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Product Liability in Quebec – What's New?

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Failure to warn: Did you know Lysol Advanced can cause corrosion?

Are you among the millions of Canadians who buy and use the popular blue product Lysol Advanced? Not only does it kill 99.9% of bacteria, it can also corrode metal. It is a safe bet (or at least it is hoped) that after reading this article, you will no longer store your Lysol Advanced product under your sink…

In *La Capitale assurances générales inc.* c. *Construction McKinley inc.*, 2023 QCCS 419, Martin Tremblay and Annie Thibault purchased a parcel of land in 2012, and retained the services of a general contractor, McKinley, to build their house. They chose Rubi brand faucets directly from the supplier, Céramique Décor, who sold them to McKinley, who then billed them to Martin Tremblay and Annie Thibault.

For years, Martin Tremblay and Annie Thibault used Lysol Advanced to clean their toilet bowls. This product was stored (as you guessed it) in the cabinets under the bathroom sink. However, on February 12, 2017, one of the metal flexible connectors located under the sink failed, causing $137,000 in damages. All experts agreed on the cause of the failure: corrosion caused by chlorine fumes from the Lysol Advanced product. Indeed, Lysol Advanced contains 12% hydrochloric acid, and fumes may leak if the cap is not tightly sealed.

Martin Tremblay and Annie Thibault's property insurer commenced an action against McKinely, Céramique Décor and the manufacturer of Lysol Advanced, Reckitt Benckiser. The judgment was rendered on February 14, 2023 by the Honorable Judge Alain Michaud of the Superior Court, and is interesting on many points:

- McKinley was not held liable. Although McKinley sold the Rubi brand faucets, it is not a professional faucet seller. McKinley is a professional home seller, and does not warrant, through the sale of the home, that all accessories that are installed inside the home are free of any defects.
- Céramique Décor was not held responsible for the failure of the metal flexible connector in itself, because it was not established that it was defective. However, Céramique Décor had noticed a high number of failures concerning the Rubi brand faucets and had even begun to keep track of them. Céramique Décor had reached the conclusion that there was an incompatibility between the Rubi faucets and chemical products. Although Céramique Décor attempted to notify future customers by adding a notice in the box of the Rubi products, Céramique Décor did nothing to attempt to notify former customers who had previously bought the Rubi products. For this reason, Céramique Décor was held liable for 25%, for failure to warn.
- The Court concluded that Reckitt Benckiser should bear the greater part of the liability, i.e. 75%, since the risk of corrosion was not indicated anywhere on their product. Their argument that Martin Tremblay and Annie Thibault failed to tightly close the cap did not convince the Court, since Reckitt Benckiser did not indicate on its product the risk of corrosion that this can result into. Nor did Reckitt Benckiser convince the Court that Martin Tremblay and Annie Thibault failed to inspect the metal

flexible connectors under the sink periodically, since hardly anyone ever does such an inspection.

Consequently, towards Martin Tremblay and Annie Thibault's insurer, Céramique Décor and Reckitt Benckiser were jointly and severally found 100% liable; however, as between them, their respective shares of liability were established at 25% and 75% respectively.

Dear manufacturer: Did you wait to recall your product? If so, that could be costly

In *CCI Thermal Technologies Inc.* v. *AXA AL (XL Catlin)*, 2023 QCCA 231, the Court of Appeal considered how liability should be split between the manufacturer of a finished product and the manufacturer of a component. The litigation involved portable heaters sold and assembled by Stelpro, Dinplex and Ouellet, all of which incorporated a heating element manufactured by CCI Thermal. Several heating elements had failed, throwing incandescent particles and starting fires. Stelpro, Dimplex, Ouellet and CCI Thermal had agreed to settle with the victims but did not agree on how to split the costs between them.

In Superior Court, CCI Thermal was held 100% liable. CCI Thermal had been aware of the fire hazard posed by the heating elements for twenty years but had never disclosed it to the portable heaters' manufacturers. On appeal, the Court of Appeal noted that it was necessary to examine the respective fault of the portable heaters' manufacturers, depending on what measures they put in place to warn consumers once they became aware of the fire hazard. In particular:

- Dimplex discovered the fire hazard posed by the heating elements in 2007. Dimplex took steps to recover the inventory not yet sold; however, it did not see fit to issue a public recall.
- Stelpro discovered the fire hazard posed by the heating elements on March 23, 2007. It issued a massive public recall in September 2009.
- Ouellet discovered the fire hazard posed by the heating elements on November 14, 2007. Ouellet nevertheless continued to purchase heating elements from CCI Thermal. Ouellet only issued a public recall after Stelpro did so. Ouellet's public recall mainly took place in the winter of 2010.

The Court of Appeal held that the portable heaters' manufacturers should bear 20% of liability for all fires that occurred during the period between the date when they became aware of the fire hazard and the date on which they issued a public recall. CCI Thermal remained 80% liable for these fires. For fires which occurred after the date on which a public recall was issued, CCI Thermal was solely held 100% liable. Because Dimplex never issued a recall, it was held liable for 20% of the damages caused by all fires involving its portable heaters. As for Stelpro and Ouellet, their 20% share of liability respectively ended in September 2009 and winter of 2010. As stated by the Court of Appeal:

"[135] CCI's liability must also remain predominant, namely 80%, given the cumulative seriousness of the defect affecting its elements and its failure to disclose it to the manufacturers in a timely manner. (…)

[136] Thus, as we have seen, the manufacturers cannot be absolved of all liability on the grounds that it is the defect affecting the heating elements manufactured by CCI that constitutes the genesis of the fires. A sound judicial policy requires that in this case, the manufacturers answer for their omission or delay in acting after having nevertheless acquired knowledge of this defect. To hold them harmless from any liability despite the evidence on file would be tantamount to encouraging any other manufacturer placed in the same circumstances to adopt a *laissez-faire* attitude and wait-and-see attitude." [Translated.]

Public recall programs are likely to be scrutinized in the future, in order to determine the share of liability between the various manufacturers involved.

opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

The WeirFoulds Subrogation & Recovery Practice Group specializes in large, complex subrogation matters, and prosecutes cases all over Canada, including Quebec. For more information on this topic or for any related inquiries, please reach out to Raj Datt, Chair & Partner, or Marie-Pier Nadeau, Partner.

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