

Chapter 1

OVERVIEW OF PRODUCT LIABILITY LAW

1.1 LEGISLATIVE AUTHORITY FOR PRODUCT LIABILITY LAW IN CANADA

§1.1 Under the Canadian constitution, the federal government possesses legislative authority to regulate trade and commerce. Pursuant to its legislative power, the federal government regulates a variety of areas related to product liability, most notably food and drugs, consumer products, hazardous products and safety standards for motor vehicles.¹ The ten Canadian provincial governments, meanwhile, have legislative authority over property and civil rights within their province. Provincial governments regulate the area of product liability through legislation dealing with the sale of goods, product warranties and general consumer protection legislation.²

§1.2 With the exception of Québec, all of Canada's provinces and its three northern territories are common law jurisdictions. The law regarding product liability is reasonably uniform in Canada's 12 common law jurisdictions and principles of contract law and tort are subject to the authority of the Supreme Court of Canada, whose decisions are binding on all provincial and territorial courts. The province of Québec, meanwhile, is a civil law jurisdiction and although product liability law in Québec is similar to that in the rest of Canada, one must have regard for the provisions of the *Civil Code of Québec*.³

¹ See *The Constitution Act, 1867* (U.K.), 30 & 31 Vic., c. 3. Also see Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 165-68; and J. Cassels & C. Jones, *The Law of Large-Scale Claims* (Toronto: Irwin Law, 2005) at 64.

² See *The Law of Large-Scale Claims*, *ibid.*

³ L.R.Q., c. C-1991. The *Civil Code of Québec*'s product liability regime is set out in ss. 1442, 1458, 1468, 1469, 1473, 1726-1739. Québec's *Consumer Protection Act*, R.S.Q., c P-40.1, is also applicable to product liability claims in that province. See Articles 2, 34-42, 53.

1.2 BREACH OF WARRANTY CLAIMS AGAINST MANUFACTURERS

1.2.1 Contractual Warranty Claims

§1.3 A plaintiff can found an action for product liability in a claim for breach of contract. Contractual warranties as to the quality of the product may arise from the contract of sale, separate collateral contracts or oral discussions leading up to the sale.⁴ When determining if a collateral warranty was created, Canadian courts have adopted the English test⁵ of whether “an intelligent bystander”, listening to a statement, “would reasonably infer that a warranty was intended”.⁶

§1.4 By their very nature, contractual claims are limited to cases where privity of contract exists between the plaintiff and the defendant; but unlike a negligence action, a plaintiff claiming breach of contract does not need to prove a manufacturer failed to exercise reasonable care in designing and manufacturing the defective product. A breach of the terms of the contract is sufficient.

§1.5 A contractual claim may also arise from an implied common law warranty that the product being supplied will be reasonably safe for use⁷ and reasonably fit for the purposes for which it is required.⁸ A common law warranty will be added to a contract of sale unless the “circumstances of a particular case are sufficient to specifically exclude it”.⁹

⁴ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 107.

⁵ *Ibid.*

⁶ *Traders Finance Corporation Ltd. v. Haley*, [1966] A.J. No. 73 at para. 13, 57 D.L.R. (2d) 15 (Alta. C.A.), affd *Ford Motor Co. of Canada v. Haley*, [1967] S.C.J. No. 29, [1967] S.C.R. 437 (S.C.C.), quoting Lord Denning L.J. in *Oscar Chess Ltd. v. Williams*, [1957] 1 All E.R. 325 at 328 (Eng. C.A.).

⁷ *Hart v. Bell Telephone Co. of Canada Ltd.*, [1979] O.J. No. 4385, 26 O.R. (2d) 218, 102 D.L.R. (3d) 465 (Ont. C.A.).

⁸ *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, [1983] O.J. No. 3181, 43 O.R. (2d) 401, 1 D.L.R. (4th) 262 (Ont. C.A.). See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 105.

⁹ *G. Ford Homes Ltd. v. Draft Masonry (York) Co.*, *ibid.*, at 404 (O.R.).

1.2.2 Statutory Warranty Claims

§1.6 Each of the common law provinces and territories has enacted sale of goods legislation that codifies much of the common law on implied warranties.¹⁰ Although these sale of goods statutes diverge on some points, their provisions are generally similar to one another.

§1.7 Canadian sale of goods statutes generally contain two statutorily implied warranties relevant to product liability.¹¹ The first is an implied warranty that the goods will be reasonably fit for the general purposes such goods serve.¹² The following requirements must be satisfied for this implied warranty to come into effect:

- the buyer must have expressly or by implication made known to the seller the particular purpose for which the goods were being sold (except perhaps where the sale occurs under the article's patent or other trade name);
- the buyer must show reliance on the seller's skill or judgment; and
- the goods must be of a description that it is in the course of the seller's business to supply.¹³

§1.8 The second warranty implied by Canadian sale of goods legislation is that the product being sold is of merchantable quality.¹⁴ Under Ontario's *Sale of Goods Act*,¹⁵ the implied condition requires that the goods were bought by description from a seller who deals in goods of that description. If the purchaser examines the goods, however, there will not be an implied condition "as regards defects that such examination ought to have revealed".¹⁶ For a product to be merchantable, it has been generally accepted that it must be saleable in the relevant market and reasonably fit for its general purposes.¹⁷

¹⁰ These pieces of legislation are discussed in L.G. Theall *et al.*, *Product Liability: Canadian Law and Practice*, looseleaf (Aurora, ON: Canada Law Book, 2001) at L4:20. See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 113ff; and Fridman, *Sale of Goods in Canada*, 11th ed. (Toronto: Thomson Carswell, 2004) at 157-58.

¹¹ See *Product Liability Law in Canada*, *ibid.*, at 113-14.

¹² *Ibid.*, at 114.

¹³ See, for example, Ontario *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 15.1. See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 115-26.

¹⁴ See Ontario *Sale of Goods Act*, *ibid.*, s. 15.2. Also see Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 113-14.

¹⁵ R.S.O. 1990, c. S.1.

¹⁶ *Ibid.*, s. 15.2.

¹⁷ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 128.

§1.9 As a general rule, parties can contract out of the statutorily implied warranties of fitness for purpose and merchantability found in sale of goods legislation.¹⁸ However, including an express contractual warranty in the contract of sale may not be sufficient to preclude the application of these statutorily implied warranties. In *Synchrude Canada Ltd. v. Hunter Engineering Co.*, the Supreme Court of Canada found that parties wishing to contract out of these statutorily implied warranties must do so “by clear and direct language, particularly where the parties are two large, commercially sophisticated companies”.¹⁹

§1.10 International sales into Canada may also be subject to the *United Nations Convention on Contracts for the International Sale of Goods*²⁰ (the Convention), which has been ratified by federal statute and provincial international sale of goods legislation.²¹ The Convention implies a warranty of fitness generally similar to that of provincial sale of goods legislation.²² Canadian litigation involving the Convention is sparse, and in cases where the Convention has been invoked, its implied warranty has been treated as the equivalent of the warranties found at common law and under provincial sale of goods legislation.²³

§1.11 A number of common law provinces also have consumer protection legislation that provide additional conditions and warranties for specific types of goods.²⁴ For instance, section 6 of Alberta’s *Farm Implement Act*²⁵ sets out a number of warranties to be statutorily implied in any agreement for the sale of farm machinery in that province. In regards to consumer products in general, several provinces’ consumer protection statutes also create additional statutory warranties for

¹⁸ *Ibid.*, at 133-35. See also Ontario *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 53.

¹⁹ *Synchrude Canada Ltd. v. Hunter Engineering Co.*, [1989] S.C.J. No. 23 at paras. 37-38, [1989] 1 S.C.R. 426, 57 D.L.R. (4th) 321 (S.C.C.).

²⁰ 1489 U.N.T.S. 3, 19 I.L.M. 671 (April 11, 1980).

²¹ See, for example, *International Sale of Goods Contracts Convention Act*, S.C. 1991, c. 13.

²² Compare the Convention at Article 35 with Ontario’s *Sale of Goods Act*, R.S.O. 1990, c. S.1, s. 15(1).

²³ *Nova Tool & Mold Inc. v. London Industries Inc.*, [1998] O.J. No. 5381 (Ont. Gen. Div.), vard [2000] O.J. No. 307 (Ont. C.A.); *La San Giuseppe v. Forti Moulding Ltd.*, [1999] O.J. No. 3352 at paras. 28-31 (Ont. S.C.J.); and *Diversitel Communications Inc. v. Glacier Bay Inc.*, [2003] O.J. No. 4025 at para. 26, 42 C.P.C. (5th) 196 (Ont. S.C.J.); *Khan Resources Inc. v. Atomredmetzoloto JSC*, [2012] O.J. No. 1059 at para. 35, 110 O.R. (3d) 298 (Ont. S.C.J.).

²⁴ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 139.

²⁵ R.S.A 2000, c. F-7. There is legislation to the same effect in Manitoba, Prince Edward Island and Saskatchewan. See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 139.

consumer contracts for the sale of goods. Pursuant to Nova Scotia's *Consumer Protection Act*,²⁶ for example, the following warranties, among others, are implied in every consumer sale: the seller has a right to sell the goods, the purchaser shall enjoy quiet possession of the goods, the goods are of merchantable quality except for such defects as are described and, where there is a contract for the sale of goods by description, the goods correspond to the description.²⁷

1.3 TORT-BASED PRODUCT LIABILITY CLAIMS AGAINST MANUFACTURERS

1.3.1 Framework for Tort-based Claims

§1.12 Tort principles have risen to a place of primary importance in the protection of consumers and users under product liability law in Canada. Although some product liability claims are based on intentional torts (such as fraudulent misrepresentation), the most common basis for tortious product liability claims is negligence. The three specific types of product liability claims based on the tort of negligence are for design defects, manufacturing defects and failure to warn. Each will be discussed in greater detail below.

§1.13 To succeed on a negligence claim, a plaintiff must establish that:

1. the defendant owed a duty of care to the plaintiff;
2. the defendant's conduct fell below the expected standard of care;
3. the plaintiff sustained damage; and
4. the damages were caused in fact and in law by the defendant's breach.²⁸

§1.14 The existence of a duty of care by a manufacturer and consumer in product liability claims is rarely a contentious issue.²⁹ The relationship between a manufacturer and a consumer was described by the Supreme Court of Canada in *Hollis v. Dow Corning Corp.* as a "relationship of reliance", in which consumers "have far less knowledge than the manufacturers concerning the dangers inherent in the use of the products, and are

²⁶ R.S.N.S. 1989, c. 92, s. 26(3).

²⁷ There is legislation with provisions to a similar effect in the Northwest Territories, the Yukon, New Brunswick and Saskatchewan. See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 139.

²⁸ See *Mustapha v. Culligan of Canada Ltd.*, [2008] S.C.J. No. 27, 2008 SCC 27 (S.C.C.).

²⁹ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 13.

therefore put at risk if the product is not safe”.³⁰ Further, the duty of care of manufacturers and distributors extends beyond the consumer to those that “might reasonably be foreseen to suffer injury or damage if the manufacturer or vendor fails to exercise reasonable care”.³¹ Accordingly, a manufacturer will almost invariably owe a duty of care to any person injured by its product.³²

§1.15 The standard of care imposed upon a manufacturer under Canadian tort law is one of reasonableness. Unlike many jurisdictions in the United States, Canadian courts have not adopted the principles of strict liability in product liability cases.³³ Under the principle of strict liability, a manufacturer is held responsible for any injuries caused by defective products, regardless of whether the manufacturer exercised reasonable care.³⁴ The Ontario Court of Appeal explicitly rejected a strict liability approach to product liability in *Phillips v. Ford Motor Co. of Canada Ltd.*³⁵ and this ruling remains authoritative.³⁶ However, the Supreme Court of Canada left the door open to the possible adoption of strict liability for some product liability claims in *ter Neuzen v. Korn* when it declined to deal with the issue for procedural reasons.³⁷ It has also been suggested that the difference between Canadian and U.S. law on the issue is not as different as may seem. “Through the robust use of inferences, and the setting of fairly stringent standards of care, Canadian courts hold manufacturers to very high levels of accountability that arguably come close to strict liability.”³⁸

³⁰ *Hollis v. Dow Corning Corp.*, [1995] S.C.J. No. 104 at para. 21, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.) [*Hollis*].

³¹ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 13.

³² *Ibid.*

³³ *Ibid.*, at 18.

³⁴ See J. Cassels & C. Jones, *The Law of Large-Scale Claims* (Toronto: Irwin Law, 2005) at 91.

³⁵ *Phillips v. Ford Motor Co. of Canada Ltd.*, [1971] O.J. No. 1564, [1971] 2 O.R. 637 at 653 (Ont. C.A.).

³⁶ *Privest Properties Ltd. v. Foundation Co. of Canada Ltd.*, [1995] B.C.J. No. 2001 at paras. 281-89, 11 B.C.L.R. (3d) 1, 128 D.L.R. (4th) 577 (B.C.S.C.), affd [1997] B.C.J. No. 427, 143 D.L.R. (4th) 635 (B.C.C.A.); *Park v. B & B Electronics Ltd. (c.o.b. Certified Radio)*, [2003] A.J. No. 873 at para. 176, 2003 ABQB 594 (Alta. Q.B.); *Horti-Pak Inc. v. Nikko Materials U.S.A. Inc.*, [2009] O.J. No. 3404 at para. 443 (Ont. S.C.J.); and *Johansson v. General Motors of Canada Ltd.*, [2011] N.S.J. No. 508 at para. 32, 2011 NSSC 352 (N.S.S.C.), revd [2012] N.S.J. No. 631, 2012 NSCA 120 (N.S.C.A.).

³⁷ *ter Neuzen v. Korn*, [1995] S.C.J. No. 79 at para. 4, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.).

³⁸ J. Cassels & C. Jones, *The Law of Large-Scale Claims* (Toronto: Irwin Law, 2005) at 96.

§1.16 The applicable standards of care for specific product liability claims are discussed in greater detail below. Adherence to government or industry standards (whether for design, manufacturing or labelling) will not necessarily absolve a manufacturer of liability for negligence, although compliance will serve as an important consideration in arriving at any determination on liability.³⁹ In Canada, the civil consequences of breaching government standards are generally subsumed in the law of negligence and, rather than being determinative evidence that the defendant breached the standard of care, are just one of the circumstances a court can consider when assessing the applicable standard of care.⁴⁰ The same treatment is accorded to industry standards⁴¹ and customary practice.⁴²

§1.17 The fourth element of negligence in Canada is causation. In order for a negligence claim to succeed, a plaintiff must demonstrate on a balance of probabilities that either (i) the injury or damage would not have occurred “but for” a defect in the product’s design, manufacture or warning; or (ii) that a defect in the product’s design, manufacture or warning “materially contributed” to the injury or damage.⁴³ The presence of an intervening act or omission that contributes to the plaintiff’s injury or damage will not exculpate the defendant. Further, if two or more persons’ negligent behaviour materially contributed to the injury or damage suffered by a plaintiff, each person will be held jointly and severally liable for the full amount of the plaintiff’s damages, even if a single defendant’s conduct alone was not sufficient to cause the injury or damage.⁴⁴ The awarding of damages for product liability claims in Canada is explored in detail below.

³⁹ See S.M. Waddams, *Products Liability*, 5th ed. (Toronto: Carswell, 2011) at 140-44.

⁴⁰ *Canada v. Saskatchewan Wheat Pool*, [1983] S.C.J. No. 14 at paras. 30-31, [1983] 1 S.C.R. 205, 143 D.L.R. (3d) 9 (S.C.C.); and *Ryan v. Victoria (City)*, [1999] S.C.J. No. 7 at para. 29, [1999] 1 S.C.R. 201, 168 D.L.R. (4th) 513 (S.C.C.).

⁴¹ *Murphy v. Atlantic Speedy Propane Ltd.*, [1979] N.S.J. No. 819 at paras. 16, 28, 29, 103 D.L.R. (3d) 545 (N.S.T.D.).

⁴² *Waldick v. Malcolm*, [1991] S.C.J. No. 55 at paras. 30-37, [1991] 2 S.C.R. 456, 83 D.L.R. (4th) 114 (S.C.C.) [*Waldick*].

⁴³ *Athey v. Leonati*, [1996] S.C.J. No. 102 at paras. 14-15, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235 (S.C.C.). See also *Hanke v. Resurfice Corp.*, [2007] S.C.J. No. 7 at paras. 18-29, 2007 SCC 7 (S.C.C.) for a detailed analysis of the test for causation in the context of the tort of negligence in Canada.

⁴⁴ *Waldick v. Malcolm*, [1991] S.C.J. No. 55 at paras. 30-37, [1991] 2 S.C.R. 456, 83 D.L.R. (4th) 114 (S.C.C.). Some provinces have codified this principle that joint tortfeasor’s will be held jointly and severally liable for the full amount of damages. For instance Ontario’s *Negligence Act*, R.S.O. 1990, c. N.1, s. 1 provides that: “where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence”.

1.3.2 Claims for Design Defects

§1.18 A manufacturer will be held liable under Canadian law for foreseeable injury or damage caused by products that were negligently designed.⁴⁵ In *Kreutner v. Waterloo Oxford Co-operative Inc.*, the Ontario Court of Appeal stated that to succeed on a negligent design claim, a plaintiff must establish that “the defect created a substantial likelihood of harm and that there exists an alternative design that is safer and economically feasible to manufacture”.⁴⁶ It should be noted that the foreseeability of harm and the reasonableness of a design must be evaluated in the context of “the environment in which a product is used” and not only in respect of the product’s intended use.⁴⁷

§1.19 As can be seen in the quote from *Kreutner*, Canadian law does not require that the manufacturer select the safest possible design, but rather a design that is reasonable in the circumstances. Courts will generally consider the state of knowledge and technology at the time the product was manufactured or distributed to assess whether a reasonable standard of care was met in the circumstances. To evaluate whether the manufacturer exercised reasonable care, some Canadian courts have adopted the American “risk-utility approach”, which calls for a balancing of the alternatives and risks faced by the manufacturer.⁴⁸ Therefore, while a manufacturer will be required to replace an inherently dangerous design with a safer alternative where feasible, it is not necessary for a manufacturer to replace an existing design that is adequate simply because it is not the safest design available.⁴⁹

1.3.3 Claims for Manufacturing Defects

§1.20 In addition to negligent design, a manufacturer will be liable for foreseeable injuries or damage caused by an unintentional defect in the

⁴⁵ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 51-56.

⁴⁶ *Kreutner v. Waterloo Oxford Co-operative Inc.*, [2000] O.J. No. 3031 at para. 8, 50 O.R. (3d) 140, 135 O.A.C. 216 (Ont. C.A.).

⁴⁷ *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 at paras. 53-54, 49 C.C.L.T. 150 (Ont. H.C.J.), affd [1994] O.J. No. 50 (Ont. C.A.).

⁴⁸ *Ibid.*

⁴⁹ *Dallaire v. Paul-Émile Martel Inc.*, [1989] S.C.J. No. 91 at para. 12, [1989] 2 S.C.R. 419, 62 D.L.R. (4th) 182 (S.C.C.).

product that originated from a failure to manufacture the product in accordance with the relevant specifications.⁵⁰

§1.21 Plaintiffs injured by a product's defect do not need to prove exactly how the defect occurred. If it is proven that the defect originated during the manufacturing process (*i.e.*, before it left the manufacturer), a presumption of negligence against the manufacturer arises in the plaintiff's favour.⁵¹ Consequently, the manufacturer will be saddled with the evidentiary burden of disproving that it was responsible for the defect.⁵² The presumption of negligence will apply even where the manufacturer supplies the product through a retailer and not directly to the consumer.⁵³

§1.22 Manufacturers have been found negligent for poor inspections or a failure to inspect.⁵⁴ Courts have held manufacturers liable where the manufacturer's system of quality control was judged to be inadequate in light of the dangers presented by the products and the manufacturer's awareness of those dangers.⁵⁵

1.3.4 Claims for Breach of the Duty to Warn

§1.23 Under Canadian law, manufacturers have a duty to warn consumers of the dangers inherent in the use of their products of which the manufacturer has, or ought to have, knowledge.⁵⁶ A manufacturer, likewise, has a duty to warn consumers where it knows, or should know, of safety related dangers caused by a product's negligent design or manufacture, or from using the product in certain ways or circumstances.⁵⁷ A manufacturer must also advise consumers of any risk of

⁵⁰ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 49.

⁵¹ *Ibid.* See also *Grant v. Australian Knitting Mills Ltd.*, [1936] A.C. 85 (P.C.).

⁵² Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 49.

⁵³ *Zeppa v. Coca Cola Ltd.*, [1955] O.J. No. 596, [1955] O.R. 855, [1955] 5 D.L.R. 187 (Ont. C.A.).

⁵⁴ See Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 49, citing *Brunski v. Dominion Stores Ltd.*, [1981] O.J. No. 287, 20 C.C.L.T. 14 (Ont. H.C.J.).

⁵⁵ *Waldick v. Malcolm*, [1991] S.C.J. No. 55 at paras. 30-37, [1991] 2 S.C.R. 456, 83 D.L.R. (4th) 114 (S.C.C.).

⁵⁶ *Hollis v. Dow Corning Corp.*, [1995] S.C.J. No. 104 at paras. 20-23, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.). See also *Bow Valley Husky (Bermuda) Ltd. v. St. John Shipbuilding Ltd.*, [1997] S.C.J. No. 111, [1997] 3 S.C.R. 1210 (S.C.C.); and, more recently, *Anderson v. St. Jude Medical Inc.*, [2012] O.J. No. 2921 at para. 184, 2012 ONSC 3660 (Ont. S.C.J.) [*St. Jude*].

⁵⁷ *Buchan v. Ortho Pharmaceutical (Canada) Ltd.*, [1984] O.J. No. 3181 at paras. 46-53, 46 O.R. (2d) 113, 8 D.L.R. (4th) 373 (Ont. H.C.J.), *affd* [1986] O.J. No. 2331, 54 O.R. (2d) 92, 25 D.L.R. (4th) 658 (Ont. C.A.).

injury associated with the use of a product that would likely not be in the contemplation of the reasonable consumer, even where the product is generally safe.⁵⁸

§1.24 The Supreme Court of Canada in *Lambert v. Lastoplex Chemicals Co.*⁵⁹ and *Hollis*⁶⁰ provided a number of principles that define the scope of a manufacturer's duty to warn. In *Hollis*, the court stated that “[a]ll warnings must be reasonably communicated, and must clearly describe any *specific dangers* that arise from the ordinary use of the product.”⁶¹ The nature and scope of the manufacturer's duty to warn varies with the level of danger resulting from the ordinary use of the product.⁶² As such, the nature and extent of the warning will depend on what is reasonable in the circumstances — the more dangerous the product, the more explicit the warning.⁶³ Hence, a manufacturer of an inherently dangerous product can be held liable where its warning lacks sufficient explicitness.⁶⁴

§1.25 Manufacturers should be aware that their duty to warn does not cease at the time of sale; it is a continuing duty that requires manufacturers to warn consumers of dangers discovered after the product has been sold and delivered.⁶⁵ An extensive discussion of the duty to warn is provided in Chapter 2 below.

1.4 PRODUCT LIABILITY CLAIMS AGAINST DISTRIBUTORS

§1.26 Canadian product liability law also imposes obligations upon distributors. In addition to the claims discussed above, a manufacturer may be liable under Canadian law where it has been negligent in the manner in which it has marketed, distributed or sold its products.

⁵⁸ *Ibid.*

⁵⁹ *Lambert v. Lastoplex Chemicals Co.*, [1971] S.C.J. No. 132, [1972] S.C.R. 569, 25 D.L.R. (3d) 121 (S.C.C.) [*Lambert*].

⁶⁰ *Hollis v. Dow Corning Corp.*, [1995] S.C.J. No. 104, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.).

⁶¹ *Ibid.*, at para. 20 [emphasis added].

⁶² *Ibid.*, at para. 22.

⁶³ *Lambert v. Lastoplex Chemicals Co.*, [1971] S.C.J. No. 132 at para. 12, [1972] S.C.R. 569, 25 D.L.R. (3d) 121 (S.C.C.).

⁶⁴ *Ibid.*, at para. 13.

⁶⁵ *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] S.C.J. No. 126 at para. 19, [1974] S.C.R. 1189 [*Rivtow*]. See *Hollis v. Dow Corning Corp.*, [1995] S.C.J. No. 104 at para. 20, [1995] 4 S.C.R. 634, 129 D.L.R. (4th) 609 (S.C.C.).

Likewise, a distribution company can be held responsible on the same grounds, even in respect to defects of products that the distributor did not manufacture.⁶⁶

§1.27 Liability for distributors can arise in several different ways.⁶⁷ First, a distributor may be liable for failing to meet its duty to use reasonable care in “purchasing, testing or inspecting” the products.⁶⁸ Hence, a distributor may be held liable where it puts into circulation a product in a dangerous condition where the defect could and ought to have been discovered by reasonable diligence on the distributor’s part.⁶⁹ Second, distributors may be liable for “negligent misrepresentations, recommendations or instructions”.⁷⁰ Where a distributor makes a claim about a product without properly testing or inspecting the product, it may be responsible under tort law for any resulting injury or damage.⁷¹ Similarly, recommendations or instructions based on expertise may also render a distributor liable.⁷² Third, liability may be imposed on distributors for a failure to warn of safety risks.⁷³ Finally, distributors can be held liable for selling products to a purchaser in whose hands the product may be dangerous. For example, where a distributor sells a product to a customer knowing the customer intends to use the product

⁶⁶ *McEvoy v. Ford Motor Co.*, [1989] B.C.W.L.D. 2317 (B.C.S.C.), affd [1992] B.C.J. No. 166, 88 D.L.R. (4th) 358 (B.C.C.A.); and *Phillips v. Ford Motor Co. of Canada Ltd.*, [1970] O.J. No. 1484 at paras. 45-48, [1970] 2 O.R. 714, 12 D.L.R. (3d) 28 (Ont. H.C.J.) [*Phillips*], revd on other grounds [1971] O.J. No. 1564, [1971] 2 O.R. 637 (Ont. C.A.), where the courts in each cases cited, *inter alia*, *Watson v. Buckley*, [1940] 1 All E.R. 174 (K.B.) in support of the proposition the doctrine of *M’Alister (or Donoghue) v. Stevenson*, [1932] A.C. 562 (H.L.) [*Donoghue v. Stevenson*] extended to distributors. See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 61.

⁶⁷ See *Product Liability Law in Canada*, *ibid.*, at 62.

⁶⁸ *Ibid.*

⁶⁹ *Phillips v. Ford Motor Co. of Canada Ltd.*, [1970] O.J. No. 1484 at paras. 45-58, [1970] 2 O.R. 714, 12 D.L.R. (3d) 28 (Ont. H.C.J.), revd on other grounds [1971] O.J. No. 1564, [1971] 2 O.R. 637 (Ont. C.A.), citing *Andrews v. Hopkinson*, [1956] 3 All E.R. 422.

⁷⁰ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 62.

⁷¹ See *Leitz v. Saskatoon Drug & Stationery Co.*, [1980] S.J. No. 197 at para. 14, 112 D.L.R. (3d) 106 (Sask. Q.B.).

⁷² *Murray v. Collegiate Sports Ltd.*, [1986] O.J. No. 1658 (Ont. Dist. Ct.). See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 64; and *Walford (Litigation Guardian of) v. Jacuzzi Canada Ltd.*, [2007] O.J. No. 4053, at para. 58, 2007 ONCA 729 (Ont. C.A.), leave to appeal refused [2007] S.C.C.A. No. 599 (S.C.C.) [*Walford*].

⁷³ See Chapter 2, Section 2.1.

in a manner for which it is not suited, the distributor may be liable in negligence to the customer and any injured third parties.⁷⁴

1.5 PROCEDURAL ISSUES ASSOCIATED WITH PRODUCT LIABILITY CLAIMS IN CANADA

1.5.1 Class Action Lawsuits

§1.28 While class action lawsuits have a more established history in the United States, class action litigation is now an established part of the Canadian legal landscape. Most Canadian provinces have enacted modern class action statutes⁷⁵ and courts in provinces with such legislation have shown a willingness to certify provincial class actions on a national basis, thereby allowing for nation-wide class action suits.⁷⁶

§1.29 To proceed with a class action in Canada, the plaintiffs must have the proceeding certified by a court. The criteria for certification are set out in the applicable provincial legislation, which largely mirror one another. The following is a list of five criteria that are representative of those found in the various provincial class action statutes:

1. the pleadings or the notice of application discloses a cause of action;
2. there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
3. the claims or defences of the class members raise common issues;
4. class proceeding would be the preferable procedure for the resolution of the common issues; and
5. there is a representative plaintiff or defendant who fairly and adequately represents the interests of the class, and does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

⁷⁴ *Good-wear Treaders Ltd. v. D & B Holdings Ltd.*, [1979] N.S.J. No. 532 at paras. 29-30, 98 D.L.R. (3d) 59 (N.S.C.A.).

⁷⁵ See *Class Proceedings Act*, (Alberta) S.A. 2003, c. C-16.5; *Class Proceedings Act*, (British Columbia) R.S.B.C. 1996, c. 50; *Class Proceedings Act*, (Manitoba) C.C.S.M. c. C130; *Class Proceedings Act*, (New Brunswick) R.S.N.B. 2011, c. 125; *Class Actions Act*, (Newfoundland and Labrador) S.N.L. 2001, c. C-18.1; and *Rules of the Supreme Court*, S.N.L. 1986, c. 42, Sch. D, r. 7A; *Class Proceedings Act*, (Nova Scotia) S.N.S. 2007, c. 28; *Class Proceedings Act, 1992*, (Ontario) S.O. 1992, c. 6; *An Act respecting the class action*, (Québec) R.S.Q., c. R-21 and *Quebec Code of Civil Procedure (Book IX Class Action)*, R.S.Q., c. C-25; and *Class Actions Act*, (Saskatchewan) S.S. 2001, c. C-12.01.

⁷⁶ For a discussion of national classes, see W. Branch, *Class Actions in Canada*, looseleaf (Toronto: Thomson Reuters, 2013) at 11.10–11.198.

§1.30 A number of class actions have been certified in Canada for product liability claims, many concerning the manufacture and distribution of prescription and over-the-counter drugs.⁷⁷ More recently, Lax J. of the Ontario Superior Court of Justice tried a class action brought on behalf of a class of persons implanted with allegedly defective heart valves.⁷⁸ The action was premised upon, *inter alia*, whether the actions of St. Jude Medical, the manufacturer of the device, had fallen below the standard of care expected of a medical device manufacturer in (i) designing and testing the devices at the pre-manufacturing stage;⁷⁹ or (ii) in monitoring and inspecting the device's post-sale performance, including with respect to warning of safety defects as they became known or should have become known and recalling the product within a reasonable time frame.⁸⁰ Justice Lax, ultimately dismissing the action, held that St. Jude Medical met or exceeded the standard of care expected of a similar organization in similar circumstances.⁸¹

1.5.2 Use of Civil Juries

§1.31 One area in which Canadian jurisdictions differ markedly from American jurisdictions is the use of juries in civil cases. There is no constitutional right to a civil jury trial in Canada and, generally, the judge in a civil trial can order the case to proceed without a jury.⁸² There are also statutory provisions that exclude the use of juries in certain types of actions.⁸³ As a result, civil jury trials are rare in Canadian courts, with defamation and personal injury cases being the only areas where civil juries are still seen with any frequency.

⁷⁷ *Ibid.*, at 5.90-5.350.

⁷⁸ *Andersen v. St. Jude Medical Inc.*, [2012] O.J. No. 2921, 2012 ONSC 3660 (Ont. S.C.J.).

⁷⁹ *Ibid.*, at paras. 58-181.

⁸⁰ *Ibid.*, at paras. 184-213.

⁸¹ *Ibid.*, at paras. 182-83, 214, 594.

⁸² The Ontario Court of Appeal, in *Burton v. Harding*, [1952] O.J. No. 517 at para. 14, [1952] 3 D.L.R. 302 (Ont. C.A.), opined that, although "the right of trial by jury is subject to the discretion of the trial Judge or a Judge", such discretion must be "based on sound principles and cannot be arbitrarily exercised". The Supreme Court of Canada, in *King v. Colonial Homes Ltd.*, [1956] S.C.J. No. 32, [1956] S.C.R. 528 (S.C.C.), further clarified that the right to a trial by jury in a civil proceeding is "a substantive right of great importance of which a party ought not to be deprived except for cogent reasons".

⁸³ For instance, s. 108(2) of the Ontario *Courts of Justice Act*, R.S.O. 1990, c. C.43, prohibits the use of juries in actions involving, *inter alia*, injunctions, declaratory relief, rectification of a contract, or specific performance of a contract. Meanwhile, s. 108(3) provides that the courts "may order that issues of fact be tried or damages assessed, or both, without a jury".

1.6 DAMAGE AWARDS FOR PRODUCT LIABILITY CLAIMS IN CANADA

1.6.1 Damages for Unfitness for Purpose

§1.32 In cases involving claims for breach of contract, where a defect that has left a product unfit for its intended purpose can be remedied, “the measure of damages is the cost of such repairs, together with any other loss directly and naturally resulting from the breach of warranty”.⁸⁴

§1.33 If the defect cannot be repaired, the plaintiff may be compensated for the loss of value of the product.⁸⁵ Damages for pure economic losses of this nature are available under contract, but may not be available under negligence if the defect does not make the product dangerous or potentially dangerous.⁸⁶

1.6.2 Damages for Physical Damage to Other Property

§1.34 Where a defect in a product causes physical damage to other property, damages are generally available in both tort and contract.⁸⁷ Where a defective component of a product causes damage to the product as a whole, the courts may treat the component separately from the product so as to be able to award damages in tort.⁸⁸

1.6.3 Damages for Pecuniary Loss

§1.35 A plaintiff who suffers personal injury because of a defective product can bring a claim in tort to recover full compensation for any pecuniary loss he or she may have suffered.⁸⁹ The aim of awarding pecuniary damages is to restore the plaintiff to the position he or she would have been in absent the injury.⁹⁰ Canadian courts may also award

⁸⁴ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 211-12, quoting *Oliver v. Courtesy Chrysler (1983) Ltd.*, [1992] B.C.J. No. 512 (B.C.C.A.). See also *Ewanchuk Transport Ltd. v. Canadian Trailmobile Ltd.*, [1971] A.J. No. 132, 21 D.L.R. (3d) 246 at 254 (Alta. C.A.) [*Ewanchuk*], where the court analyzed what the proper measure of damages was for a breach of an implied term in a contract for the sale of a trailer.

⁸⁵ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 211-13.

⁸⁶ *Ibid.*, at 212, 244-45.

⁸⁷ *Ibid.*, at 213.

⁸⁸ *Ibid.*, at 213-14, citing *Chabot v. Ford Motor Co. of Canada Ltd.*, [1982] O.J. No. 3498, 138 D.L.R. (3d) 417 (Ont. H.C.J.).

⁸⁹ *Product Liability Law in Canada, ibid.*, at 214.

⁹⁰ See *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (S.C.C.).

pecuniary damages for the cost of future care.⁹¹ Calculation of damages for future care is a fact-specific determination, based on what “may reasonably be expected to be expended in putting the injured party in the position he would have been in if he had not sustained the injury”.⁹² To reject a plaintiff’s claim as unreasonable, there should be evidence that would suggest a squandering of money or evidence that proper care can be provided in the appropriate environment at a firm figure less than that sought to be recovered by the plaintiff.⁹³ Pecuniary damages may also be awarded for a loss of earning capacity that results from the injury.⁹⁴ Generally, loss of income capacity is calculated as the difference between what a person’s earnings would have been but for the injury, and what their earnings will be following the injury.⁹⁵

1.6.4 Damages for Non-pecuniary Loss

§1.36 Non-pecuniary damages may also be awarded in cases of personal injury to compensate for non-economic damages such as pain and suffering, loss of amenities and loss of enjoyment of life.⁹⁶ Large awards for non-pecuniary damages, of the sort frequently awarded in United States, are virtually unheard of in Canada. The Supreme Court of Canada set strict limits on awards in respect of non-pecuniary losses in a trilogy of cases in 1978.⁹⁷ In those cases, the court essentially capped non-pecuniary damages at \$100,000, with an allowance for inflation later specifically recognized.⁹⁸ The current adjusted ceiling is approximately \$330,000.⁹⁹

⁹¹ *Ibid.*, at 241 (S.C.R.).

⁹² *Ibid.*

⁹³ *Thornton (Next friend of) v. Prince George School District No. 57*, [1978] S.C.J. No. 7, [1978] 2 S.C.R. 267 at 268 (S.C.C.).

⁹⁴ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229 at 251-60, 83 D.L.R. (3d) 452 (S.C.C.).

⁹⁵ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 215.

⁹⁶ *Thornton (Next friend of) v. Prince George School District No. 57*, [1978] S.C.J. No. 7, [1978] 2 S.C.R. 267 at 284-85 (S.C.C.).

⁹⁷ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452 (S.C.C.); *Thornton, ibid.*; and *Teno v. Arnold*, [1978] S.C.J. No. 8, [1978] 2 S.C.R. 287 (S.C.C.).

⁹⁸ *Andrews, ibid.*, at 278 (S.C.R.). Allowance for inflation was recognized in *Lindal v. Lindal*, [1981] S.C.J. No. 108, [1981] 2 S.C.R. 629 at 643 (S.C.C.).

⁹⁹ See for example *Tompkins v. Bruce*, [2012] B.C.J. No. 357 at para. 50, 2012 BCSC 266 (B.C.S.C.); and *Minhas v. Sartor*, [2012] B.C.J. No. 1087 at para. 435, 2012 BCSC 779 (B.C.S.C.).

§1.37 In theory, the limit may be exceeded in “exceptional circumstances”.¹⁰⁰ However, the Supreme Court has stayed within the cap even where injuries were arguably more severe than those suffered by the plaintiffs in the trilogy cases.¹⁰¹

1.7 PUNITIVE DAMAGES

§1.38 Punitive damages are awarded sparingly in Canada and are treated as an exception to the rule that damages compensate the injured rather than punish the tortfeasor. For example, in *Vorvis v. Insurance Corp. of British Columbia*, the Supreme Court of Canada stated that such damages were to be awarded only in circumstances where “the conduct giving the cause for complaint is of such nature that it merits punishment”.¹⁰² The impugned conduct cannot be conduct of which the court merely disapproves, rather, the defendant’s conduct must be “so malicious, oppressive and high-handed that it offends the court’s sense of decency”.¹⁰³

§1.39 Punitive damages are rarely awarded in negligence cases because negligence is most often inadvertent rather than intentional or malicious.¹⁰⁴ There have only been a small number of product liability cases in Canada in which punitive damages have been awarded.¹⁰⁵ One instance was the Alberta case of *Van Oirschot v. Dow Chemical Canada Inc.*¹⁰⁶ The defendants in that case improperly marketed and recommended a

¹⁰⁰ *Andrews v. Grand & Toy Alberta Ltd.*, [1978] S.C.J. No. 6, [1978] 2 S.C.R. 229 at 265, 83 D.L.R. (3d) 452 (S.C.C.).

¹⁰¹ See, for example, *Lindal v. Lindal*, [1981] S.C.J. No. 108, [1981] 2 S.C.R. 629 at 642-43 (S.C.C.); and *ter Neuzen v. Korn*, [1995] S.C.J. No. 79 at paras. 104-10, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577 (S.C.C.).

¹⁰² *Vorvis v. Insurance Corp. of British Columbia*, [1989] S.C.J. No. 46 at para. 16, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 (S.C.C.).

¹⁰³ *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64 at para. 196, [1995] 2 S.C.R. 1130 (S.C.C.). See also Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 251-54.

¹⁰⁴ In fact, the Supreme Court of Canada, in *Beals v. Saldanha*, [2003] S.C.J. No. 77 at para. 223, 2003 SCC 72 (S.C.C.) explicated “that punitive damages are available when the defendant’s conduct goes *beyond mere negligence* and is morally blameworthy in some way”. [Emphasis added]. Also see the Ontario Court of Appeal’s consideration of the issue in *McIntyre v. Grigg*, [2006] O.J. No. 4420 at paras. 61-70, 83 O.R. (3d) 161 (Ont. C.A.).

¹⁰⁵ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 253-54.

¹⁰⁶ *Van Oirschot v. Dow Chemical Canada Inc.*, [1993] A.J. No. 480, 10 Alta. L.R. (3d) 380 (Alta. Q.B.), affd [1995] A.J. No. 611, 31 Alta. L.R. (3d) 212 (Alta. C.A.). While the Court of Queen’s Bench characterized the \$10,000 awarded in light of the defendant’s high-handed approach as general damages, the Court of Appeal found that the award was actually exemplary or punitive.

herbicide to the plaintiff farmer. The defendants were held liable for damages in negligence for failing to warn and punitive damages were awarded due to “an element of high-handed stone walling in the manner in which [the defendant] treated the plaintiff, knowing that their best defence lay in the passage of time which would cause the natural destruction of the evidence”.¹⁰⁷ Punitive damages can be awarded in both contractual claims and tort-based claims, although there is some suggestion that an independent actionable wrong is required to award punitive damages for a breach of contract.¹⁰⁸

§1.40 In contrast to the United States, the trend in Canada has been to grant only modest punitive damages awards. Until the late 1980s, the highest punitive damages award in Canada was only \$50,000. Since then, there have been only a handful of cases where the amounts awarded were more substantial. For example, the Ontario Court of Appeal awarded punitive damages of over \$4 million in a case where a bank was involved in a fraud.¹⁰⁹ The Supreme Court of Canada, meanwhile, has upheld punitive damage awards of \$800,000 in a libel case¹¹⁰ and of \$1 million against an insurance company that acted in bad faith by denying the plaintiff’s insurance claim.¹¹¹ Whether these high punitive damage awards will prove anomalous or have any impact on awards in product liability cases remains to be seen.

1.8 ECONOMIC LOSS

§1.41 In certain circumstances, product liability claimants may be able to recover damages for economic losses, even where no personal injury has been suffered.

§1.42 Justice La Forest has distinguished the various categories of economic loss as such: (i) economic loss that is consequential to claims for property damage or injury; (ii) pure economic loss that is unrelated to any personal injury or property damage; and (iii) contractual relational economic loss suffered as a result of damage caused to the property of

¹⁰⁷ *Ibid.*, at para. 6 (Alta. Q.B.).

¹⁰⁸ Dean F. Edgell, *Product Liability Law in Canada* (Markham, ON: Butterworths, 2000) at 253.

¹⁰⁹ *Claiborne Industries Ltd. v. National Bank of Canada*, [1989] O.J. No. 1048, 69 O.R. (2d) 65 (Ont. C.A.).

¹¹⁰ *Hill v. Church of Scientology of Toronto*, [1995] S.C.J. No. 64 at para. 196, [1995] 2 S.C.R. 1130 (S.C.C.).

¹¹¹ *Whiten v. Pilot Insurance Co.*, [2002] S.C.J. No. 19, [2002] 1 S.C.R. 595 (S.C.C.).

someone other than the plaintiff.¹¹² Historically, it has been the second category articulated by La Forest J., namely pure economic loss, that has produced the most uncertainty respecting its availability to tort claimants.¹¹³

1.8.1 Pure Economic Loss

§1.43 Four primary reasons have been asserted to justify the judicial reluctance to permit compensation for pure economic loss in tort claims, specifically: (i) the view that economic interests are less compelling than personal injury or property damage; (ii) the fear of indeterminate liability; (iii) the perception that economic loss is an inherent business risk that should be covered by third-party insurance or self-insurance; and (iv) the desire to discourage a multiplicity of lawsuits by limiting economic losses to contractual claims.¹¹⁴

§1.44 Notwithstanding the apparent hesitancy to recognize pure economic losses, Canadian courts have taken steps toward this end in at least some circumstances.¹¹⁵

§1.45 For example, in *Rivtow Marine Ltd. v. Washington Iron Works*,¹¹⁶ the Supreme Court considered the issue of economic loss in a case involving the plaintiff company, which had removed one of its cranes from service upon learning that a similar crane from the same supplier had collapsed. A subsequent inspection discovered that Rivtow's crane suffered from serious structural defects.¹¹⁷ While the defendants were aware of the problem, they did not warn the plaintiff of these defects.¹¹⁸ The plaintiff thus brought an action claiming damages for the cost of repairing the crane and for lost earnings while the crane was out of service.¹¹⁹

¹¹² *Canadian National Railway Co. v. Norsk Pacific Steamship Co.*, [1992] S.C.J. No. 40, [1992] 1 S.C.R. 1021 at 1054 (dissenting) (S.C.C.) [*Norsk*].

¹¹³ L.G. Theall *et al.*, *Product Liability: Canadian Law and Practice*, looseleaf (Aurora, ON: Canada Law Book, 2001) at L9-5.

¹¹⁴ See *Martel Building Ltd. v. Canada*, [2000] S.C.J. No. 60 at para. 37, [2000] 2 S.C.R. 860 (S.C.C.). See also *Product Liability: Canadian Law and Practice*, *ibid.*, at L9-20.

¹¹⁵ *Rivtow Marine Ltd. v. Washington Iron Works*, [1973] S.C.J. No. 126, [1974] S.C.R. 1189 (S.C.C.) [*Rivtow*]. See also *Product Liability: Canadian Law and Practice*, *ibid.*

¹¹⁶ *Rivtow*, *ibid.*

¹¹⁷ *Ibid.*, at 1193 (S.C.R.).

¹¹⁸ *Ibid.*, at 1195.

¹¹⁹ *Ibid.*, at 1199.

§1.46 While the plaintiff succeeded in its claim for lost profits during the crane's inactive period due to a failure to warn, the Supreme Court majority rejected the claim for repairs, finding that awarding such damages would be "akin to liability under the terms of an express or implied warranty of fitness".¹²⁰ In his dissent, however, Laskin J. (as he then was), found the defendant also liable for producing a defective crane and therefore responsible for the repairs. According to Laskin J., where there is a foreseeable risk of physical harm from the use of a defective product and where avoidance of the harm gives rise to economic loss, recovery should be permitted.¹²¹ "Prevention of threatened harm resulting directly in economic loss should not be treated differently from post-injury cure."¹²²

§1.47 The Supreme Court of Canada again considered economic loss in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*,¹²³ a case in which a twenty-foot section of exterior cladding fell from the ninth story of a building. In this case, no injury was suffered by any person, nor was any property damaged.

§1.48 Ultimately, the Supreme Court allowed for recovery based on the reasonable likelihood of the defect causing injury.¹²⁴ According to the Supreme Court, adopting Laskin J.'s reasoning from *Rivtow* would discourage reckless behaviour,¹²⁵ while limiting the class of potential claimants to those persons for whom the building was constructed (*i.e.*, its inhabitants).

If a contractor can be held liable in tort where he or she constructs a building negligently and, as a result of that negligence, the building causes damage to persons or property, it follows that the contractor should also be held liable in cases where the dangerous defect is discovered and the owner of the building wishes to mitigate the danger by fixing the defect and putting the building back into a non-dangerous state. In both cases, the duty in tort serves to protect the bodily integrity and property interests of the inhabitants of the building.¹²⁶

¹²⁰ *Ibid.*, at 1190.

¹²¹ *Ibid.*, at 1216-1224. See also L.G. Theall *et al.*, *Product Liability: Canadian Law and Practice*, looseleaf (Aurora, ON: Canada Law Book, 2001) at L9-10.

¹²² *Rivtow*, *ibid.*, at 1222.

¹²³ *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] S.C.J. No. 2, [1995] 1 S.C.R. 85, 121 D.L.R. (4th) 193 (S.C.C.) [*Winnipeg Condominium*].

¹²⁴ *Ibid.*, at para. 36.

¹²⁵ *Ibid.*, at para. 37.

¹²⁶ *Ibid.*, at para. 36.

The Supreme Court's finding also limited damages to the reasonable cost of restoring the building to a non-dangerous state, and the defendant would thus, at most, only be liable for defects during the useful life of the building.¹²⁷

§1.49 Whether damages are available in cases where defects do not render a product dangerous (shoddy products) has historically been more uncertain.¹²⁸ The Supreme Court didn't explicitly consider the issue in *Winnipeg Condominium* and, while some courts have held that product defects "that do not endanger persons or property are excluded from tort liability",¹²⁹ the Ontario Superior Court has wavered on the issue.¹³⁰ For example, on a motion to certify a class proceeding in *Griffin v. Dell Canada Inc.*¹³¹ with regards to defective laptop computers, the Ontario Superior Court canvassed the law on recovery for pure economic loss for shoddy yet non-dangerous products and ultimately found the question of whether recovery in negligence for non-dangerous defects is permitted to be an open question. According to the court, it was not "plain and obvious" that the negligence claim could not possibly succeed.¹³²

§1.50 However, in the more recent certification decision of *Arora v. Whirlpool Canada LP*,¹³³ the Ontario Superior Court ultimately found that the Supreme Court jurisprudence, as well as an application of first principles, led to the finding that it was plain and obvious that a product-liability negligence action could not be sustained for pure economic losses attributed to the negligent design of a non-dangerous consumer product.¹³⁴

¹²⁷ *Ibid.*, at paras. 48-50. See also L.G. Theall *et al.*, *Product Liability: Canadian Law and Practice*, looseleaf (Aurora, ON: Canada Law Book, 2001) at L9-12.

¹²⁸ *Product Liability: Canadian Law and Practice, ibid.*, at L9-16.

¹²⁹ *Ibid.*, at L9-16. See also *Blacklaws v. 470433 Alberta Ltd.*, [2000] A.J. No. 725, 187 D.L.R. (4th) 614 (Alta. C.A.), leave to appeal refused [2000] S.C.C.A. No. 442 (S.C.C.).

¹³⁰ See *Hughes v. Sunbeam Corp. (Canada)*, [2000] O.J. No. 4595, 2 C.P.C. (5th) 335 (Ont. S.C.J.), *var'd* [2002] O.J. No. 3457, 116 A.C.W.S. (3d) 522 (Ont. C.A.), leave to appeal refused [2002] S.C.C.A. No. 446 (S.C.C.). [*Hughes*]. See also L.G. Theall *et al.*, *Product Liability: Canadian Law and Practice*, looseleaf (Aurora, ON: Canada Law Book, 2001) at L9-17–L9-18.

¹³¹ *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 (Ont. S.C.J.), leave to appeal to Div. Ct. refused [2009] O.J. No. 3438 (Ont. Div. Ct.), *aff'd* [2010] O.J. No. 177 (Ont. C.A.), leave to appeal refused [2010] S.C.C.A. No. 75 (S.C.C.). Settlement approved, [2011] O.J. No. 2487 (Ont. S.C.J.).

¹³² *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at paras. 49-57 (Ont. S.C.J.).

¹³³ *Arora v. Whirlpool Canada LP*, [2012] O.J. No. 3865, 2012 ONSC 4642 (Ont. S.C.J.).

¹³⁴ *Ibid.*, at para. 202.

1.9 CONCLUSION

§1.51 In summary, there are two principle categories of product liability claims under Canadian law. A plaintiff may make a claim against the manufacturer of a product that is unfit for its intended purpose by way of contract or statute. Plaintiffs claiming by way of contract or statute can recover damages for unfitness of purpose and for physical damage to other property. Alternatively, a plaintiff can bring a claim in tort for negligent design, negligent manufacturing and/or failure to warn. Plaintiffs claiming in tort may be compensated for physical damage to other property and for physical injury by way of pecuniary and non-pecuniary damages. Plaintiffs in Canada may also claim punitive damages whether proceeding by way of a contractual or tort-based claim.

§1.52 From a comparative perspective, the major differences between Canadian and American product liability law are the rejection of the strict liability principle by Canadian courts and the lower quantum for damages typically awarded under Canadian law. As consequence of these two differences, there is less risk of a manufacturer or distributor being the subject of a large award for a product liability claim in Canada than in the United States.

