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product liability bulletin

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standard setters and the duty of care

A trial court in British Columbia has, for the first time in Canada, found that a standards development organization ("SDO") owes a duty of care to end users of products that have to meet their standards. Following the decision in *More v Bauer Nike Hockey,*[1] SDOs whose standards are found to be set at an unreasonably low level may be held liable in negligence if the evidence establishes an injury would have been avoided had the product met a higher standard that, as found by the court, ought to have been adopted by the SDO.

The events giving rise to *More* occurred in 2004. In that year 17 year-old Darren More suffered a devastating brain injury while playing organized ice hockey in Esquimalt, British Columbia. At the time of his accident, More was wearing a Bauer HH5000L hockey helmet.

The defendants at trial were Bauer Nike Hockey Inc and Bauer Hockey Corp, the entities responsible for the design and manufacture of the helmet, and the Canadian Standards Association (the "CSA"), the SDO responsible for developing the standards for ice hockey helmets in Canada and for certifying helmets against the standard.

The plaintiffs, More and his parents, alleged that the CSA knew or ought to have known that the standards it set relating to ice hockey helmets were inadequate. They claimed that the CSA had a duty to develop helmet standards sufficient to prevent the risk of serious head injury and that the CSA had breached this duty.

The CSA argued that it owed no duty of care to the plaintiffs on the basis that there was insufficient proximity between the CSA and end users to ground a duty of care and that, in any event, policy considerations militated against imposing such a duty.

The BC Supreme Court found there was sufficient proximity to found a duty of care primarily because all persons playing organized hockey in Canada are required to wear a CSA-approved helmet and any hockey helmet that is not certified by the CSA is considered a "hazardous product" that cannot be sold here.

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[1] 2010 BCSC 1395 [*More*].

In going on to consider whether there were any policy reasons that should derogate from this duty, the court considered, and seemingly gave little weight to, a number of factors including that the CSA is largely a volunteer organization with a public service aspect to its performance and that extending the risk of liability to the CSA might adversely affect its ability to function. The court distinguished prior cases which found SDOs did not owe a duty of care to purchasers whose only losses were economic. It noted that unlike economic losses, personal injuries can never be fully repaired with monetary compensation and thus civil sanctions are justified for personal injury on the basis of justice, punishment, deterrence and education.

Ultimately, while the court found the CSA owed a duty of care to More, it also found the CSA did not breach this duty in the circumstances, and in any event, that the standard the plaintiffs alleged ought to have been in place would not have prevented More's injuries. The BC Supreme Court consequently dismissed the plaintiffs' claims against the CSA.

It remains to be seen whether this decision will be followed in other Canadian jurisdictions. While the *More* decision will be considered persuasive, it is not binding on courts of other provinces and even if it is followed, it may be confined to cases involving personal injury leaving open the question of its application to cases confined to property damage.

by Adrienne Boudreau

For more information on this topic, please contact:

Toronto	Adrienne Boudreau	416.865.7073	adrienne.boudreau@mcmillan.ca

For further information or advice in relation to our Product Liability practice, please contact:

Calgary	Michael A. Thackray, Q.C.	403.531.4710	michael.thackray@mcmillan.ca
Toronto	Teresa Dufort	416.865.7145	teresa.dufort@mcmillan.ca
Montréal	Céline Tessier	514.987.5032	celine.tessier@mcmillan.ca