IN FACT AND IN LAW

Damage Insurance

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The liability of manufacturers and specialized sellers: the Court of Appeal tightens the screw

By Jean-Pierre Casavant

The Court of Appeal rendered an important decision on October 31, 2006, which dealt with the liability of manufacturers and professional sellers, as well as several other related issues, in the case of *The Boiler Inspection and Insurance Company of Canada* and *Prima Viande Ltd* v. *Manac inc./Nortex* (manufacturer of the Arcoplast product) and *Systèmes intérieurs Atlas inc.* (professional seller and distributor of the Arcoplast product) and *Michel Côté, André Duclos* et *Denis Baril* (architects).[1]

More specifically, the Court of Appeal tightened the screw on the issue of manufacturers' presumed knowledge of defects, deciding that such presumption is "virtually unchallengeable". In addition, the Court seemed to limit the possibility of overturning the presumption to four cases only. We will return to this issue below.

The Court of Appeal further decided that the liability between the manufacturer and the professional seller is joint and several. We will also return to this issue below.

The judgment of the Court of Appeal was rendered by Judges Marc Beauregard, Marie-France Bich and Paul Vézina. Ms. Justice Bich wrote the main reasons for judgment (62 pages).

The basic elements of the judgment may be summarized as follows:

- In May 1990, a fire destroyed a calf slaughterhouse located in Saint-Louis-de-France. The slaughterhouse was a new concrete and steel structure. The whole interior, both the walls and the ceilings, was covered with "Arcoplast" panels manufactured by Manac Inc./Nortex.
- The Boiler Inspection and Insurance Company indemnified the owner of the slaughterhouse and instituted a lawsuit against the manufacturer of the "Arcoplast" panels, Manac inc./Nortex, and its distributor, Systèmes intérieurs Atlas inc., alleging that the product in question was defective in that it caused the fire to spread abnormally which resulted in the complete destruction of the plant.
- The Court of Appeal upheld the judgment of the trial court and solidarily condemned Manac inc./Nortex, as the manufacturer of the product, and Systèmes intérieurs Atlas inc., as the distributor of the product, to pay $8.5 million with interest and the additional indemnity, as well as the costs and experts' fees determined to be $1.7 million.
- The Court of Appeal allocated the liability equally between the manufacturer Manac inc./Nortex and the distributor, Systèmes intérieurs Atlas inc.
- The claim against the architects Côté, Duclos and Baril, was dismissed.[2] It should be noted that the architects had been found liable only to the extent of 10% by the trial judge. However, the Court of Appeal concluded that the trial judge had erred in his analysis of the evidence as, in fact, according to the Court of Appeal, the architects had never authorized or accepted the "Arcoplast" product.
- The manufacturer and the distributor of the "Arcoplast" product attempted to convince the Court that the rapid spreading of the fire had been caused, at least in part, by fault on the part of the Saint-Louis-de-France fire fighters. The Superior Court had completely exonerated the fire fighters from any fault, which was moreover confirmed by the Court of Appeal.

1 2006 QCCA 1395, JE 2006-2212.

2 2006 QQC 1398, JE 2006-2215.

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The manufacturer's knowledge of defects: a "virtually unchallengeable " presumption

Judge Bich made a clear analysis of the rules governing the liability of manufacturers for latent defects. In the specific circumstances of the case, the rules of the former Civil Code applied, namely articles 1522 to 1531 C.C.L.C. However, it should be noted at the outset that her analysis also applies to the corresponding articles, namely 1726 and following, of the new *Civil Code of Québec*.

First, Judge Bich cited at length the judgment of the Supreme Court of Canada in *General Motors* v. *Kravitz*[3], in which the particularly thorough analysis turned out to place a very heavy burden on the manufacturer of the defective product (General Motors) and the specialized seller (the dealer).

Our courts have generally always been quite severe with manufacturers and they virtually never succeed in being exonerated from liability. Indeed, it has time and time again been held that a manufacturer cannot invoke ignorance and tell the Court "I did not know" – it is the very duty of the manufacturer to know.

On this specific issue, the Court of Appeal tightened the screw on manufacturers' liability and reaffirmed that it is a "**virtually unchallengeable**" presumption, which can only be overturned in a very limited number of cases, such as:

- the buyer was or should have been aware of the defect (therefore, the defect was no longer latent);
- unirresistible force;
- the damage was caused by fault on the part of the purchaser or a third party; or
- scientific knowledge at the relevant time did not enable the manufacturer to detect such a defect.

In our view, the following paragraph of Judge Bich's reasons for judgment is very significant:

[Translation]

> "[138] In the same way, it would seem that the majority of the case law and legal doctrine tends to recognize that the presumption set out in the second paragraph of Article 1527 C.C.L.C. is refutable in principle, though, as one author put it, it is "virtually unchallengeable". The legal doctrine notes that manufacturers only rarely succeed in overturning this presumption, which imposes a heavy burden on them. Manufacturers may overturn it in a limited number of cases where, for instance (and except for cases where the purchaser himself was or should have been aware of the defect), the manufacturer proves force majeure or causal fault of the purchaser or a third party. The case law and legal doctrine seem also to recognize (not without some controversy) that manufacturers are, however, not legally required to be aware of defects which scientific knowledge at the time does not allow them to detect."

It should be noted that in the case being discussed it had been clearly proved that the manufacturer was unaware of the characteristics of Arcoplast, that is, its high flammability. But, precisely, says the Court of Appeal, the manufacturer should have been aware of these characteristics and it is no defence to plead ignorance. The presumption thus works against the manufacturer, who is presumed to have known of the existence of the defects in his product, even if, in fact, he was unaware of them.

The presumption that a professionnal seller is aware of latent defects

Judge Bich also performed a very detailed analysis of the rules that apply to professional sellers and concluded that they are governed by the same rules that apply to the manufacturer (*Systèmes intérieurs Atlas inc.*), which is entirely consistent with the existing law. Like the manufac-turer, the professional seller is presumed to have been aware of the defects in the product sold.

However, in the case of the professional seller, everybody agrees that the presumption is in principle refutable to the extent that he proves that it was impossible for him, despite meticulous care, to suspect or discover the defect by taking all reasonable means; this rule originates from the *Samson and Filion* v. *Davie Ship Building* case.[4]

In the case of the defendant Systèmes intérieurs Atlas inc., the Court concluded that it had not rebutted the presumption since it knew that the Arcoplast product had not been perfected, that it was still at the experimental stage and that, for all intents and purposes, it was not yet a product ready for the market[5].

3 [1979] 1 S.C.R. 790.

4 [1925] S.C.R. 202.

5 Paragraphs 171 and 172 of Judge Bich's reasons for judgment.

As in the case of the manufacturer, it was clearly proved that the distributor of the Arcoplast, Systèmes intérieurs Atlas inc., did not know the characteristics of the product. And like it did in the case of the manufacturer, the Court of Appeal ruled that the distributor should have known them and that it was not a valid defence to allege that it did not suspect their existence. The presumption thus operates also against the distributor even if, in fact, it was not aware of the defects in the product.

Solidary – As opposed to *in solidum* - Liability

The Court of Appeal also decided that the liability of manufacturers and professional sellers (distributors) is solidary and not *in solidum*.

This distinction may have important practical effects, because a lawsuit instituted against one of solidary co-debtors, for instance, the distributor or the retailer, interrupts prescription against all the other intermediaries, whether wholesalers, importers or manufacturers. Since it is a solidary obligation, the victim may always amend his pleadings to add new co-defendants, even after the prescription period has expired.

In the case being discussed, the Court of Appeal ruled that the liability between the manufacturer and the distributor was solidary, as had been previously decided by the Supreme Court of Canada in *General Motors* c. *Kravitz*[6] and in two other judgments of the Court of Appeal [7].

Other interesting elements of the judgment

- Among the issues that were raised, it was sought to establish whether the sole fact that Arcoplast ignites easily and contributes to a fire spreading made it a hazardous or defective product. Indeed, there is also the risk of a wood house igniting and the flames then propagating rapidly. Judge Bich, recognizing that many things are dangerous, starting with kitchen knives, nonetheless stated that in the present case we are faced with a [translation] "poor product design" and that the panelling had an [translation] "abnormal propensity to ignite" and that it then became [translation] "the agent or the vector of a violent spreading of the flames", which constituted a defect. It was a characteristic that rendered the product, in the words of Article 1522 C.C.L.C., which has become 1726 C.C.Q.,[8] "unfit for the use for which it was intended or which so diminish its usefulness that the buyer would not have bought it ".
- In addition to the capital amount of the judgment, which was $8.5 million, the Court of Appeal ordered the manufacturer and the distributor to pay $1.7 million in experts' fees. Although such an amount for experts' fees was already rather high, Boiler Inspection had requested that the Court increase the amount to $2.3 million, that is, the total amount it incurred in experts' fees for the proceedings in the trial court. After analyzing that request, Judge Vézina of the Court of Appeal came to the conclusion to allow it in part by increasing the initial amount of $1,695,533 to $1,974,077. However, he was in the minority on this issue as Judges Bich and Beauregard decided to maintain the amount allowed for experts' fees at $1.7 million.

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6 See note number 3.

7 *General Motors of Canada* v. *Colton*, JE 80-970 (C.A.); *General Motors of Canada* v. *Demers*, [1991] R.D.J. 551 (C.A.); see also *Gougeon* v. *Peugeot Canada*, [1973] C.A. 824.

8 Paragraphs 120 and 121 of Judge Bich's reasons for judgment.

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