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The Devil is (Apparently, Not Always) in the Details: Court of Appeal Comments on Pleadings Requirement in Product Liability Actions

Pleadings continue to be a popular battleground in the product liability context. Over the years, a body of law has developed respecting motions to strike for negligent design, negligent manufacture and failure to warn claims. Nevertheless, there continues to be debate as to the specificity needed for pleading these types of claims. That debate is fuelled in part by jurisprudence demonstrating a high tolerance for claims that are arguably vague and lacking in material facts. Even where a claim is struck, plaintiffs are routinely permitted to amend their pleading.

The Court of Appeal for Ontario recently added to the jurisprudence on these issues in the Fernandez Leon v Bayer Inc decision. The Court re-iterated the permissive approach to pleadings in the context of whether a specific defect must be pleaded for a product liability claim.

The Motion Decision

The Appellants, Arianna Fernandez Leon and Bolelsaw Brzozowski, brought a product liability claim against Bayer alleging negligence. In a single, bare and conclusory paragraph, the Appellants alleged that the design of Bayer's female contraceptive implant was defective and caused Ms. Leon injury. Bayer brought a motion to strike the claim without leave to amend.

The Motion Judge granted the motion and struck the claim in its entirety, without leave to amend. Bayer submitted that there were no material facts to underpin the constituent elements of a claim in negligence, and in particular that there was no pleading of the specific defect. The Motion Judge agreed and found that the allegations were conclusory in nature, without material facts pleaded to support them. The Motion Judge struck the claim and reiterated that a plaintiff "cannot base their claim on speculation and conjecture and hope that the discovery process will yield the evidence needed to support their claim".

Leave to amend was denied because the Appellants had been previously notified of the deficiencies in their claim and did not rectify them. Permitting the claim to proceed to discovery to allow the Appellants to discover the requisite elements of their claim would only increase the cost of the proceedings and the Motion Judge “fear[ed] the outcome will remain the same”.

The Appeal

The Appellants argued that the Motion Judge erred in failing to grant leave to amend. Prior to the hearing, the Appellants delivered a draft amended Statement of Claim. Bayer took the position that the Statement of Claim still did not disclose a cause of action for negligent design and manufacture because, in reliance on existing jurisprudence, the pleading did not identify the specific design and manufacturing defects.

The Court allowed the appeal and permitted the Appellants to amend the Statement of Claim. In doing so, the Court held that the particulars of a specific defect were not elements of the tort that are “always required” (our emphasis) to be pleaded before the claim discloses a cause of action. The Court distinguished the line of certification decisions dealing with product liability claims in the class action context relied on by Bayer. Notably, although a representative plaintiff is subject to the same pleadings test as an individual action, the Court distinguished these decisions by identifying that certification motions require a representative plaintiff to show some basis in fact for the existence of a defect.

The Court reiterated that the threshold to plead a cause of action was low and found that requiring a plaintiff to identify a “specific manufacturing or design defect in every case would place too onerous a burden on a plaintiff at the stage of initiating a proceeding in a product liability action.”

Takeaways

Some will certainly interpret this decision to be a loss for manufacturers on the whole. It is important to emphasize (and the Court did), however, that the decision was, in part, factually driven. The product in this case was an implanted medical device and it was alleged that Bayer stopped selling and distributing the product at some point. For what it is worth, the Court also emphasized that Bayer is free to seek further particulars before it delivers its Statement of Defence.

Notwithstanding this decision, manufacturers will continue to be able to reasonably argue that a pleading is deficient for failing to identify the particular defect in design or manufacturing. Depending on the case, it might just require a bit more work than before.