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Business

Defences available to manufacturers in product liability claims

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(August 10, 2021, 3:03 PM EDT) -- Product liability claims are often rooted in provincial sale of goods legislation. Sale of goods statutes afford consumers a set of protections, which are fairly uniform across jurisdictions. Depending on the circumstances of the case, a manufacturer faced with a sale of goods claim may have a number of available defences.

The absence of contractual privity may provide a defence. Courts across the country have recognized that a direct contractual relationship is an essential component of a sale of goods claim. The Ontario Court of Appeal's decision in *Arora v. Whirlpool Canada LP* 2013 ONCA 657 is a recent example.

The plaintiffs in *Arora* alleged that a manufacturer was negligent in the design and manufacture of a washing machine. They framed their claim as a breach of the warranty of fitness for purpose implied by Ontario's *Sale of Goods Act*.

The Ontario Court of Appeal determined this claim had no reasonable prospect of success, stating that "the fact that [the defendant] did not sell the machines directly to consumers is critical to the viability of the appellants' implied warranty claim ... their remedy under the *Sale of Goods Act* is against the seller, and in this case [the defendant] was not the seller" (paras. 31–33).

A manufacturer may be able to defend a sale of goods claim on this basis, even if it actively participated in pre-sale negotiations. The Ontario Superior Court of Justice reached this conclusion in *Haliburton Forest & Wildlife Reserve Ltd. v. Toromont Industries Ltd.* 2016 ONSC 3767.

The manufacturer in *Haliburton* manufactured forestry equipment. Although it did not sell the equipment directly to the buyer, a representative of the manufacturer attended meetings with the retailer and buyer to answer questions and helped facilitate the plaintiff's trial run of the equipment.

The equipment malfunctioned, and the plaintiff sued the retailer and manufacturer for breach of the *Sale of Goods Act*. The manufacturer moved for summary judgment on the basis that it was not a "seller" within the meaning of the Act. The court granted the motion, noting that the absence of a contractual relationship defeated the claim against the manufacturer. The court was clear that the manufacturer's involvement in the pre-sale negotiations did not bring it within the definition of a "seller" under the Act.

A manufacturer who did sell goods directly to the buyer may still have a number of available defences. Sale of goods claims are often framed as a breach of the implied warranty of fitness for purpose. A manufacturer may defeat such a claim by establishing that a warranty of fitness for purpose was not implied into the particular contract for sale.

In *Venedam v. Tanks & Ducts R Us Ltd.* 2010 NSSC 186, the Nova Scotia Supreme Court confirmed that the *Sale of Goods Act* only implies a warranty of fitness for purpose when the following three

factors are present (para. 53):

(a) The seller supplied the goods in the ordinary course of its business;
(b) The buyer made the intended purpose of the goods known to the seller; and
(c) The buyer relied on the seller's skill and judgment in purchasing the goods.

A manufacturer may successfully defend a claim for breach of the implied warranty of fitness for purpose by establishing that one or more of the above criteria are not met.

If a warranty of fitness for purpose does arise, evidence that the product in question has served its intended purpose may defeat a claim of this nature. This was the outcome in *MacDonald v. Holland's Carriers Ltd.* 2011 NSSC 130. The defendants in *MacDonald* were operating a logging truck, which was constructed with a series of vertical posts designed to contain the logs. An accident occurred when one of the vertical posts came loose and flew off the truck, striking the plaintiffs' windshield.

The defendants brought a third-party claim against the retailer from whom they had purchased the logging truck, alleging a breach of the implied warranty of fitness for purpose.

The court rejected this argument, concluding that "the extensive use of the trailer demonstrates [it] was indeed fit for the purpose intended" and "[t]he defect which ultimately led to the accident appears to have come about because of use and was non-existent at the time of sale." In making this determination, the court gave weight to the fact that the defendants had used the vehicle for 22 months after purchase and logged approximately 250,000 kilometres.

In addition to the above, manufacturers should consider whether an express warranty precludes liability. A manufacturer may be able to defeat a product liability claim on the basis that it falls outside the specified warranty period.

Further, manufacturers' warranties often restrict liability to the cost of repairing or replacing the product and exclude liability for other types of damage. Such an exclusion could be of assistance if the consumer claims to have suffered other losses as a consequence of a defective product. In summary, manufacturers involved in a contractual dispute with a consumer should be aware of the many defences at their disposal.

This is part one of a two-part series.

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