Product liability design negligence claims allowed to proceed in mass shooting class action

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In *Price v Smith & Wesson Corp.*, 2021 ONSC 1114, Justice Perrell of the Ontario Superior Court of Justice considered the viability of product liability claims advanced against a gun manufacturer in an action commenced by the victims of the Danforth shooting in Toronto and their families.

The plaintiffs alleged negligent design, manufacture and/or distribution, public nuisance and strict liability under the rule in *Rylands v. Fletcher*, which normally applies to the discharge of harmful material from real property. Justice Perrell found it was plain and obvious that the claims of public nuisance and strict liability could not succeed. The negligent manufacture and distribution claims suffered the same fate. However, the plaintiffs' design negligence claims were allowed to proceed.

Background

This action arises out of the Danforth shooting in Toronto on July 22, 2018. The plaintiffs are victims of the shooting and their families. The defendant, Smith & Wesson, is a gun manufacturer with its head office in Massachusetts, U.S.

The plaintiffs commenced this class action in December 2019. In July 2020, Justice Perrell ordered that the certification motion be heard in two stages. The first stage would determine whether the plaintiffs met the requirement of showing that their claim disclosed a cause of action. The Court also heard the defendant's motion to strike out the claim for failing to disclose a cause of action, under Rule 21 of the *Rules of Civil Procedure*. If the plaintiffs met the cause of action requirement, the second stage would address the remaining four certification criteria.

According to the defendant manufacturer, the gun used in the shooting was designed and manufactured for military and police use and was available for sale in Canada in 2013. In 2015, a Saskatchewan gun dealer reported the gun later used in the attack as missing. The gun did not utilize "authorized user" or "smart gun" technology, which is designed to prevent criminal use of weapons by unauthorized persons (*i.e.*, through the

use of fingerprint or palm print recognition, dynamic grip recognition, or voice identification).

While Smith & Wesson had been developing authorized user technology since at least 1998, in 2005 the United States Congress passed the *Protection of Lawful Commerce in Arms Act*, which shielded Smith & Wesson (and other manufacturers, dealers, and sellers of firearms and ammunition) from civil actions resulting from unauthorized or unlawful misuse of a firearm. As a result, Smith & Wesson did not adopt authorized user technology or other safety measures.

Plaintiffs' causes of action and the Court's reasoning

The plaintiffs pleaded causes of action in negligence, public nuisance, and strict liability under the rule in *Rylands v. Fletcher*. However, the crux of the claim was eventually narrowed down to whether the gun manufacturer owed a duty of care to the plaintiffs as persons who could be harmed by that weapon, to take care that the weapon had authorized user technology.

At the outset, Justice Perrell concluded that it was "plain and obvious" that the plaintiffs' claims in public nuisance and strict liability under the rule in *Rylands v. Fletcher* were "doomed to fail." With respect to public nuisance, Justice Perrell reiterated that such a claim is typically about an activity that unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience. Here, manufacturing weapons was not a public nuisance, although the misuse of those weapons by others might be. Accordingly, a product manufacturer cannot be held liable in nuisance for simply distributing a product in the course of its business that is then misused by others, causing harm to the plaintiffs.

With respect to strict liability, Justice Perrell reiterated that the rule in *Rylands v. Fletcher* is a tort that arises out of the use of land or real property and is not applicable to products liability claims. Under Canadian law products liability is a matter of negligence, not strict liability.

With respect to negligence, the plaintiffs argued that their claim fell within an established category of negligence. In the alternative, if their claim was novel, it was not plain and obvious that it failed to satisfy the test for the recognition of a new duty of care. Accordingly, the claim was not doomed to fail.

Justice Perrell agreed, and found that the plaintiffs' claim fell within two established categories of negligence claims: dangerous goods *per se* and negligent design.

With respect to dangerous goods *per se*, Justice Perrell reiterated that a handgun is an article dangerous in itself and those who "send forth" a handgun owe a duty to take care when other parties may come within proximity of that handgun. The defendant manufacturer argued that the proximate cause of the Danforth shooting was not the alleged negligence, but instead the criminal acts of the shooter. Justice Perrell did not accept this argument. His Honour pointed out that the difficulty with such an argument is that there was a precaution that Smith & Wesson could have taken to prevent the shooting. It could have incorporated authorized user technology, but did not do so.

With respect to the negligent design claim, Justice Perrell agreed with Smith & Wesson's argument that the claims for negligent manufacture and distribution were technically deficient because the plaintiffs had not pled the material facts necessary to establish negligence in manufacturing or distributing the gun. Accordingly, Justice Perrell focused solely on the negligent design claim.

Justice Perrell stated that the underlying argument in a negligent design action is that a manufacturer has a duty to not design a product negligently, because the manufacturer should and can be held responsible for the choices it makes that affects the safety of the product.

Therefore, a manufacturer has a duty to make reasonable efforts to reduce any risk to life and limb that may be inherent in its design. Whether the manufacturer breaches this duty is determined by a risk-utility analysis that measures whether the utility of the chosen design outweighs the foreseeable risks associated with the chosen design.

Smith & Wesson argued that the weapon was manufactured as a military and police weapon and, from a police officer's perspective, the introduction of authorized user technology could actually present as a danger to the police officer. Therefore, not introducing the technology could not be said to be a design defect.

Justice Perrell viewed this as an argument about the merits rather than the legal viability of the plaintiffs' negligence cause of action. His Honour reiterated that the duty of design extends beyond the police officers and soldiers for whom the weapon was designed. Others might come within the range of foreseeability and proximity, and so it might be fair to impose liability on the manufacturer. Accordingly, Justice Perrell was not satisfied that the negligent design allegation was doomed to fail.

Because Justice Perrell was satisfied that the plaintiffs' claims fell within established categories of duty of care, His Honour did not undertake a novel duty of care analysis.

Ultimately, the Court found that the cause of action criterion for certification was satisfied with respect to the design negligence claims.

Manufacturers beware

This case presents a cautionary tale for manufacturers. The decision not to use of state-of-the-art technology to make products as safe as possible may expose manufacturers to product liability claims if those products cause injury or death. Whether such allegations are sufficient to ground liability will depend on how a court weighs the utility of the chosen design against the foreseeable risks presented by such a choice. At this time, it is not known whether Smith & Wesson will appeal this decision.

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