FANNING THE FLAMES OF LIABILITY: THE ONTARIO COURT OF APPEAL CONSIDERS PRODUCT LIABILITY ISSUES IN *BURR V. TECUMSEH PRODUCTS OF CANADA LIMITED*

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The decision of the Court of Appeal in *Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135 provides a helpful overview of product liability law, including the importance of complying with regulatory regimes when defending failure to warn claims, but it should not be looked to as precedent for exculpating sub-component manufacturers from liability. Rather, the case demonstrates the importance of indemnity provisions as between manufacturers of products and manufacturers of sub-components. Moreover, it highlights the significance of expert evidence in the determination of product liability claims.

Background

The action stemmed from a 2012 incident involving a heat recovery ventilator (the "**Ventilator**") which overheated, exploded and caught fire resulting in serious damage. The Ventilator was designed and manufactured by Venmar Ventilation Inc. ("**Venmar**") and the motor was designed and manufactured by Fasco Products Company (formerly known as Tecumseh Products of Canada Limited)("**Fasco**"). The parties agreed that the fire was caused by the end-of-life failure of the motor in the Ventilator.[1]

The main issue at trial was whether one or both of Venmar and/or Fasco was negligent for failing to install the appropriate protective devices. A secondary issue was whether Venmar was contractually obligated to indemnify Fasco for all damages and costs in this proceeding.[2]

The Trial Judge's Decision

The trial judge held that Venmar was solely liable for the negligent design of the Ventilator, although the trial judge held that Venmar did not breach its duty to warn the public.[3]

The trial judge held that Fasco was not liable for either the negligent manufacture or design of the motor, or for failing to warn the respondents. The trial judge concluded that Fasco owed the plaintiffs no duty of care and therefore was not liable for either negligent manufacture or design of the motor. Even if Fasco were liable, the contract between Venmar and Fasco provided that Venmar had to indemnify Fasco for "any and all claims"

relating to the motors sold regardless of Fasco's negligence. Accordingly, the contract shielded Fasco from any liability.[4]

Central to the trial judge's finding of negligence was the evidence of Fasco's expert, Beth Anderson, who opined that Venmar failed to meet industry standards by not incorporating overload and overcurrent protection in the design of the Ventilator.[5] The trial judge accepted Anderson's evidence that it was insufficient for Venmar to "simply attach the certified motor, move the unit past the certification process, and make sure the fans turned satisfactorily at the end of the production run".[6] This conclusion was supported by the fact that other motors used in the same application also resulted in fires.

The Court of Appeal Decision

Venmar appealed the decision to the Ontario Court of Appeal ("**ONCA**").[7] The ONCA dismissed Venmar's appeal, finding that the trial judge correctly held that Venmar was entirely liable to the respondents. Even if Fasco was liable to the respondents, the Court of Appeal found that Fasco was protected by the indemnity provision in the contract between the two parties.

In its decision, the Court of Appeal confirmed that "[a] trial judge's evaluation of expert evidence is owed significant deference and Venmar has not provided this court with any basis to interfere with the evidentiary assessment".[8]

Although the Court of Appeal was required to show deference to the trial judge's findings, the ONCA expressed doubt with regard to several of the trial judge's conclusions, including:

- the trial judge's finding that Fasco had no liability toward the respondents. The ONCA noted: "I have some reservations about the trial judge's conclusion that parts manufacturers like Fasco who supply products in "close and direct" proximity to the final product, have no duty of care even where they act in a way that contravenes their own policy";[9]
- the trial judge's determination, that "it would not have mattered what Fasco told Venmar" about the end-of-life risks. The ONCA noted instead that, had Venmar been alerted earlier about the risks, it could have investigated and discovered the foreseeable fire risk earlier;[10] and
- the trial judge's finding that it would have been "commercially impractical" for Fasco to warn its manufacturer-customers of the known end-of-life risks as Fasco's omission to inform Venmar of the risk of its motor catching fire was done in violation of its own corporate policy.[11]
- Fasco also argued at trial that it did not have a duty to warn the respondents of the risk of fire because Venmar was a learned intermediary, who had the same level of knowledge about the product as Fasco, and thus this duty to warn fell on Venmar. Importantly, the Court of Appeal also took issue with the trial judge's acceptance of the "learned intermediary" rule relied on by Fasco.[12] The learned intermediary

> rule is an exception to a manufacturer's duty to warn a consumer about the risks of a product. The rule applies when a product is technical and intended to be used only under expert supervision. The expert — a "learned intermediary" — generally needs less information about the product than the general public would.

The ONCA noted that the rule did not clearly apply beyond cases involving a product that is "highly technical in nature and is intended to be used only under the supervision of experts", such as prescription drugs and medical devices.[13] The Court found that ventilators are ordinary products and do not necessarily meet this threshold. The ONCA also noted that the application of the rule also presumes that the intermediary (in this case, Venmar) must be 'learned' in the sense that its knowledge of the product and its risk is the same as that of Fasco. On the facts found by the trial judge, the ONCA found that it was "unclear that Venmar's knowledge of risk of fire approximated that of Fasco."[14]

Despite the reservations expressed in relation to the judgment, the Court found it unnecessary to conclude on these issues, given that Venmar was contractually obliged to indemnify Fasco, the Court of Appeal dismissed the appeal.[15] It is important to exercise caution when relying on the trial decision since the Court specifically declined to opine on whether the trial judge's findings above were correct.[16]

The Case Provides a Primer on Duty of Care in Product Liability Cases in Ontario

On manufacturer's duty, the Court notes that it is well established that a manufacturer owes a duty of care to the ultimate consumer or user of its products. Manufacturers owe a duty to consumers of their product to see that there are no defects in manufacture which are likely to give rise to injury in the ordinary course of use.[17]

On the duty to warn, the Court notes that foreseeability of harm is an objective standard, and in this case liability rested on what Venmar ought to have reasonably known. The Court confirms that principles governing the duty to warn including the following:

i. there is a duty to warn of dangers inherent in the use of a product;
ii. the duty is ongoing and continues after the product is delivered;
iii. warnings must be clear and specific to the dangers that arise from ordinary use; and
iv. the duty varies with the level of danger associated with ordinary use of the product.[18]

The ONCA also affirms that to prove negligent design, there must be a design defect that creates a substantial risk of foreseeable harm and there must be an alternative design that is both safer and economically feasible to manufacture.[19] In this case, the Court found that the design defect in the Ventilator could have been resolved by incorporating a one-shot thermal protector and a fuse. The Court found, based on the expert evidence outlined above, that a safer design was available and economically feasible at the time the Ventilator was

manufactured.[20] Again, this underscores the importance of both internal/corporate and external expert evidence at trial.

On the failure to warn, the Court found that Venmar had complied with its obligations under the Electrical Safety Authority's reporting regimes, and found that because of this compliance, Venmar had properly warned consumers of its products' potential end-of-life failures.[21] This is helpful commentary which underscores the importance of manufacturers complying with the applicable Canadian industry reporting and recall regimes (and those of their global equivalents). With this finding, we can rely on compliance with the applicable regulatory regimes to protect against failure to warn allegations.

The Indemnification Provision

Fasco imposed Terms and Conditions ("**T&Cs**") into its two-page contract, a copy of which was included with each delivery order.[22] The T&Cs of the contract contained an indemnity clause providing that Venmar shall indemnify Fasco for:

> "[A]ny and all claims, actions, causes of action, liabilities, liens, losses and costs … relating to the Goods or any device, material or things to which the Goods or attached or of which the Goods are made a part of or within which the Goods are enclosed, regardless of whether Fasco may be wholly, concurrently, partially, jointly or solely negligent or otherwise at fault."[23]

Venmar disputed that the T&Cs applied, taking the position that it did not consent and in fact, wasn't aware of the terms of the contract. However, in another critical choice, Venmar chose not to call any witnesses with any direct involvement with the contract or the process actually followed by the parties. The trial judge therefore drew the adverse inference that "Venmar's witnesses would have confirmed Fasco's evidence that the Terms and Conditions attached to the acknowledgment were to be accepted before Fasco accepted the contract to create the motor as requested by Venmar."

Moreover, the trial judge noted that the parties were sophisticated commercial entities, the T& C's of the contract had remained the same for many years, they were conspicuous, bolded, reproduced and sent with every order, they "take up more than half the [two-page] document", and therefore, "a reasonable person in Venmar's position would have noticed them". Venmar never objected to the indemnification provision although Venmar sought to modify another provision in the contract relating to the terms of payment in 1997 or early 1998.[24] Accordingly, the trial judge found that Venmar agreed to the T &C's in the contract and the indemnification provision applied.[25]

The Court of Appeal thus agreed with the trial judge's finding that the indemnity provision in the contract was operative and Venmar was bound to indemnify Fasco for any damages payable to the respondents.[26]

Takeaways

The Court of Appeal in this case was limited in its ability to interfere with the trial judge's decision, because of the obligation to give deference to the trial judge's assessment of the expert evidence. As such, it is important to note that the finding in this case will not be applicable to every instance where a sub-component of a product fails.

The Court of Appeal decision does not serve as a precedent for the notion that manufacturers of sub-components generally will not be liable for product failures. Given the contractual provisions, the ONCA declined to rule conclusively on many of the issues before the Court. As such, the critical question of sub-component manufacturer liability remains live and unsettled law.

Furthermore, the decision reiterates the following factors which are critical when preparing for a product liability trial in Ontario:

1. Pleadings can be amended up until the time of trial; parties should avail themselves of this rule to avoid trial by ambush and failure to do so can result in dismissal of otherwise valid arguments;
2. An adverse inference may be drawn against a party claiming to be unaware of terms and conditions of a contract where that party fails to call a witness involved in contracting;
3. Selection of an expert witness is critical, especially because a Court of Appeal will show deference to a trial judge's assessment of expert evidence;
4. In considering whether a manufacturer has satisfied their duty to warn, a Court can and should consider whether a notification program was put into place that was in accordance with regulatory regimes;
5. By placing themselves on the market, manufacturers hold themselves out as being knowledgeable in a certain field and thus can be held to the same level of expertise as an expert;
6. A manufacturer may be liable for negligent design where a safer design is available and economically feasible; and
7. Consider what evidence is necessary to demonstrate whether a design change is economically feasible or risk having the judge make that determination based on an inference.

[1] *Burr v. Tecumseh Products of Canada Limited*, 2023 ONCA 135 at para 6 [*Court of Appeal Decision*].
[2] *Court of Appeal Decision* at para 7.
[3] *Burr v. Tecumseh*, 2022 ONSC 412 at para 6 [*ONSC Decision*].
[4] *ONSC Decision* at para 6.
[5] *ONSC Decision* at para 322.
[6] *ONSC Decision* at para 326.
[7] *Court of Appeal Decision* at paras 11-13.

[8] *Court of Appeal Decision* at para 73.
[9] *Court of Appeal Decision* at para 103.
[10] *Court of Appeal Decision* at para 105.
[11] *Court of Appeal Decision* at para 105.
[12] *Court of Appeal Decision* at para 106.
[13] *Court of Appeal Decision* at para 106.
[14] *Court of Appeal Decision* at para 106.
[15] *Court of Appeal Decision* at para 107.
[16] *Court of Appeal Decision* at para 107.
[17] *Court of Appeal Decision* at para 53.
[18] *Court of Appeal Decision* at para 83.
[19] *Court of Appeal Decision* at para 56.
[20] *Court of Appeal Decision* at para 81.
[21] *Court of Appeal Decision* at paras 84-87.
[22] *Court of Appeal Decision* at para 108.
[23] *Court of Appeal Decision* at para 109.
[24] *Court of Appeal Decision* at para 115.
[25] *Court of Appeal Decision* at para 114.
[26] *Court of Appeal Decision* at para 118.

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A Cautionary Note