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Product Liability in Contracts in Quebec



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CONTRACTUAL LIABILITY

In Quebec, a seller must sell products free of latent defects and is responsible where it fails to do so. This obligation with respect to the quality of products applies to manufacturers, distributors and resellers of products (i.e., each member of the supply chain). Any of these entities can be pursued by a buyer and be found liable for a defective product as if it had sold the product directly to the buyer.

Defects

A product will only be considered defective and give rise to product liability in circumstances where the *use* of the product is affected by a defect. Use of a product can be affected where there is a material defect (e.g., where the product is broken or damaged) or where the product is not fit for its typical or intended use (considered from an objective standpoint) or a particular use (based on an agreement with the buyer or the reasonable expectation of the buyer when the product was purchased).

The defect must therefore be serious enough to render the product unfit for its intended use or diminish its usefulness to such an extent that the buyer would not have bought it or would have paid a lesser price for it. The buyer is not required to demonstrate the origins of the defect, but merely that use of the product is compromised. Factors such as the cost of repairs, the inconvenience to the buyer, and the decrease in value of the product as a result of the defect, can be taken into account in order to determine whether a defect is serious enough to make a product unfit for use.

A defect must also be “hidden”, meaning that the defect was not disclosed to the buyer and was not apparent at the time of the sale. It is generally accepted under Quebec law that a buyer is expected to be reasonably diligent in its inspection of a product prior to purchasing it, but is not required to have any professional inspection performed. If a defect has been disclosed to a buyer prior to its purchase of a product, the seller bears the burden of proof with respect to that disclosure. In addition, where a buyer is made aware of defects prior to the sale or is provided with adequate instructions and warnings with respect to the use and maintenance of a product, it will be more difficult for the buyer to demonstrate latent defects relating to same.

Finally, the defect must have existed at the time of the sale (even if it was not yet manifest). Subject to the legal presumptions described in more detail below, the buyer would normally bear the burden of proving that the defect existed at the time of the sale.

Legal Warranty as to Quality

All buyers of a product are beneficiaries of the warranty of quality. The warranty of quality does not benefit only the first buyer of a product, but is transferred automatically to subsequent purchasers, along with ownership of the product, as an accessory. As such, any subsequent buyer can invoke it directly against the first seller or any member of the supply chain.

Legal Presumptions

A professional seller (i.e., a person or entity that usually sells products in the ordinary course of its business operations) is legally presumed to have knowledge of any defect affecting its products. The professional seller can rebut this presumption; however, the courts apply a stringent test, making it difficult to refute the legal presumption in practice.

In order to successfully rebut the legal presumption of knowledge of a latent defect, a professional seller must demonstrate that:

- (a) it did not know about the defect, but also that it was *justified* in not knowing about it (i.e., that the defect could not have been discovered even if every reasonable precaution were taken). This is commonly referred to as the “state of the art” defence, and relies on the principle that the buyer assumes the risk of technological advancement following its purchase of a given product; or
- (b) the defect resulted from a fault by the buyer; or
- (c) the defect resulted from a fault by a third party; or
- (d) the defect resulted from a *force majeure* event; or
- (e) the alleged defect does not constitute a latent defect giving rise to liability. For example, by arguing (i) the absence of any defect with respect to the product; (ii) that the defect does not affect the foreseeable use of the product; or (iii) that the defect was known to the buyer.

Manufacturers tend to be subject to the strongest presumption of knowledge as they are considered to be experts with respect to the design, labour and materials used in the production of their products. As a result, the range of defences available to manufacturers remains very narrow.

There is another legal presumption that applies where a product is sold by a professional seller: a defect is presumed to have existed at the time of the sale if the product malfunctions or deteriorates prematurely as compared to other similar products. As a result of this presumption, the buyer must prove a product’s objective malfunctioning or deterioration as compared to other similar products, instead of the existence of the defect at the time of the sale; once the malfunction is proven, a defect is presumed to have existed at the time of the sale by a professional seller. The presumption can be rebutted if the professional seller proves that the deterioration or malfunction of the product is in fact due to improper use of the product by the buyer. In addition, if the buyer is a “professional buyer” (i.e., it usually purchases similar products in the ordinary course of its business

operations), it will generally be easier for the professional seller to rebut the presumption because the defects would typically be more apparent or easier to detect for such a buyer, either prior to or at the time of the sale, and professional buyers may be expected to show a higher degree of vigilance in inspecting the products they purchase, as compared to unsophisticated buyers.

Contractual Limitations of Liability

It is not uncommon and it is generally acceptable to limit or transfer liability as between parties to a given contractual arrangement, subject to a third party buyer’s rights as they relate to members of the supply chain.

However, it would not be possible for any seller (whether or not a professional seller) to contractually or otherwise limit its liability for any damages suffered as a result of (i) its personal fault, (ii) its intentional or gross fault, or (iii) bodily or moral injury caused by its fault or negligence.

In addition, a seller’s limitation of liability or of its warranty obligations would not apply to third parties outside the contractual framework.

Finally, a seller cannot contractually or otherwise exclude or limit its liability where it knows of a product defect or is legally presumed to know of a product defect (i.e., in the case of a professional seller), and the defect is not disclosed to the buyer. Therefore, any applicable limitations of liability will not be enforceable in such circumstances.

CONSUMER CONTRACTS

Consumers benefit not only from the contractual liability regime discussed above, but also from the more extensive protections provided in the *Consumer Protection Act* (Quebec).

The *Consumer Protection Act* is applicable to every contract for goods or services entered into between a consumer and a merchant in the course of its business, and creates important warranty obligations that extend to manufacturers, distributors, importers and resellers as concerns product liability.

The *Consumer Protection Act* is considered to be a statute of public order; therefore, **a consumer cannot waive any of its rights** thereunder and **the merchant or manufacturer may not exclude its liability in any way** for the warranty obligations thereunder.

The following specific warranties constitute the minimal protection granted to consumers:

- (a) Warranty of ownership: a merchant must provide a consumer with a clear and encumbered title.

- (b) Warranty of fitness for purpose: products must be fit for the purposes for which goods of that kind are ordinarily used, based on the typical or foreseeable use of the product (and not the specific use intended by a given consumer). It is not necessary that the defect diminish all usefulness of the product.
- (c) Warranty of durability: a product must be durable in normal use for a reasonable length of time, having regard to its price, the terms of the contract and the conditions of its use. A merchant or manufacturer will therefore be held liable if a defect only appears after the sale, and does not result from improper use by the consumer.
- (d) Warranty as to post-sale service and parts: where a product is of a nature that requires maintenance or replacement parts, they must be provided, unless the consumer is advised in writing (before the contract is entered into) that such services or parts will not be provided.
- (e) Warranty of conformity to contract: goods must conform to the description in the contract, whether by their nature, quality and quantity, and instructions for use of a product must be provided.
- (f) Warranty against latent defects and of sufficient instructions or warnings: these warranty obligations of the seller extend to manufacturers and grant a direct recourse against manufacturers not only to the initial purchaser of a product, but also to the subsequent purchaser that has no contractual relationship with the manufacturer. In the consumer context, a merchant or manufacturer cannot rely on its ignorance as a defence to avoid liability.

All such warranty obligations bind merchants, which include sellers and lessors under contracts of sale or lease with consumers. The obligations resulting from the warranties described in the foregoing paragraphs b) warranty of fitness for purpose, c) warranty of durability, d) warranty as to post-sale service and parts and f) warranty against latent defects and of sufficient instructions or warnings **also bind manufacturers**.

The initial purchaser under a consumer contract can take action based on a breach of any of the above-mentioned statutory warranties. **Subsequent purchasers** of a product are also beneficiaries and can take action based on a breach of the warranties described in the foregoing paragraphs b) warranty of fitness for purpose, c) warranty of durability and f) warranty against latent defects and of sufficient instructions or warnings.

The content of this publication is intended to provide general commentary only and should not be relied upon as legal advice.

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