilege that Parties can assert. Rule 30.05 states that “disclosure or production of a document shall not be taken as an admission of its relevance or admissibility.” That is important because, if a Party produces something in discovery, or on depositions in the documentary discovery process, that does not in fact mean the document is admissible at trial. Parties still have to rely on the rules of admissibility.

Another important area in terms of setting the scene for Canadian product litigation is the issue of subsequent remedial measures. It has become a very important aspect for product manufacturers, particularly in a time when technology is constantly on the move. The leading case in Canada is one from the late 1980s, Algoma Central Railway v. Herb Fraser & Associates Ltd. et al. It is still good law, and it is the benchmark case on entitlement to discovery of the issue of subsequent remedial measures. In this case, the Court held that evidence of subsequent remedial measures can be proper at the discovery or deposition stage, but its admissibility and weight is left to the trial judge.

It is also important to note that when a witness is testifying, that witness has to inform himself or herself and come to the discoveries with information about the litigation. So there is a positive obligation to documents and a positive obligation on the part of the witness to inform and give information.

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3 Ontario, Rules of Civil Procedure, r. 30.02(2).
4 Ontario, Rules of Civil Procedure, r. 30.05.
6 “While the discovery process should not be a "fishing expedition," neither should it be unduly restricted by concerns about the admissibility or weight which may be given to the evidence at trial. Accordingly, such questions concerning subsequent remedial measures were proper at the examination for discovery stage of proceedings. Matters of admissibility and the weight to be given to such evidence at trial should be left to the trial Judge to determine.” Id.
about the litigation, and the relevance in terms of the information that has to be examined is determined by the pleadings to the action.

The *Algoma* case involved a claim for fire damage. Plaintiff brought an action claiming negligence and breach of contract resulting from a fire that occurred while the plaintiff's ship was undergoing repairs performed by the defendants. Questions were objected to on discovery involving remedial measures taken by the defendant in this case, on practices and safety procedures implemented following the fire. The first trier of fact ruled the evidence inadmissible. That was reversed. The issue was considered again on appeal, and it was heard at the divisional court level by a three-judge panel.

The Court had to consider an old line of authority in Canadian law stemming from the Law Reform Commission Report on evidence, which involves the issue of subsequent remedial measures. Under the Law Commission's Report, evidence of measures taken after an event, which if taken previously would have made the event less likely to occur, is considered inadmissible if the intent of the evidence was to prove culpable conduct in connection with the event, except when that evidence is offered to rebut an allegation regarding the feasibility of the precautionary measures. Courts normally looked at this evidence and said that it was only of slight probative value. Also, there was a public policy goal of not imposing on Parties some risk that they will be found negligent by taking steps to try and remedy a problem.

The court in *Algoma* had to consider that old policy and determine whether or not they would follow it. The reasons for the majority of the court were delivered by Justice Chilcott. His Honor reasoned, after considering the old public policy rule, that courts have always agreed that evidence of remedial measures has at least some probative value. It tended to be excluded, however, on policy grounds of not discouraging manufacturers from taking precautionary measures which may later be used against them. The judge claimed that this is a fallacious argument because it is unlikely that rather than furnishing some evidence, which may or may not be prejudicial to one's defense of an action, one will instead take no remedial measures, thus risking further actions being brought by later-injured plaintiffs.

The resulting ruling allowed evidence relating to subsequent remedial measures to be proper at the discovery stage, assuming, of course, that the inquiry was relevant. The Court further held that admissibility and weight of the evidence was to be left to the trial judge. It also made the statement that relevance at the discovery stage is broader than at trial. The Court really did not directly comment on whether or not this particular evidence would be

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8 See Algoma, supra note 5.
admissible at trial, but made some comments as to the relevance and the breadth of relevance at the discovery stage in trial.9

The Algoma case provides us with a change in a long-standing policy that evidence was not admissible to prove negligence, and therefore would not be relevant for production on discovery. It also expands the old concept that the two exceptions to the former policy were evidence that showed feasible precautionary measures or knowledge of the dangerous nature of the defendant’s actions, or essentially the foreseeability of the risk of harm. The Algoma case has been consistently followed since 1988. In all subsequent cases presented with this issue, the courts have applied the ruling of Algoma lock, stock, and barrel. As a result, all evidence is before the Court, with the probative value being left for the trial judge.

What has to be considered before discovery is ordered? First of all, one must look at the allegations in the pleadings, primarily the Statement of Claim and look to see whether there is an allegation that the defendant was dilatory in developing a precaution for a known risk or that the defendant failed to take adequate care to investigate and ascertain the scope and extent of a risk that was or ought to have been known.

At the same time, there is an inherent tendency to limit or curtail unreasonable discovery, allowing product manufacturers, if they are being subjected to unreasonable inquiry, to seek protection from the courts to exercise their inherent jurisdiction. The court will look at several factors, such as the degree of intrusion into private affairs, the degree of relevance, and the degree of probity of information sought to be introduced. There is also an overriding authority to exclude evidence where its probative value is outweighed by possible prejudice by the evidence. That, essentially, is the effect of the Algoma case. It is an important case because it sets a standard which many Courts must follow in product liability cases, particularly in a time when technological changes can be considered subsequent and remedial measures.

Another issue worth mentioning is class proceedings. Class proceedings have become more and more important in Canada, particularly in the last few years. Three Canadian provinces now allow class proceedings. The first province to allow class action legislation was Quebec, which has had class actions since the 1970s. In 1992, Ontario’s statute came into place, becoming effective in 1993. British Columbia passed legislation effective in the middle of 1995.

It is significant that, unlike the United States, Canada does not have federal class action legislation. Canadians cannot bring a “national” piece of litigation, unlike what can be done in the United States. As a result, a number

9 See id.
of products cases have been pursued across Canada. Many come up from across the border through a network of plaintiffs lawyers. Lawyers are networking across Canada in the three class action provinces, and a number of product liability cases are now being pursued on a national level. The prospects for creating a national class are unclear. It is not impossible; in fact a number of them with certified national classes have arisen in Ontario, and at least one has been certified in Quebec. Judges in the class action provinces are willing to certify national classes.

Whether or not judges in other provinces outside of Ontario, Quebec, or British Columbia will enforce a national class is uncertain. There is a need for reliance on the issue of judicial comity - will another judge grant judicial comity to the ruling of a judge in a class action province and hold that a national class has relevance and should be applied in a non-class action province?

Another important concern, particularly in products cases, is the issue of limited fund settlements, which is very common in the United States. It has not been tried in Canada. I probably have one of the first ones going to settlement, but it is untried and we are going to be quite creative and inventive. We are in murky waters on this one.

The other important area that is very common in the United States, but is totally foreign to Canada, is bar orders. Canada does not have a body of law that allows the creation of bar orders. Again, it is an untried issue in Canada. What has happened, though, in Canada, is that there have been a number of successful products cases where issues of remedial measures and technology have all been brought to the floor as issues of liability. These cases have caused some financially devastating results to date. One example is the case that actually started in the United States, made its way into Canada, and has effectively caused a company to go under. It involves a temporomandibular joint implant. Another example is breast implant litigation in Canada and its effects. There is also a fairly large pacemaker implant litigation in Canada that caused the company effectively to go out of business.


Those are some of the effects that Canada is facing in product liability litigation. Now, I will turn it over to Phil Spencer and ask him to comment on the effects of product liability and technological change on industries.

MR. SPENCER: Having heard how the process goes forth in Canada, just what is the cross-border impact of technological change? Canada does not have the same research and development dollars available to expend that the United States has, so it is very dependent upon the evolution and development of technology that comes from the United States. The one significant exception where Canada participates on a more equal basis is the auto industry. Of course, design, technology, and improvement all come from the United States. That is important because we see the impact of technological change coming through more or less after the fact. The impact varies, depending upon the nature of the industry and the product which is involved, but generally technological change will continue and many cases with consumer products are driven by the regulators. Canada looks very much to the trends in the United States to see what is happening. It is very much influenced by what happens in the course of those changes and in the litigation that flows from it.

How does this affect manufacturers, importers, or distributors in Canada? They are faced with a choice of either non-development, that is, not doing anything, or ineffective or insufficient technology. There are liability risks that flow from these choices if manufacturers do not take advantage of the technological change. The Algoma case demonstrates that the Courts are going to start applying their own standards if there is evidence of technological change, and manufacturers have not taken advantage of it.

A no-win situation is developing in Canada, driven by the fact that technological change is moving very quickly and is making its way across the border. Canadian manufacturers must keep up with other product manufacturers. They must have more effective safety measures in the circumstances, and that is an impact that we are seeing time and again. Those effects are being felt in Canada on a daily basis.

There are a number of specific examples. One is aircraft manufacturers. As everyone knows, the majority of commercial aircraft are built either in this country or in Europe. However, Canada does have one significant company, Bombardier. In fact, we flew down on a Bombardier regional jet today. The focus of aircraft manufacturers these days is upon litigation and how it affects them, the joint research impact, design product-related publications, certification, and regulation.

Generally, current fleets of airplanes are aging and financial resources are being diverted away from upgrades by the airlines. This is partly because of
this concern with respect to new product development. Companies like Bombardier, a very successful company in Canada, still upgrade in part with government money. But that is another issue that troubles some of us in Canada. The cost of new product development has increased as a result of the potential inspector of claims. Significant time and resources are diverted from manufacturing to the defense of claims. This is occurring over time as matters develop. And in this industry, particularly, technological change is being looked at worldwide as the benchmark for measuring the activities of companies, in regard to what they have and have not done.

Auto manufacturers serve as another very significant example. Developments such as air bags were engrafted upon the existing restraint systems, seat belts. What should the manufacturer do? Should they install air bags because that is the safety level required and a safety device which they have to have? However, it has been found that restraint systems and air bags have caused injuries for drivers and have created another problem for auto companies.

That leads to another impact of technological change. Manufacturers that have a new and better generation of restraint or accident prevention devices, such as air bags, and choose not to install them are finding themselves being measured against the standard of what they might have done, even with aftermarket products. So, current technology is being dealt with and has to be utilized by the manufacturer. The problem with air bags is obvious. Canada faces the issue of the installation of air bag cutoff switches. In our country, a vehicle owner must justify not using the air bag and having such a cutoff switch before he or she is permitted to disengage the air bag. Most people are not bothering to meet this requirement. They simply have someone quietly disengage the air bag. I have had some individual clients ask what their legal liability is.

Addressing the liability of the manufacturer of the air bag, first of all, creates an initial problem because people come in different sizes. One driver may be of a particular size or stature that would cause him to suffer more serious injuries from the airbag than someone with a smaller build. Or in the alternative, what is going to happen if the manufacturer knows about the disengagement of the device but, because of technological change, the air bag cannot be retrofitted particularly easily? What happens is those kickup liability problems exist and they have a significant impact on development in R&D.

In Canada, we are watching what is coming out of the major auto manufacturers in the United States to see what standards are developing. Of course, there is a great body of litigation in this particular area. Even without juries significant lawsuits are coming forth. There is a cap on damages in
Canada, and we do not have contingency fees, generally, except in class actions with the Court’s approval.

Another issue which is now being recognized in a North American context, is that of vehicle aggressivity. Approximately fifty percent of all new vehicles being sold are sports utility vehicles (SUVs), light trucks, or minivans, and the death rates and numbers of collisions for those who do not drive those type of vehicles are increasing. When analyzing the question of a vehicle’s aggressivity and those who manufacture and sell the vehicles, we see that an analysis and a test can be applied. There is actually a standard for a vehicle’s “aggressivity”; it is a function of vehicle mass. To assess it, one looks at the mass of the SUV compared to a compact or subcompact car, and what happens to a person who is driving the subcompact or compact car during a collision. There is the question of linear stiffness, which is the structural incompatibility between the two vehicles, and aggressivity is a function of ride and rocker panel height because geometrically, the vehicles are incompatible. These highly “aggressive” vehicles have become increasingly popular in Canada as well as in the United States.

The risk of injury and damage as a result of this concept of vehicle aggressivity is something that is fairly recent because a few years ago, there was not this preponderance of SUVs out on the road. These vehicles present a greater risk of fatality in car crashes when they collide with smaller cars. We see that this will increase the liability on the manufacturers, and that is another impact of the change in technology and the popularity of these vehicles.

Now, let us turn to pharmaceuticals and medical devices. The Canadian pharmaceutical industry is basically a branch plant industry as far as the major brand name companies are concerned. There is no uniquely Canadian company. Most are American or European companies. However, Canada has a burgeoning industry in emerging and mid-cap companies in the biotechnological and medical device industry, or concept businesses that can license to pharmaceutical companies.

In Canada, there has been somewhat of a chilling effect that has balanced out this increase in technology. It is the fact that, given cross-border accessibility to U.S. culture, and given the fact that most Canadians’ closest exposure to a courtroom is through American television, Canadian litigation has started to evolve along the lines of American litigation. For example, our terminology has changed tremendously. Thirty years ago, Canadians used to call the place where a witness sat the witness box. It is now the “stand.” Judges, once called, “My Lord,” are now addressed as “Your Honor.” Canadian lawyers have not yet gone so far as to “approach the bench,” though.
Generally, American and Canadian attorneys often do the same things, but give those things different labels. For instance, U.S. attorneys will ask, "can you stipulate to that?" A Canadian will ask, "are those agreed facts?" The public, on the other hand, sees the impact of two things, litigation and compensatory damages. There is a very great public interest and awareness in class action proceedings.

The pharmaceutical and medical device industries are very much aware of this. Canadian law firms are starting to give companies planning advice to avoid lawsuits. As they are involved in developing new technology and bringing it to market or licensing it to a brand name pharmaceutical company, they are told initially to make sure that they have engaged in a program of appropriate risk management because the standards that are expected of them are much higher in product liability law. They are also told that it is foolish not to have appropriate insurance coverage for these types of risks, even if they think that the premium is being paid for something that may never take place. As a result of the increased interest in litigation in Canada, there is an explosion of litigation for damages with respect to medical devices and pharmaceuticals, and it is slowing down the assessment of the market for new products.

As noted earlier, some class actions have been virtually devastating in various areas, such as the breast implant litigation, and the pacemaker lawsuit. Glenn and I did a presentation about this last week. The Chief Operating Officer of the company told us what happened as a result of what was an unforeseen defect in one of the company's products. Even though that improved technology helped to lengthen life and to save life, the process the company went through when there was a break in the lead wire basically forced the owners of the company to exit the business.

Also of interest was the fact that there was twenty-five million dollars of insurance worldwide, and a well-known Canadian lawyer managed to scoop up about $6,000 per claimant, leaving nothing for the rest of the worldwide claimants.

Manufacturers looking to market new products are not only looking at the market conditions in Canada, but they are also looking at the prospects of liability there. They are looking at what might happen if they are fortunate enough to enter the U.S. market. Many companies want to have a good idea of what risks they will be assuming because of the threat of the large damage awards that hovers above the U.S. marketplace. Culturally and legally, companies deal with quite a different set of facts in the United States. If they are

13 See Arab, supra note 11.
14 See Chalmers, supra note 12.
not aware of it, we as lawyers have to make them aware of it. This flows from the new and improved technology in which they are engaging.

Next, I would like to discuss what we call the "Norplant syndrome." Norplant, an oral contraceptive, was ready to be launched by the manufacturer in Canada. When they looked at all of the down sides that they might suffer, they decided not to go ahead with it. They went through with millions and millions of dollars of clinical testing and double-blind studies and everything else, and then ultimately said they would not market it because of the risks. Companies are sometimes faced with making that choice, keeping in mind that, in Canada, in pharmaceuticals particularly, there is limited research and development. Canada is a formulation society where the bulk is brought into the country and the pharmaceuticals are manufactured for domestic consumption.

There are a couple of other areas that require your attention. The first is cellular telephones. The interest in this potential litigation stems from a Larry King Live show in 1993.\(^{15}\) A widower went on the show and stated he was going to sue two cellular phone manufacturers as a result of a brain tumor from which his wife died. The program provoked a significant amount of interest in Canada as a source of potential litigation. Although there is no proof, and even though these claims appear to be unfounded, because of the dissemination of that information from the U.S. national networks and CNN, which is very closely watched in Canada, Canadians are really looking at the potential for litigation. They are looking at litigation with respect to this technology which has not really been around for all that many years.

As far as gun manufacturers are concerned, Canadians like to think we are different because Canada has gun registration, but it is really not that much different at all. All of the issues with respect to potential claims against gun manufacturers will be in play in our country. We are carefully watching the New Orleans lawsuit.\(^{16}\) There are a number of cities that are commencing action against gun manufacturers because of allegations of lack of safety of design. So when the manufacturer brings out a new concept or an addition or an improvement which is a result of new technology, then we are watching the lawsuits that will take place and will be taking place in this jurisdiction.

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\(^{15}\) See Larry King Live (CNN television program).

I do not think I need to say much about the growth of the Internet as a business tool and a recreational tool. I have certainly been involved in defamation cases where a bulletin board service was made available to users, defamatory or alleged defamatory comments were made, and someone who received those comments, quite often off-shore, threatens or commences litigation. In fact, I know of one person, who is not from the United States or Canada, who precipitates this litigation by saying nasty things about the country of origin of those who receive it, and seems to be litigating around the world. The bulletin board service and Internet issues and the law with respect to them evolves from the cases that are taking place in your state superior courts and in the federal district court, and again there is great interest in the use of the Internet and inappropriate comments being made.

The best example of a case in our jurisdiction was regarding a teacher at an educational institution who received his performance review. There was nothing wrong with that, except the Dean of the institution inadvertently transmitted it by e-mail to every other academic at the institution. So our courts said, that is an appropriate case of libel under the circumstances, and therefore, the action can go ahead.

Finally, I have something to say about Y2K. Trust the computer industry to shorten the year 2000 to Y2K. It was this kind of thinking that caused the problem in the first place. Need I say more?