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Bruce A. Thomas

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A Canadian View of the Product Liability Aspects of Innovation

*Bruce A. Thomas**

North Americans have grown up in an economy which has prided itself on growth, development and innovation. Lately, however, there have been disquieting comments concerning the alleged lack of competitiveness of the North American economy with the economies of other countries, particularly Japan and the Orient. Lack of innovation is cited as one of the problems in the North American economy. In turn, it is suggested that the legal systems in Canada and the United States have contributed to a stifling of innovation in the economy.

I believe that technological innovation has not been significantly inhibited by our legal system and our product liability laws. This position may not be shared by all American legal scholars and corporate executives. Nonetheless, for the reasons I will discuss, I have come to the conclusion that Canadian product liability laws and our legal system do not significantly inhibit innovation.

If there is a difference between the Canadian and the U.S. experience in this area, and if, as I suggest, Canadian product liability laws have not inhibited technological advancement, our different experiences may result from some of the following factors:

- 1) Differences between U.S. and Canadian social systems and our basic cultural differences;
- 2) Procedural differences within the U.S. and the Canadian judicial systems;
- 3) Differences in the approach to damage assessments; and
- 4) Differences in our respective substantive product liability laws.

Other non-legal factors which have an impact upon our capacity for economic innovation and growth have been discussed at this Conference. One wonders whether we think long-term in the management of our business enterprises. Is enough being spent on product research and development? Is too much emphasis being placed on financial results for the short-term because of stock market pressures? Is the emphasis on takeovers something which is distracting our industrial leaders from the need to innovate?

I. SOCIAL/CULTURAL DIFFERENCES

Aside from the difference in the size of U.S. and Canadian popula-

* Partner at Cassels, Brock & Blackwell, Toronto.

tions, many Canadians view themselves as more conservative and less aggressive than Americans in their attitudes and day-to-day approach to life. While we take great pride in the technological developments and advances in such industries as the telecommunications industry, many Canadians feel that we need more Northern Telecoms in the Canadian economy. Northern Telecom, a company which began in Canada and has become a significant factor in its industry, is quite unique in the Canadian industrial experience, particularly where the reason for its success is technological development.

Canadians generally are less aggressive in their use of the civil justice system in seeking redress for personal injury. For example, my firm currently represents a foreign automotive manufacturer who faces in excess of 1000 claims involving the use of a particular product in the United States. Yet, in all of Canada, it faces only eight claims involving the use of the same product. Differences in the number of units available, the population base or the hours of use do not explain the significantly fewer claims in Canada. Indeed, I am aware of persons in Canada who have been injured while using the product, who have simply accepted as a fact that their own conduct, and not the product's design or manufacture, was the root cause of their injuries. There is a greater reluctance on the part of Canadians to make use of the judicial system to seek damages as compared to Americans.

This "reluctance" may not be attributable solely to a sense of individual responsibility. Canadians have available to them a network of medical, health and social security programs which reduce the need to litigate. In Ontario, for example, the Ontario Health Insurance Plan pays for all medical and health services. Any person seriously injured while using a product does not face financial ruin in order to pay for medical care. In addition, there are social assistance programs at all levels of government, which provide at least a base level of income to a disabled person, regardless of fault. Still other programs provide for subsidized housing and education. Accordingly, in situations where "fault" is questionable, the injured person is not compelled to litigate.

We also have a government sponsored worker's compensation scheme providing for "without fault" rehabilitation, retraining and a guarantee of income for workers disabled in the course of their employment. This has been part of our economic system for over fifty years. It has resulted in the elimination of the right to litigate work-related injuries, including those stemming from allegedly defective machinery or equipment, or from unsafe working conditions.

Accordingly, while perhaps not capable of precise statistical or academic analysis, I believe that the social and cultural differences between our two countries have reduced the need for Canadians to use the court system.

II. PROCEDURAL DIFFERENCES BETWEEN THE U.S. AND CANADIAN LEGAL SYSTEMS

From discussions with U.S. lawyers, including those who share the defense of certain products with us, I understand that product liability cases are invariably tried in the United States by a court composed of a judge and a jury. In Ontario, either party has a right to request a jury. However, unlike the U.S. system, there is no constitutional guarantee to trial by jury. Any party can move before, at the commencement of, or during a trial, to have a jury dispensed with on the basis of complexity. Most product liability cases involve complex issues of design and manufacture. Our trial judges routinely dismiss the jury in such cases and go on to hear the evidence and give a judgment with an opinion or reasons, which are reviewable by courts of appeal.

On a related point, our judges are appointed, subject to good behavior, for life. They are paid reasonably well and are generally drawn from the leaders of the legal profession. The need for election or re-election, the need for campaign funds and the expenditure of effort required to obtain re-election, are not factors in our judicial system.

There are other procedural differences which discourage product liability cases. These include the prohibition of any party or counsel from polling members of a jury. In this way, neither party is able to determine the jury's reasons for a verdict, their perception, nor their reaction to a product. This also prevents plaintiffs' counsel from "targeting" a particular product after an initial success based upon a juror's reaction to the evidence.

While cost sanctions are available in the United States, I believe that they are of greater severity in Canada. Canada follows the English system, where costs awarded by a court may indemnify as much as 50% of a litigant's actual legal expenses; on occasion the courts can and do assess costs against an unsuccessful party which result in complete recovery by the winning side of their legal expenses. I believe that plaintiffs in our country, and to a lesser extent, their counsel, are influenced by the prospect of cost sanctions.

Although they are likely to be a feature in our jurisdiction in the future, in Ontario, contingency fee arrangements have not been permitted as of yet. This factor, and the others I have mentioned, discourage plaintiffs from pursuing "high risk litigation." These procedural differences, and in particular the absence of a jury in most product liability cases, have, in my view, discouraged product liability actions in Canada.

III. DAMAGE ISSUES

Until recently, a claim for punitive damages in a product liability case has not been allowed to stand. There has never been an award of punitive damages following trial of a product liability case. Accordingly, manufacturers and distributors of products have not had to weigh the

potential of a punitive damage award when considering the release of a new product.

In 1978 the Supreme Court of Canada placed a cap of \$100,000 on non-pecuniary general damages. That cap has risen through inflation to approximately \$200,000. While I understand that similar types of caps have been enacted by some state legislatures in the United States, Canadian product manufacturers do not face substantial "seven figure" awards for pain and suffering. Presently, a tort reform package is before our legislative assembly. This package will, among other things, enable the court to impose a structured settlement in appropriate cases. It is hoped that this will avoid the squandering of huge lump sum awards by plaintiffs inexperienced in handling investments. In addition, such annuity payments are not subject to income tax.

IV. SUBSTANTIVE LAW

We have not been faced with the standard of strict liability in defending products in our country. While some judges have imposed a "heavy onus" resembling strict liability upon our product manufacturers, courts have been careful to emphasize that the finding of liability is not based on the theory of strict liability, but rather on traditional negligence standards. Courts attempt to determine if a product was defectively designed, or defectively manufactured, or whether a product, if potentially hazardous, is accompanied by the necessary and appropriate warnings.

There have been comparatively few product liability cases which have resulted in awards based on design defect. The cases based on design defect are of necessity, difficult and expensive to establish. Inevitably, they become expensive battles between experts, which few Canadians have demonstrated a willingness to undertake.

We continue to be governed by the principle of contributory negligence in Canada and I assure you that it is a principle of law to which more than lip service is paid by our judges. The conduct of a plaintiff in any product liability case is rigorously scrutinized. Accordingly, the expense and uncertainty of a design defect case combined with the potential for significant contributory negligence, tends to discourage litigation and not product innovation in Canada.

There are a number of reported cases where courts have held that there were manufacturing defects in a product. These are relatively isolated incidents and cannot be fairly stated to be a deterrent to innovation. Most manufacturers have protected themselves from this risk with insurance. They have considered the exposure resulting from an individual product malfunction. The cost of the potential exposure is insured and the product is priced accordingly.

Product liability claims may even promote innovation through their impact upon manufacturers. I am personally aware of a case which in-

volved a lawn and garden tractor. As a result of learning of the unsafe design through claims, the manufacturer made improvements in the product, increasing both its quality and safety. In this case and others, we are aware that product liability laws have fostered innovation in a positive sense.

One theory of liability advanced more often today in product cases is the failure to warn. Most cases which come to our attention contain a plea that the manufacturer or distributor failed to warn of the potential for harm. The net effect of this approach has been to cause manufacturers and distributors to evaluate their marketing and distribution program. Manufacturers are examining their advertising and marketing materials, and examining the warnings and the form of warnings being provided to potential users.

Our firm was also involved in a case involving an oral contraceptive. The trial judge found that the product was manufactured properly. However, he found that the oral contraceptive exposed certain women, and in particular, a class including the plaintiff, to an unusual health risk. The court imposed liability, primarily on the basis that the manufacturer took inadequate steps to properly warn its intended consumers of the associated health risks. One must ask whether this decision improperly inhibits the innovative process of manufacturers. Such a decision may cause manufacturers to consider all the safety aspects before releasing new products and to carefully assess their marketing program. On the other hand, this may not be inappropriate where a product is capable of causing serious harm to one's safety or health. The threat of litigation in our experience, has been a safety check on indifference. It has not been a restriction on innovation.

V. CONCLUSION

In late 1985 and 1986, we experienced an insurance crisis. Many manufacturers in Canada were unable to obtain affordable liability insurance for goods shipped into the United States. Most people will accept that this was due to an extremely tight insurance market caused by difficulties around the world within the insurance industry itself. In that respect, Canada's laws and legal system had little, if any, impact. Insurance was available for Canadian goods used in Canada. At that time insurers were concerned about the risk exposures within the U.S. market because of unlimited damages for pain and suffering, punitive damage awards in product liability cases, and the joint and several liability issues that worked to the disadvantage of some defendants. We certainly heard a great deal about the U.S. jury system. Remember, however, that all manufacturers, whether based in the United States, Canada, Japan or the European Community, faced the same market conditions. The exposure in the United States was no different for a foreign

manufacturer than for a domestic manufacturer, yet this did not slow efforts to export goods to the United States.

Accordingly, I do not believe that the U.S. economy has suffered from a lack of innovation solely due to its product liability laws. I am convinced that Canadian product liability laws have had little, if any, impact on the Canadian capacity for innovation. Americans are an innovative people, however, curtailment of monies allocated to research and development, toughening consumer expectations, takeover-mania and the failure to take the long view, are factors which I believe play a larger role in any curtailment which may have occurred in U.S. product innovation. The spirit of innovation survives in the U.S. economy. From north of the border we continue to see U.S. corporations playing a leading role in the development of new technologies and new products.

Product liability laws at their worst have acted as a safety check to indifference by product manufacturers and distributors. This is the role which was intended for our civil justice system in Canada and which I am satisfied it fulfills today.