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Ontario Court of Appeal Certifies Negligence Class Action Against Gun Manufacturer in Mass Shooting Case

The Ontario Court of Appeal's decision in *Price v Smith & Wesson Corporation* is a significant development in product liability law and class action procedure, particularly in cases involving harm from criminal acts. The ruling allows a class action in negligence to proceed against Smith & Wesson, the manufacturer of the handgun used in the 2018 Danforth Avenue mass shooting in Toronto.

The case was brought by victims and affected families who argued that Smith & Wesson was negligent in failing to incorporate "authorized user" technology – mechanisms that restrict gun use to authorized individuals – into the firearm. They claimed that manufacturing the gun without this technology made it vulnerable to theft and criminal misuse, consequences the manufacturer should have foreseen.

Background

In the initial proceedings, Justice Perell of the Ontario Superior Court dismissed the plaintiffs' strict liability and public nuisance claims, finding no reasonable cause of action. As for the negligence claim, the Court allowed this to proceed, as it was not plain and obvious that it would not succeed. However, the Court declined to certify the class action, holding that the plaintiffs had failed to establish "some basis in fact" for the common issues as required under the *Class Proceedings Act*.

On appeal, Smith & Wesson sought to strike the negligence claim, arguing that the motion judge erred in failing to hold that it did not disclose a reasonable cause of action. For their part, the plaintiffs appealed the dismissal of their strict liability and public nuisance claims and the refusal to certify the class.

The Ontario Court of Appeal was primarily favourable to the plaintiffs. While the Court upheld the decision dismissing the strict liability and public nuisance claims, the Court overturned the refusal to certify the negligence claim and allowed that claim to proceed.

The Court’s Reasoning: Clarifying the Duty of Care in Novel Cases

With respect to Smith & Wesson’s appeal that the negligence claim should be struck, the core issue was whether Smith & Wesson owed a duty of care to the victims. The Court applied the *Anns/Cooper* test, used to assess whether a novel duty of care should be recognized, looking first at the foreseeability of harm and the proximity between the parties, and then at broader policy considerations that could negate the duty.

The Court rejected the argument that the caution in *Livent Inc v Deloitte & Touche* against expanding duty categories applies only to economic loss cases. It emphasized that this caution also extends to personal injury cases, as seen in *Rankin’s Garage & Sales v JJ.* As such, when addressing novel claims, courts must conduct a full duty of care analysis rather than attempting to fit the facts into existing categories.

Applying this framework, the Court held it was not "plain and obvious" that the plaintiffs’ negligence claim would fail:

- **Foreseeability** – Smith & Wesson could reasonably have foreseen that its handguns might be stolen and used to cause physical harm. The company had previously agreed, in US litigation settlements, to implement authorized user technology to reduce unauthorized use and misuse, and had even patented such technology. The US Congress had passed legislation to shelter the manufacturer from civil liability for third party unauthorized use. Additionally, US government reports warned of the risks posed by stolen guns. Given these facts, the Court found that the defendant reasonably should have foreseen the risk of unauthorized use and bodily harm by manufacturing firearms without technology preventing their use if stolen.
- **Proximity** – Given the foreseeability of bodily harm, the Court found sufficient proximity between Smith & Wesson and the victims. The Court clarified that in general, reasonably foreseeable bodily harm due to overt acts will ground proximity. Importantly, the manufacturer’s decision to omit safety technology was found to be an “overt act,” not a mere omission, and thus created proximity. The criminal act of the shooter did not sever the chain of liability – it was a foreseeable result of the product design.
- **Policy Considerations** – The Court found no overriding policy reasons to deny a duty of care. The Court clarified

that policy considerations should only negate a duty of care in rare cases, for instance when evaluating the decisions of governmental policy or quasi-judicial bodies. The existence of federal firearms regulations that do not require authorized user technology did not shield the manufacturer from common law tort liability.

Low Threshold for Class Certification

With respect to the plaintiffs' appeal, the central issue was the quality of the evidence that plaintiffs need to lead to establish "some basis in fact" for the certification requirements. The Court reaffirmed the low bar for certifying class actions in Ontario. Courts do not evaluate the merits in depth but instead look for "some basis in fact" for each certification criterion.

Here, the central common issues were whether Smith & Wesson was negligent in failing to include authorized user technology, and whether that failure contributed to or caused harm to victims.

The Court held that the motion judge erred by applying a merits-based test at certification. The Court noted that the judge had scrutinized expert evidence on the commercial and technical viability of the technology and had conducted independent research into unauthorized gun use in Canada, which was inappropriate at this stage. The Court further held that the plaintiffs presented sufficient evidence to suggest that the technology was feasible and could have reduced the risk, including the company's past commitment to implementing it. This was sufficient at the certification stage.

Limits of Strict Liability and Public Nuisance in Products Cases

While the plaintiffs were successful in getting the negligence claim certified, the Court upheld the dismissal of the strict liability and public nuisance claims, confirming that these doctrines play a narrow role in product liability law.

- **Strict Liability** – Under *Rylands v Fletcher*, strict liability applies only to "non-natural" uses of land, not to the manufacturing of potentially dangerous but legally permitted products like firearms.
- **Public Nuisance** – The manufacture and sale of firearms is regulated and permitted and does not by itself constitute a public nuisance that interferes with public spaces.

Key Takeaways

- **Recognition of Novel Duties of Care** – The ruling suggests the possibility that manufacturers may owe a duty of care to third parties where their products pose a foreseeable risk of physical harm through criminal misuse. Whether such a claim is truly viable will need to be determined at a fully contested hearing.
- **Negligence Can Proceed Despite Criminal Acts** – Even where harm is caused by a third party, manufacturers may still face claims if the risk was reasonably foreseeable and their conduct contributed to that risk. Again, the precise scope of such liability remains to be seen.
- **Certification Bar Remains Low** – Plaintiffs in class actions must only provide some factual basis for their claims at certification, not definitive proof. Courts must allow arguable claims to proceed unless it is plain and obvious that they will fail. Judges must avoid deeper inquiry into the merits of the case at the certification stage.
- **Limits on Non-Negligence Claims** – The decision confirms that strict liability and public nuisance have a limited role in cases involving regulated commercial products.

Ultimately, the Court of Appeal's decision ensures that arguable negligence claims, especially those involving public safety concerns, will proceed to be tested in court.