

We live in an age of ever-increasing litigation not the least of which is that concerning manufactured products. In order to discover more on what this can mean for manufacturers, *World Footwear* asked Marcy McKee, an associate in the Litigation Group at the Toronto office of Blake, Cassels & Graydon LLP, for her thoughts. While she focuses on the position in Canada, the implications for manufacturers exporting to almost any Western market are likely to be much the same.

Consumer products litigation

Footwear manufacturers frequently distribute their products worldwide. International distribution and sales increase the market for products, but also expose the manufacturer to the risk of liability to consumers for defective products in many different jurisdictions. A basic understanding of product liability litigation in different countries can help manufacturers to reduce their risk of liability. This article provides a brief introduction to product liability litigation in Canada and outlines some steps that manufacturers can take to help to protect themselves from unfavourable judgments.

In Canada, there are generally no state-operated schemes for compensation for defective products, so consumers typically seek compensation for injuries or losses caused by defective products by commencing product liability proceedings against the manufacturer or retailer of the product. These actions against a manufacturer are typically based on negligence, however, in some cases contract or warranty claims may also be made.

In addition, restitutionary claims may also be possible under the 'waiver of tort' doctrine, although the law in this area is unsettled. Waiver of tort would allow the plaintiff to require the defendant to disgorge the gains it made through its 'wrongful conduct', instead of claiming damages for his or her injuries, which in the context of product liability would most often be the profits made from the sale of the allegedly defective product.

Chain responsibility

Consumers typically seek redress from



the manufacturer of the product, but any party within the distribution chain that is found to have failed to exercise a reasonable standard of care in putting the product on the market, and whose failure in that regard caused or contributed to the consumer's injury or loss, may also be held responsible for the defective product in negligence.

However, even if the court finds more than one party liable in negligence for the consumer's loss or injury (e.g. both

the manufacturer and the distributor that sold the product), provincial negligence legislation provides that those parties will be jointly and severally liable for the loss, meaning that the plaintiff can recover all of his or her damages from any one of the parties found liable, leaving that party to then try and collect a contribution from the others found partly responsible.

To succeed against a manufacturer in a product liability action, the consumer or plaintiff must generally prove negligence and that:

- The manufacturer owed a duty of care to the consumer.
- The manufacturer breached the requisite standard of care.
- That breach caused the plaintiff's injury.
- The injury was reasonably a foreseeable outcome of the negligence.

There are basically two types of product liability negligence claims in Canada: negligent manufacturing and negligent design. Negligent manufacturing cases arise where the product is produced or manufactured incorrectly or contrary to the product's specifications. In a negligent design case, the product is manufactured in accordance with its specifications but the plaintiff alleges that the design of the product is deficient or defective. A consumer can also sue in negligence for failure to warn of the risks inherent in the use of the product, although these claims are unlikely to arise very often in the footwear industry.

Manufacturers owe a duty of care

In both negligent design and negligent manufacturing cases, Canadian courts have generally held that manufacturers owe a duty of care to the consumers of their products. The appropriate standard of care, or degree of care that must be taken by the manufacturer, will vary with the type of product and the product's capacity to do harm.

Footwear manufacturers are therefore not likely to be held to the same standard as manufacturers of pharmaceuticals or medical devices. The standard of care could also vary within the footwear industry, with manufacturers of protective, specialised athletic or orthopaedic footwear products being held to a higher standard in their design processes because of the greater potential for more serious injury if these products are defective.

Negligent manufacturing

To succeed in an action where a manufacturing defect is alleged, the plaintiff must establish both that the product was defective in how it was manufactured (i.e. it was produced contrary to its intended design) and, in theory, that the defect was the result of negligence. Canadian courts do not impose strict liability on manufacturers of defective products. Practically speaking, however, if the court finds that the product has a manufacturing defect, it will infer negligence in the manufacturing process without requiring the plaintiff to establish how the manufacturing defect arose. This inference of negligence is non-rebuttable and without the possibility of being refuted. It can therefore be very difficult for a manufacturer to deflect a product liability claim where a manufacturing defect is found.

Avoiding the problem

Since the court will almost invariably infer negligence where a manufacturing defect is found, the best, and perhaps only, way to prevent liability is to prevent manufacturing defects from happening in the first place. Good quality control practices are imperative. In negligent manufacturing cases, the court will also sometimes consider quality control and post-sale performance records, particularly where it has to decide whether the product had a defect or failed for some other reason. Having good systems in place and keeping records can reduce the risk of

liability. Another way to reduce the risk of liability for manufacturing negligence is to act quickly when problems are found so as to avoid injury to consumers. Effective recalls of products known to contain manufacturing defects can prevent injuries to consumers that could otherwise form the basis for lawsuits.

Negligent design

As noted above, in design defect cases the plaintiff alleges that the design of the product itself is deficient or defective. For example, in a recent US case the plaintiff commenced an action against Nike Inc., alleging it had defectively designed a particular brand of athletic shoe by making the laces too long and placing a pull-tab near the top of the heel of the shoe. The plaintiff alleged that this design defect caused her to fall while running, leading to a wrist injury that will impair her career as a surgeon. In that case, the plaintiff is not alleging the particular shoes that she was wearing were manufactured improperly, but rather that the design of the shoe was dangerous.

To determine whether a product contains a design defect, the court will consider whether the design of the product poses an unreasonable risk of harm to the foreseeable user. The court will consider, among other things, the nature and extent of the risk of injury to the consumer, whether the risk of injury is obvious, the probability of injury through proper use and foreseeable misuse, and the likely severity of that possible injury. It will also consider whether there were other design alternatives which would have reduced the risk of injury and whether warnings might have reduced the risk.

Reducing the risk

Manufacturers can reduce their risk of liability in negligent design cases by complying with industry standards and any applicable regulatory requirements for the manufacture of their products. Compliance with regulatory requirements and prevailing industry standards will not automatically absolve a manufacturer from liability, but Canadian courts generally look favourably on such compliance.

Product testing is also important and Canadian courts have held that a manufacturer's failure to test a product before sale to consumers can demonstrate negligence. The amount or type of testing

that the court will find appropriate will vary by product and industry.

The courts will generally not find a defect in the manufacturer's design where the manufacturer could not have foreseen that the plaintiff would disregard the manufacturer's express instructions or recommendations. Therefore, clear instructions and warnings, taking into account both proper use of the product and possible misuses, could reduce the risk of liability. Warnings are also important because manufacturers can be found liable for failing to warn consumers of risks associated with the use of their products.

Breach of warranty and contract claims

Manufacturers can be liable to retailers for defective products under the express or implied terms of their purchase or supply contracts and/or under provincial sales of goods statutes that imply warranties or conditions regarding the fitness and quality of goods sold. Breach of warranty claims can also be made by consumers against manufacturers directly in a few Canadian provinces where legislation has implied a warranty in favour of the end consumer. However, negligence cases are far more common. In a breach of warranty or contract case, the plaintiff does not need to prove negligence in order to succeed but must still prove there was a defect in the product.

Conclusion

Actions based on negligent design or manufacture are, out of necessity, fact-specific and much depends on the danger that the individual product poses. However, in practice these cases can turn on what the manufacturer actually knew or should have known about the risks of the product's design or manufacture and whether the manufacturer responded appropriately to those risks.

While no manufacturer can completely insulate itself from liability for defective products, compliance with industry and regulatory standards, good quality control practices, product testing, taking steps to address identified problems in manufacturing or potential design defects before they become serious problems, the use of clear warnings and instructions on products, and fast and effective product recalls where defects are found, can reduce a manufacturer's risk of liability in a products liability lawsuit in Canada. 