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Product Liability Update: Q4 2024

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Key Product Liability Cases: Q4 2024 Update

The Product Liability and Mass Torts Group at McCarthy Tétrault LLP is pleased to bring you our analysis of recent decisions for businesses manufacturing or selling products in Canada:

1. **Settling Smart: Key Insights from *Dine v. Biomet Inc.*, 2024 ONSC 5949**
2. **Testing, Recalls, and Liability: Lessons from *Muss v 735084 Alberta Inc.*, 2024 BCSC 2078**
3. **No Harm, no Action: Rejected Common Issues in *Bosco v Mentor Worldwide LLC*, 2024 BCSC 1931**

**This publication is for general information only and is not intended to provide legal advice.*

Settling Smart: Key Insights from *Dine v. Biomet Inc.*, 2024 ONSC 5949

Dine v. Biomet Inc., a recent decision from the Ontario Superior Court of Justice, is a useful reminder that defendants benefit from building a strong case on the merits even if they ultimately settle. It also emphasizes the importance of appropriately tailoring a settlement structure.

The issue before the Court was approval of a settlement against Biomet, a manufacturer of medical devices. In considering the fairness of the settlement, the Court referred repeatedly to the "significant litigation risks" the plaintiffs faced. Those risks were a result of the defendants' "vigorous" efforts to defend the case.

Background

The plaintiffs were individuals who had undergone hip replacement surgeries with Biomet hip implants. They alleged serious complications following surgery, including pain, discomfort, and metal-related pathologies, and asserted claims of negligent design.

Biomet was prepared to "vigorously defend the safety and efficacy of their products," through "many complex stages" of litigation,[1] and, consequently, the plaintiffs' case "developed more risks" than in comparable precedent cases.[2]

Faced with the prospect of a lengthy and uncertain trial, both parties engaged in settlement negotiations.

Outcome

The Court approved the settlement as fair and reasonable in the circumstances.[3] The Court emphasized that the settlement provided significant benefits to the class members, especially when considering the risks associated with continuing the litigation.[4] Justice Glustein's decision placed considerable weight on the litigation risks that the plaintiffs faced if the case proceeded to trial.[5] Those risks included the possibility of an unfavourable decision, such as a finding that Biomet's implants were not defectively designed, which would result in no compensation for the class. It was acknowledged that the particular risks related to Biomet's implants were unique and their device performed better than other hip implant systems that used comparable components in other class actions.

The Court also observed that the proposed settlement structure – a "claims-made" settlement structure – was superior to an aggregate fund structure in the circumstances, and this fact supported the settlement's fairness.[6]

In an aggregate fund settlement, a fixed pool of money is created to pay out class members' claims. Under a claims-made settlement, the amount of money used to pay claims depends on how many claimants come forward. The settlement is "made" by the number of claimants who ultimately do come forward.

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[1] At para. 149, 152.

[2] At para. 150.

[3] At para. 129.

[4] At para. 129.

[5] At paras 92-94.

[6] At para. 96.

In *Biomet*, the parties did not know exactly how many class members had the surgeries implicating Biomet's medical devices, due in part to the absence of a national registry in Canada tracking this information. There was a major risk of creating an aggregate fund that was either too large or too small since the total number of potential claimants was unknown. A claims-made structure was, therefore, considered to be a much fairer basis on which to settle the claims.

Given the litigation risks and the preferable structure of the settlement, the court concluded that the settlement was in the best interests of the class members.[7] The approval reflected the balance between the benefits of the settlement and the potential uncertainties of a prolonged legal battle.

Key Takeaways

1. As a defendant, building a strong case on the merits is essential, even when cases will likely settle, as it will strengthen negotiation leverage.

2. The proposed settlement structure for a class action must be carefully considered to match the particular circumstances of the class and the case in order to maximize the likelihood that it is approved by the court.

[7] At para. 129.

Testing, Recalls, and Liability: Lessons from *Muss v 735084 Alberta Inc.*, 2024 BCSC 2078

In *Muss v. 735084 Alberta Inc.*, the British Columbia Supreme Court provided helpful commentary on the importance of pre-market testing and recall management, especially in respect of dangerous products.

Background

The defendant Earth Management designed and distributed pyrotechnic explosive devices called bear bangers. The plaintiff suffered injuries when one of Earth Management's bear bangers exploded in his hand.

Earth Management became aware of problems with the bear bangers between about April 2016 and October 2017. The bangers had a tendency to explode rather than to shoot up into the air as intended. Earth Management had stopped selling the bangers in October 2017 because "too many people [were] getting injured, and its not right".[8]

A limited recall was attempted. An Earth Management executive created a list of retail customers that had bought the bangers (there were fewer than 80) and sent a letter asking them to stop selling the bear bangers.[9] However, there was no proof any of the letters had been received. Earth Management never received a response from any of its customers. It followed up with its largest customer, but not with any of the others.[10]

The plaintiff alleged that Earth Management negligently distributed a defective product and also negligently conducted its recall.

Outcome

The Court found that Earth Management had negligently distributed the bear bangers, causing the plaintiff's injury. Earth Management's pre-market testing of the bear bangers fell short of industry standards, and indeed was limited to sporadic random detonations by a company executive. There was no record of these tests and no system in place for quality control.[11] Justice Wilkinson pointed out that more thorough testing could have revealed the defect and prevented harm.[12]

The Court also found Earth Management liable for negligence in respect of the recall. The scope of the recall – writing a single letter and not following up – was inadequate given the serious risk of harm posed to users of the bear bangers. [13]

A recall meeting the requisite standard of care would have, at minimum, have involving phoning or emailing each customer to confirm that they received the letter and were aware that the product was dangerous to users and

[8] At para. 125.

[9] At para. 129.

[10] At paras. 128-129.

[11] At paras. 112-114, 169.

[12] At para. 146.

[13] At para. 163.

should not be sold. That did not happen, and seemingly, the plaintiff was able to purchase a defective bear banger years after the intended recall.[14]

The court awarded damages to the plaintiffs, reflecting the financial and safety impacts caused by the product defect and the recall's shortcomings.

Key Takeaway

1. Businesses must conduct thorough pre-market testing that meets or exceeds industry standards to identify potential defects before products reach consumers. Failure to do so not only increases the risk of harm but also exposes companies to legal and financial liabilities.

2. When defects are identified, companies must act swiftly and comprehensively to execute a dependable recall program. Clear communication, robust outreach efforts, and guidance for affected users are essential to minimize harm and demonstrate diligence in addressing known product issues.

[14] At para. 165.

No Harm, no Action: Rejected Common Issues in *Bosco v Mentor Worldwide LLC*, 2024 BCSC 1931

In *Bosco v. Mentor Worldwide LLC*, the British Columbia Supreme Court declined to certify certain contested common issues in a proposed class action against Mentor Worldwide LLC ("Mentor"), a manufacturer of breast implants.

The contested common issues focused on the presence of, and alleged failure to warn of, "Toxins" in Mentor's breast implants. The plaintiffs led no evidence showing a basis in fact that the alleged Toxins could cause any specific condition, disease, or injury.

Ultimately, that was fatal to the contested issues. Issues regarding the presence of "Toxins" could not meaningfully advance any class members' claims if there was no evidence that the "Toxins" were harmful. Furthermore, the list of "Toxins" alleged by the plaintiffs was so broad and open-ended as to be unfair to Mentor; Mentor would not know the case it would have to meet at trial.

The Court did certify other, uncontested common issues.

Background

The plaintiffs sought to certify common issues on behalf of individuals who had received Menor breast implants on the theory that the products contained "Toxins" and that Mentor had failed to provide adequate warnings about those Toxins. The Toxins were defined in the plaintiffs' materials in a broad and open-ended fashion as "heavy metals and/or volatile and extractable chemicals, or other toxins as may otherwise be proven at trial."[15] The plaintiffs did not seek to certify any common issue that the alleged Toxins were harmful.

The plaintiffs argued that they were not required to prove that the Toxins were harmful. Instead, they argued that they were only required to lead:[16]

a) evidence tending to prove that the implants were harmful (by pointing to the harm they suffered after their breast implementation surgeries – not evidence that the Toxins caused those harms),
b) evidence of a workable methodology for providing an answer to whether the Toxins were harmful at trial, and
c) evidence that the question of the Toxins' harmfulness could be answered in common.

Mentor opposed certification, largely because there was no basis in fact that the Toxins were harmful.[17]

Outcome

The Court agreed with Mentor and denied certification of the contested common issues. The Court found no basis in fact that the alleged Toxins were either present or had diffused from the breast implants in sufficient quantities to cause harm.[18] There was no point certifying common issues about whether Toxins were present or

[15] At para 39, 172.

[16] At para 155.

[17] *Class Proceedings Act*, RSBC 1996, c 50.

[18] At para 176.

insufficiently warned of if the Toxins were not shown to be harmful, since those issues, even if resolved, would not advance the class members' claims.[19]

The Court also emphasized that the plaintiffs' definition of Toxins was problematic because it was potentially unlimited in scope. The plaintiffs had proposed an open-ended list of Toxins. Mentor was entitled to know what alleged substances would be at issue at a common issues trial.[20]

These problems were also fatal to proposed issues related to the *Competition Act*, R.S.C. 1985, c. C-34 and British Columbia's *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2, since the issues sought under those statutes turned on whether the Toxins were harmful, and there was no evidence that they were.

Key Takeaways

1. Courts generally require specific allegations of harm to establish common issues. Generalized claims or hypothetical risks are insufficient to justify class action certification.

[19] E.g., at para 180.

[20] At para. 177.

For more information, please contact one of the contributors noted below or another member of our Product Liability and Mass Torts Group.

BYRON SHAW | bdshaw@mccarthy.ca | 416-601-8256

Byron is a Toronto litigation partner with extensive expertise in product liability, including a particular focus on litigation relating to pharmaceutical products and devices and consumer products and services. He has acted on some of the highest profile and complex product liability matters—often following recalls, market withdrawals and other regulatory action in Canada, the U.S. and other jurisdictions. Byron regularly acts as litigation counsel in product liability class actions and mass tort inventory litigation in all courts across the country.

DOROTHY CHARACH | dcharach@mccarthy.ca | 416-601-7710

Dorothy is a partner in our Litigation and Dispute Resolution Group in Toronto and Co-leader of our Health Industry Group. She maintains a broad practice with an emphasis on product liability, class actions, commercial litigation and dispute resolution, professional negligence, and defamation. Dorothy has appeared before numerous courts and tribunals, including the Ontario Court of Appeal, the Divisional Court of Ontario, the Ontario Superior Court, the Ontario Court of Justice, and the Health Professions Appeal and Review Board.

SAMUEL LEPAGE | slepage@mccarthy.ca | 514-397-4238

Samuel Lepage is a partner in the firm's Litigation and Dispute Resolution Group in Montréal. He has extensive experience in class actions, including in the area of product liability. Samuel often defends manufacturers' liability class actions related to pharmaceutical and consumer products. He regularly acts for significant clients in class actions involving *Consumer Protection Act* claims. Samuel has appeared before the Supreme Court of Canada, the Quebec Court of Appeal and all Quebec trial courts.

PATRICK WILLIAMS | pwilliams@mccarthy.ca | 604-643-7940

Patrick is a partner in our Litigation and Dispute Resolution Group in Vancouver focused on complex commercial litigation, including arbitrations, class actions, and regulatory proceedings. With an emphasis on product liability claims and contract disputes, Patrick represents clients in diverse industries, including the consumer product, energy, mining, real estate, technology, and transportation sectors. He has appeared in the Supreme Court of Canada, all levels of court in British Columbia, the Federal Court of Appeal, the Federal Court, domestic and international commercial arbitrations, and before administrative tribunals.

GREG RINGKAMP | gringkamp@mccarthy.ca | 416-601-7817

Greg is an associate in our Litigation and Dispute Resolution Group, focusing primarily on product liability. Graduating from the University of Toronto's Faculty of Law, he received distinction standing and the Samuel and Clara Shime Award for Achievement in Law and Medicine. Prior to law school, Greg was a research ethics officer at the Montreal Neurological Institute, where he worked on experimental drug trials.

About McCarthy Tétrault's Product Liability and Mass Torts Group

Product liability and mass tort claims are among the most serious challenges an organization can face. When the survival of a brand or a business hangs in the balance, the world's leading companies turn to McCarthy Tétrault. Our deep bench strength and expertise across Canada allows us to help our clients navigate their most complex product liability and mass tort challenges from start to finish. We act for companies in a wide range of matters and industries, including medical products and devices, consumer products and services, transportation and automotive products, toxic chemical and environmental matters, and catastrophic events. Our firm's integrated, industry-focused approach allows us to anticipate issues and help prevent and contain product liability and mass tort lawsuits before they begin.

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VANCOUVER

Suite 2400, 745 Thurlow Street
Vancouver BC V6E 0C5
Tel: 604-643-7100
Fax: 604-643-7900

QUÉBEC CITY

500, Grande Allée Est, 9e étage
Québec QC G1R 2J7
Tel: 418-521-3000
Fax: 418-521-3099

CALGARY

Suite 4000, 421 7th Avenue SW
Calgary AB T2P 4K9
Tel: 403-260-3500
Fax: 403-260-3501

NEW YORK

55 West 46th Street, Suite 2804
New York NY 10036
UNITED STATES
Tel: 646-940-8970
Fax: 646-940-8972

TORONTO

Suite 5300, TD Bank Tower
Box 48, 66 Wellington Street West
Toronto ON M5K 1E6
Tel: 416-362-1812
Fax: 416-868-0673

LONDON

1 Angel Court, 18th Floor
London EC2R 7HJ
UNITED KINGDOM
Tel: +44 (0)20 7786 5700
Fax: +44 (0)20 7786 5702

MONTRÉAL

Suite MZ400
1000 De La Gauchetière Street West
Montréal QC H3B 0A2
Tel: 514-397-4100
Fax: 514-875-6246