

LITIGATION BULLETIN

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CANADA'S HIGHEST COURT PUNISHES MANUFACTURERS

A relatively recent Supreme Court of Canada decision confirms that the courts may use consumer protection legislation to punish manufacturers - not just protect consumers. The highest court in Canada awarded \$25,000 in exemplary damages, on top of \$48,000 in compensatory damages, against an automotive manufacturer for violating Saskatchewan's *Consumer Protection Act*.

THE *PREBUSHEWSKI* CASE

The facts in *Prebuszewski v. Dodge City Auto (1984) Ltd. and Chrysler Canada Ltd.* are straightforward. The plaintiff purchased a new pick-up truck and financed the entire \$43,000 purchase price through her bank. About a year and a half later, the pick-up spontaneously caught fire while parked and was completely destroyed. The fire was caused by a short-circuit in the daytime running light module.

After recovering about \$27,000 (the value of the pick-up at the time of loss) from her insurance company, the plaintiff still owed over \$11,000 (plus growing interest) to the bank. The plaintiff asked the manufacturer and the dealer for assistance, but to no avail. The manufacturer directed the plaintiff back to her insurer.

Prior to the fire, however, the manufacturer knew it was having problems with the daytime running light module. Although the manufacturer had known about this defect for several years, it had failed to issue a recall or warn its customers about the problem.

EXEMPLARY DAMAGES

Obtaining no relief from the manufacturer, the plaintiff successfully sued the manufacturer and the dealer under Saskatchewan's *Consumer Protection Act* (the "*Act*") for the full value of the truck plus \$25,000 in exemplary damages. The Saskatchewan Court of Appeal set aside the exemplary damages award, and the plaintiff appealed to the Supreme Court of Canada.

Generally speaking, exemplary, or punitive, damages are awarded only in exceptional cases to deter particularly "malicious, oppressive, and high-handed" conduct that offends the court's sense of decency. Because this threshold is so high, exemplary damages are rarely awarded. The Saskatchewan Court of Appeal used this test and reversed the exemplary damages award on the basis that the defendant had not acted in bad faith.

The *Act* entitles consumers to recover damages from manufacturers and dealers for breaches of certain statutory warranties contained in the *Act*. The *Act* also has a specific provision that allows the court to award exemplary damages where "any manufacturer . . . has committed a *wilful* violation" of the *Act*. The issue before the Supreme Court of Canada was whether this statutory language modified the common law test for when exemplary damages should be awarded.

The Supreme Court of Canada restored the \$25,000 exemplary damages award by finding that a "wilful" violation of the *Act* does not have to be "malicious, oppressive or high-handed", but merely intentional or deliberate. In doing so, the Court confirmed that the test for awarding exemplary damages under Saskatchewan's consumer protection legislation is lower than at common law. The Supreme Court of Canada ultimately held that

the manufacturer had intentionally violated the *Act* by not advising consumers of the defective module, ignoring the plaintiff's complaints and denying liability for the problem.

THE LESSON

Like Saskatchewan, consumer protection legislation in other provinces (including Ontario) permits exemplary damages to be awarded for violations of statutory warranties. Unlike Saskatchewan, however, no other provincial legislation uses the word "wilful" in its operative provision. This may mean that the higher common law test would apply outside of Saskatchewan - but not necessarily. The *Prebushewski* decision could have an impact on how courts award exemplary damages under consumer protection legislation outside of Saskatchewan as well.

Manufacturers should accordingly be aware of the potentially increased liability for exemplary damages if they voluntarily, intentionally or deliberately violate a statutory warranty contained in consumer protection legislation. The Court may use consumer protection legislation not only to protect the consumer, but to punish the manufacturer.

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The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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