A Dozen Key Differences

Defending Product Liability Cases in Canada

by Teresa M. Dufort and J. Scott Maidment

Those of us who defend product liability cases in Canada consider ourselves lucky. We have the best of both worlds. We have the best of the American judicial system, and the best of the European system. That makes us different from both. While most European practitioners understand that our system is different from theirs, because of our geographical proximity and similarities in culture, many American practitioners assume our law and practice are very similar to their own. As we will outline below, however, in some key areas our law and practice differ significantly from that in the U.S.

Civil Justice System Generally

In addition to the federal government, Canada has 10 provincial and three territorial governments. The Canadian Constitution places primary responsibility for the administration of justice and civil courts with the provinces and territories (hereafter "provinces"), rather than with the federal government. Each province is responsible for creating and administrating a civil court system. This means that the *Rules of Civil Procedure*, as well as the names, jurisdiction, and levels of the courts, can vary from province to province.

Each province has a "superior court" that exercises the general and inherent jurisdiction of a common law court. Their jurisdiction is restricted only by statutes that reserve jurisdiction over a particular area of the law to an administrative board, tribunal, or to the Federal Court. Canadian superior court judges are appointed for life on a model similar to that of the U.S. Federal Court.

There is a federal court system, but its jurisdiction is limited to administering specific federal laws like admiralty, copyright, and customs. The Supreme Court of Canada is the ultimate court of appeals for all courts, whether it is the provincial superior courts, provincial courts of appeal, or the federal courts.

Jurisdiction over Foreign Defendants

The civil procedure rules in the majority of the provinces permit service on a defendant outside the jurisdiction in a defined a set of scenarios, including cases involving:

- property in the province;
- contracts made in the province, or that expressly provide that the contract will be governed by the law of the province;
- torts committed in the province;
- damages sustained in the province arising from a tort or a breach of contract committed elsewhere; and
- a necessary and proper party to a proceeding properly brought against another person served in the province or a party outside the province who is ordinarily resident or conducts business in the province.

Other provinces permit service outside of the jurisdiction in similar circumstances, but only with leave of the court.

Even where these circumstances exist, however, Canadian courts will still grant motions to set aside service or to stay an action in some situations. First, the court will not take jurisdiction where it is satisfied that the province is not the jurisdiction with the most real and substantial connection to the subject matter of the lawsuit. Second, even if a real and substantial connection is found, the court may nevertheless decline jurisdiction on the ground that the province is not a convenient forum for the hearing of the action.

In considering whether there is a real and substantial connection that will allow the court to take jurisdiction, the court will consider:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendants;
- unfairness to the defendants if the court assumes jurisdiction;
- unfairness to the plaintiff if the court does not assume jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extra provincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international; and
- comity and standards of jurisdiction recognition and enforcement prevalent elsewhere.

In going on to consider whether it *ought* to take jurisdiction given convenient forum considerations, the court will take into account the following:

- where the events giving rise to the dispute arose;
- the applicable law governing the dispute;
- where the majority of witnesses reside;
- where key witnesses reside;

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- where the bulk of the evidence will come from;
- where the factual matters arose;
- the residence or place of business of the parties;
- whether any party will suffer any loss of juridical advantage if jurisdiction is taken or refused;
- the relative financial positions of the parties and their abilities to bear the expense of prosecuting or defending a claim in a foreign jurisdiction;
- the desire to avoid multiple proceedings; and
- the existence of an attornment clause.

Jury vs. Bench Trials

It is open to civil litigants in Canada to elect to have questions of fact, damages or both tried and assessed by a jury. The reality, however, is that only a small percentage of trials in Canada are jury trials.

Provincial rules typically require the party who wants a jury to deliver a jury notice early in the proceeding. However, opposing parties may then move to strike the notice. Many provinces exclude juries from cases involving certain kinds of relief such as injunctions, declarations, and equitable relief. In some provinces, some classes of defendant, such as municipalities, are immune from trial by jury. And, even where a case is otherwise appropriate for a jury, it is still open to an opposing party to argue that a jury would be inappropriate because the case will involve complicated legal or technical issues, or particularly complex evidence, or because the jury would have to consider difficult questions of law or mixed fact and law.

In addition to the technical barriers to jury trials, there are other disincentives to jury trials in Canada. First, Canadian juries are confined by judicially imposed limits on the amount of general damages that can be awarded for personal injury (discussed more fully under "Damages" below). Thus, the potential "lottery" which jury trials may represent is eliminated. This makes the increased cost, risk, and time associated with a jury trial less attractive. Second, the Canadian legal tradition, with its British roots, predisposes Canadians (and their lawyers) to trial by judge.

This naturally has an impact on the way cases are tried. Canadian trials tend to focus more on legal argument with evidentiary rulings generally playing a much less significant part in the civil trial process.

The Winner Gets Costs

Under the Canadian civil justice system, losers pay. The obligation to pay applies to lawyers' fees and disbursements (expert fees, for example). Typically, there are two different cost scales, depending on the circumstances. Ontario provides a good example. In the majority of Ontario cases, the successful party is entitled to recover costs on a "partial indemnity" scale in accordance with a published tariff. This will typically result in the successful party recovering about 40 to 50 percent of its actual costs. Where there has been reprehensible conduct by the losing party, such as inappropriate delaying tactics or forcing the trial of untenable issues, the court may be persuaded to order costs on the higher "substantial indemnity" scale, which will net the winning party approximately 75 percent of its costs.

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In some provinces, offers to settle that are made in advance of trial can have a significant impact on the quantum of costs recovered by the winning party, negatively affecting recovery where the plaintiff ultimately won less than was offered, for example, and positively affecting it where the plaintiff won more.

The courts have significant discretion in dealing with costs. On interlocutory proceedings, for example, costs can be ordered payable immediately or not until the end of the case. They can also be ordered payable regardless of who ultimately wins the case or they can be tied to the case outcome.

Where cases involve multiple defendants, courts can apportion a successful plaintiff's costs among the defendants according to their relative degrees of liability. Where one defendant wins and the others lose, courts have discretion to order the plaintiff to pay the successful defendant's costs and to receive costs from the losing defendants, or to require the unsuccessful defendants to pay the successful defendant's costs directly.

Courts also have discretion to order plaintiffs to post security in advance for the defendants' costs where the plaintiff is not resident in the jurisdiction, or where the plaintiff is a corporate or nominal plaintiff with few or no assets in the jurisdiction.

Production of Documents

In Canada, parties to a lawsuit must disclose every document within their power, possession and control related to any matter in issue in the case, technically within a certain number of days of the close of pleadings, and, in any event, fairly early on in the action. This can require a significant expenditure of time and money early in the case. In most provinces, each party submits a statement, often in the form of a sworn affidavit, listing and describing each document and indicating whether the party objects to producing the document on the basis of privilege. Each party has the right to inspect and to take copies of any unprivileged documents on the other party's list.

The pleadings define what matters are in issue, and thus the scope of relevancy. Generally speaking, parties have power and control over any document of which they can obtain the original or a copy. The existence of relevant documents must be disclosed regardless of whether they help or harm the party's case, and even if they are privileged. In some provinces, parties must also disclose the existence of documents that were once in the party's possession, power, or control but are no longer and explain what became of those they no longer possess.

Production of documents from non-parties is difficult to obtain in Canada. In most provinces, it is available only with a court order and such orders are rarely granted. In deciding whether to grant such an order, the court will consider such factors as the relevance of the documents, whether the desired production is necessary to avoid unfairness, whether discovery from a party can cover the same ground and whether the document might be available from other sources.

Obtaining production of documents from non-party affiliates and subsidiaries of corporate parties is less difficult. The civil procedure rules of some provinces specifically empower their courts to order production of relevant documents in the possession, control, or power of subsidiaries, affiliates or other corporations controlled by a party.

Generally speaking, privilege is the only permissible ground for resisting production of an otherwise relevant document. Canadian law recognizes three main forms of privilege. Legal professional privilege protects communications by or between a party and its lawyer for the purpose of giving and receiving legal advice. Litigation privilege covers all documents created for the dominant or sole purpose (the test depends on the jurisdiction) of assisting a party's counsel to prepare for anticipated or existing litigation. Settlement privilege covers communications between parties made in an effort to settle a case.

It should be noted that parties have no right to proceed with examinations for discovery (depositions) of opposing parties until they have delivered their list of documents. In addition, parties remain under an ongoing duty to disclose and produce documents up to and even during trial. Thus, it is not uncommon to serve supplementary lists of documents after initial production is made.

Protecting Confidential Information and Documents

Because Canada's civil procedure rules require such broad documentary disclosure and production, many provinces have adopted what is known as the "implied undertaking rule" to protect parties from improper use of confidential information that the civil procedure rules compel them to disclose. Under this rule, parties are deemed to undertake not to use any evidence or information another party has been compelled to disclose in the action for any purpose other than the conduct of that action. Breach of this undertaking can lead to sanctions for contempt of court and adverse costs awards.

As soon as documents or information have been disclosed in open court, however, whether as an exhibit to an affidavit or as a result of the testimony provided by a live witness, the deemed undertaking no longer applies. Thus, confidential documents and information that are thrust into the public domain as a result of litigation are accessible and useable to anyone who takes the trouble to get them from the court file. Another exception to the implied undertaking rule permits the use of disclosed information and documents for the purpose of impeaching witnesses in other proceedings.

Unfortunately, because of the implied undertaking rule, confidentiality or protective orders can be difficult to obtain in Canada. The Supreme Court of Canada has set the bar very high in terms of the test that must be met in order to obtain such orders favoring an open and transparent justice system over the privacy concerns of individual litigants.

Spoliation

The law relating to the destruction, or spoliation of evidence, including documents, is not well developed in Canada.

Canada does not recognize spoliation as a tort that gives rise to a separate cause of action. In a number of recent Canadian

cases, plaintiffs have tried to claim damages from defendants who destroyed evidence. In one case, the court refused to impose tort liability despite the fact that, by destroying the evidence, the defendant had breached a court order to preserve the evidence and deprived the plaintiffs of the opportunity to prove the underlying claim. Appellate courts in at least two provinces have expressly rejected the notion of a common law tort of spoliation, at least as between the parties to the case, finding no good reason to create such a tort.

Instead, Canadian courts have found other ways of dealing with parties who destroy evidence. Courts may issue cost orders against a party who destroys evidence, requiring that party to pay the other side's legal fees, expert fees, and other costs associated with the evidence's destruction. Canadian courts may also deny parties who destroy evidence all or some of their costs, even if they ultimately win the case.

Canadian courts do embrace the maxim that all things are presumed against the despoiler. However, this negative presumption can be rebutted by independent proof of the destroyed document's actual contents. In some cases, Canadian courts have gone beyond the general adverse inference and reversed the burden of proof where evidence was intentionally destroyed. Even so, these types of sanctions are rare. Canadian courts will not usually consider such sanctions unless the case involves the intentional destruction of evidence in circumstances approaching bad faith. This also applies to the exclusion of expert evidence based on evidence destroyed by the party calling the expert. It has been done, but only rarely. No Canadian court has ever imposed the ultimate sanction of dismissing a case or granting judgment to a party because of spoliation.

This judicial reluctance can be discouraging for products liability defendants where the plaintiff has discarded evidence or damaged it through testing. There is a corollary, however, and that is that corporate product liability defendants are also far less likely to be attacked or sanctioned in Canada for spoliation of documents.

Oral Discovery

Given the wide scope of documentary disclosure in Canada, many U.S. and other foreign counsel are surprised to learn that pre-trial oral examination (called "examination for discovery") is much more limited here. This can be of considerable advantage to the corporate product liability defendant.

The general rule is that only parties who are adverse in interest may be examined. In the case of corporate parties, most provinces allow the opposing party to examine only one representative of the corporation. Technically, the examining party will have the right to choose the representative to be examined, but in practice the representative is often chosen by the corporation itself.

Confidentiality or protective orders can be difficult to obtain in Canada..

The corporate representative can be asked any question relating to the knowledge, information and belief of *the corporation*. In other words, questions are not limited to the knowledge, information and belief of *the witness*. Thus, the representative must prepare extensively for the examination, gathering information from others within the organization on matters likely to be probed on the examination. Should the representative be asked a proper question that he or she does not have the necessary knowledge to answer, the representative must give an "undertaking" to make appropriate enquiries of others, and supply the answers at a later date, usually in writing. The opposing party may insist on further oral discovery to ask questions arising from answers to the undertakings, but this right is not often exercised.

This feature of Canadian civil practice has advantages and disadvantages. For the corporate defendant, the former generally outweigh the latter. The main disadvantage is that the corporate witness must work longer and harder to prepare for the examination than he or she would in jurisdictions where the examination is confined to the witness's personal knowledge, information and belief. However, the advantage is that, with respect to those matters reserved for undertakings, because inquires are made after the fact and responses are delivered in writing, the corporate defendant will have more control over how the information is presented. The only risk is that if too much is relegated to undertakings, the opposing party may take the position that the examination was ineffective, that the corporation designated the wrong witness, and that it should be permitted to examine a second witness. Orders permitting opposing parties to examine second witnesses are rarely granted, however.

Written interrogatories are rarely used in Canada. In many jurisdictions, the examining party must choose between written interrogatories or an oral examination for discovery. In others, written interrogatories are permitted only when all parties consent.

The opportunity to take evidence from non-party fact witnesses is very limited in Canada. Only Nova Scotia and Newfoundland permit the oral examination of non-parties without leave of the court. In other provinces, leave is required and granted in only exceptional circumstances. The party seeking leave must show they cannot obtain the information from the non-party or the parties they are entitled to examine and that it would be manifestly unfair to require them to proceed to trial without the information. This prohibition on the oral examination of non-parties also extends to expert witnesses. In most provinces, parties cannot examine expert witnesses before trial. Pre-trial disclosure is accomplished by the delivery of a report summarizing the substance of the expert's testimony a certain number of days before trial. At trial, the expert may not testify about an issue unless the substance of the testimony was set out in the expert's report.

There are some significant procedural differences in Canadian depositions. One is that where objection is made to a particular question, the witness is not required to answer it. The witness is not required to respond until the party either agrees to forego the objection or the court orders, on a later motion, that the question must be answered.

The second significant difference is that once the examination for discovery is underway, the contact permitted between counsel defending the examination and the witness is very limited. An examination for discovery is considered to be a form of cross-examination and, thus, counsel is not permitted to discuss with the witness any matter with respect to which the witness has

already given evidence on the examination. If a particular topic has not yet been reached in the examination, this can be discussed. If corrections to evidence need to be made, the witness can make them during the course of the examination. It can also be done following the examination once transcripts are received and reviewed. Technically, it can also be done through re-examination at the end of an examination for discovery but because of the prohibition on communication between counsel and witness during discovery, re-examination is rarely done.

The third major difference is that, at trial, only opposing parties can use the transcript of the examination for discovery. As a general rule, a party cannot use the discovery evidence of its own witness at trial.

Negligence and the Standard of Care

Where manufacturers and others in the supply chain are sued for injury or damage in tort, they are held to a standard that requires them to exercise reasonable care to ensure their products do not cause harm. By and large, Canada has not embraced the concept of strict product liability.

In Canada, defendants may be held liable only if they were in some way negligent in manufacturing or supplying the defective product. Thus, even where a product has caused injury, the defense of reasonable care is still available. This benefits some in the supply chain more than others. For manufacturers, for example, once the plaintiff has established both defect and causation, an inference of negligence almost naturally follows. The burden shifts to the manufacturer to show that the defect was not the result of negligence on its part. Once this shift occurs, the manufacturer may find itself having to defend such matters as its inspection procedures, quality control processes, employee training, and its capture and use of data on the product's field performance. This practical reversal of the burden of proof following proof of defect and causation applies only to manufacturers, however. The plaintiff continues to bear the greater burden where the defendant is merely a supplier or a distributor.

Comparative Fault

All of the common law provinces give their courts the power to allocate fault to more than one party. In product liability cases, courts can apportion losses caused by defective products among the manufacturer, supplier, retailer, parts manufacturer and others involved in the chain of production and distribution. Further, although they can claim contribution and indemnity from one another, each party found at fault remains fully liable to the plaintiff for the entire amount awarded. This can be problematic for a manufacturer whose co-defendants are partly, or even primarily, responsible for the damage caused, but against whom any judgment is unenforceable because the other responsible parties do not have the funds or are in a jurisdiction where collection will be difficult. The manufacturer may have to pay the entire judgment, and then, itself, try to extract from the other tortfeasors their respective shares.

Damages

One of the notable differences between the U.S. and Canadian civil justice systems is the size of damage awards in personal injury cases. Canadian courts and juries generally take a much more conservative approach than their U.S. counterparts.

While both the heads of damage and the general principles governing their measure are similar to those in the U.S., in some areas there are caps on quantum. General damages for personal injury is one such area. In 1978, the Supreme Court of Canada set a cap of CD$100,000 on such awards. Adjusted for inflation, the cap is now at around $300,000. General damages in this range are reserved for the most serious types of personal injuries such as quadriplegia.

The Canadian civil justice system is also relatively conservative in the area of punitive damages. Although courts have the discretion to make such awards, most courts exercise it very sparingly. The Supreme Court of Canada has restricted such awards to circumstances where compensation alone will not achieve a perceived need for deterrence. Thus, courts may award punitive

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damages only where the defendant's harsh, vindictive, reprehensible and malicious conduct merits punishment. The conduct must be so extreme as to constitute a separate actionable wrong. And even where such damages are awarded, as a general matter, Canadian punitive damage awards tend to be below $100,000. The highest punitive damage award ever granted in Canada was $1,000,000 for bad faith conduct on the part of an insurance company.

Class Actions

Although a relatively recent development, almost all provinces in Canada now have class action legislation.

As indicated in the above discussion of the civil justice system, because such legislation is provincial in origin, both the substantive and procedural rules relating to class actions may differ from province to province. Having said that, with the exception of Quebec where certification is relatively easy for plaintiffs to obtain, the threshold for certification is similar from province to province.

In most jurisdictions, a class will be certified only if:

- the pleadings disclose a cause of action;
- an identifiable class exists;
- claims or defenses in the case raise common issues;
- a class action would be the preferable procedure for resolving common issues in the case; and
- a representative plaintiff or defendant, who will fairly and adequately represent the class with a workable plan, is identified.

The opportunities for creating a national class can differ from province to province. In Ontario, for example, plaintiffs from outside the province are automatically included in the class unless they opt out, allowing for the possibility of a national class. In British Columbia, by contrast, non-resident class members must be in a separate sub-class and are included in the action only if they exercise their right to opt in.

In deciding whether to certify class proceedings, Canadian courts generally do not require the class to establish a *prima facie* case, although the merits do play some part in the decision. Moreover, class issues need only be common, and not identical, for certification to be granted.

The most notable difference between U.S. and Canadian approaches to class actions is probably the "common issues" requirement. In Canada, common issues need not predominate over individual issues. Rather, they must only be significant enough that their resolution will "significantly advance" the litigation.

The "loser pays" approach to costs also applies to class proceedings, albeit with some modification. In class proceedings, the court has discretion to deny the winning defendant its costs if the matter represents a test case, raises a novel point, or involves issues of public interest. In such cases, courts generally follow the U.S. approach, requiring each side to cover its own costs. Ontario has also created a class proceeding fund to indemnify unsuccessful representative plaintiffs from cost awards where the class received advance approval from an administrative body created to deal with this issue. In rare cases, recognizing that in most cases the real plaintiff is a plaintiff's class action law firm, Canadian courts have ordered that a successful defendant's costs be payable by the law firm that represented the aspiring plaintiff's class.

Conclusion

As noted above, for corporations that must defend product liability claims in Canada, our law and practice offer some significant advantages over those of other jurisdictions. We have some discovery, but not too much. We have trials but they are usually bench trials with judges that are appointed and who observe the common law of evidence. If you win in Canada, you can collect your costs. Cases are not likely to be sidetracked from the merits by allegations of spoliation. You can still defend on the grounds you took reasonable care. And damages, while payable, are not likely to ever threaten the very viability of the corporation. We really have the best of both worlds. **FD**