IN FACT AND IN LAW

Product Liability

June 2008

The Chicken, the Egg, the Producer ...

the Quebec Court of Appeal Knows Which Came First!

By Bernard Larocque

One more lengthy battle in a legal saga has just come to an end. Indeed, on June 4, 2008, the Court, comprised of Quebec's Chief Justice, Michel Robert, and Justices Jacques Chamberland and Louis Rochette, rendered a unanimous judgment.[1]

To set the stage, consider a salmonella outbreak in Abitibi, some premature deaths, dozens of persons poisoned, three producing farms... Seventy-two (72) days of hearings in Superior Court and four (4) days in the Court of Appeal were required, a rarity in both venues. Even more unusual, this major case led to a legislative amendment allowing the judge designated to deal with it in Superior Court and appointed to the Court of Appeal during the trial to continue and complete it.[2]

This key decision, highlighting the fundamental principles of product liability, applies the recent Domtar judgment[3] rendered by the Supreme Court of Canada in November 2007 and innovatively rules that an agricultural producer must be likened more to a manufacturer than to a professional seller within the meaning of the *Civil Code* and is subject to the same obligations as a manufacturer.

Lastly, note that the Court entrenched the phrase [translation] "the very strong presumption of knowledge of the defect weighing on the manufacturer" by using it several times in its decision. Paraphrasing the Domtar decision, Quebec's highest court stated as follows:

> [Translation] **[85] This presumption of knowledge of the defect is however not irrebuttable.**[4] **The professional seller may rebut it by showing that a reasonable seller in the same circumstances would not have been able to detect the defect at the time of the sale of the property.**[5] **It is therefore possible "[...] to rebut the presumption if the seller shows that he had no knowledge of the defect and that his lack of knowledge was justified."**[6]

1 *Ferme avicole Héva inc. et al.* v. *Coop fédérée du Québec et al.*, June 4, 2008, 500-09-016565-061, Court of Appeal sitting at Montreal.

2 Article 464, *in fine*, C.C.P.

3 *ABB Inc.* v. *Domtar Inc.*, [2007] 3 S.C.R. 461.

4 *Manac inc./Nortex* v. *Boiler Inspection and Insurance Company of Canada*, 2006 QCCA 1395, para 138: *ABB Inc.* v. *Domtar Inc.* supra note 4, para 66. Also see Denys-Claude Lamontagne and Bernard Larochelle, *Droit spécialisé des contrats*, Vol. 1, Cowansville, Éditions Yvon Blais, 2000, p. 121.

5 *ABB Inc.* v. *Domtar Inc.*, supra note 4, para 68.

6 Jacques Deslauriers, *Vente, louage, contrat d'entreprise ou de services*, Montreal, Wilson & Lafleur, 2005, p. 187.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS

[86] The presumption of knowledge of the defect also applies to the manufacturer, but is even more onerous. Indeed, the manufacturer is the ultimate expert with respect to the property because it has control over the labour and materials used to produce it. The buyer is entitled to expect that the manufacturer will guarantee the quality of its products. The manufacturer is subject to the strongest presumption of knowledge and to the most exacting obligation to disclose latent defects; "it is never open to the manufacturer to rely on its ignorance of the defect in question as its sole defence: [...]. The manufacturer may rebut the presumption only by showing that it did not know about the defect and *that its lack of knowledge was justified,* [...]."[7] **Professor Jobin, supported by case law, writes that [translation] "[...] in principle, the manufacturer or builder cannot rebut the presumption of knowledge because its ignorance of the defect constitutes a fault in and of itself."**[8]

The appeals filed by the farms, the plaintiffs at trial, were essentially dismissed, except that the sharing of the liability was changed based on the Court of Appeal's views on the contributory fault committed by one of the farms and the fault committed by Coopérative fédérée du Québec ("Coop"), the defendant at trial.

Of the more than $2,000,000 claimed by the farms, they were awarded a total of only $127,000. Moreover, the conclusion reached by the trial judge ordering the farms to reimburse Coop more than $70,000 in lawyers' fees for abuse of process was maintained.

1. The facts

To fully understand the facts, a brief look at the Quebec egg market production and distribution system is in order.

The three appellant farms, Ferme Kiamika ("Kiamika"), Ferme Héva ("Héva") and Ferme Paul Richard ("Richard"), are separate legal persons but, for decades, have been managed and controlled by the same family, the Richards. Some of the children are shareholders of one or the other of the farms with a different share ownership percentage depending on the company. The farms are interdependent.

Kiamika, located near Mont-Laurier in Kiamika, has two main business activities. On the one hand, it raises the chicks that it purchases from the Coop and that are delivered to it when they are a day old. After 19 weeks, these chicks are sexually mature and become laying hens whose eggs are intended for human consumption. It delivers a portion (half) of the mature laying hens to Héva located in Abitibi and keeps the rest for egg production. All the eggs destined for consumption that Héva produces are delivered to Richard. The latter also raises chicks before marketing and selling its eggs as well as Héva's eggs. Kiamika markets its eggs on its own.

Coop owns a huge hatchery where it incubates eggs that will become the one-day old chicks.

Coop procures its supply of hatching eggs from the Hutchison Farm ("Hutchison") for the most part.

In January 1996, Agriculture Canada informed Coop that some of its eggs were infected with salmonella enteretidis (S.E.) bacteria, a very rare type of salmonella that may prove dangerous to human health. Further to other tests and verifications, Health Canada and Coop representatives, including the veterinarian in charge of the file, concluded that appropriate measures had been taken.

7 *ABB Inc.* v. *Domtar Inc.*, supra note 4, para 69. Also see *Samson & Filion* v. *Davie Shipbuilding & Repairing Co.* [1925] S.C.R. 202, p. 210.

8 Pierre-Gabriel Jobin, *La Vente,* 3rd ed., Éditions Yvon Blais, 2007, p. 214 and following.

In November 1995, Coop sold more than 20,000 chicks derived from Hutchison eggs to Kiamika. Of the lot, 1,800 chicks died at Kiamika in the first week of brooding which, according to the evidence adduced, constituted an abnormal and worrisome mortality rate. Kiamika never gave notice of this situation to its seller, Coop.

In April 1996, Kiamika advised its seller, Coop, about a high mortality rate in its flock of laying hens. Héva did not, however, note the same findings in its flock, which, as already mentioned, came from the same chick brooding operation.

From that moment on, thanks to one of its services, which it refers to as the "after-sale service", Coop's veterinarian conducted some tests.

A few days later, Coop conveyed the results, which showed the presence of type D S.E., which is highly indicative of contamination by salmonella enteretidis bacteria, a danger to human health. A portion of the eggs from these chicks was earmarked for consumption.

Coop's veterinarian informed Kiamika's representatives about the risks of this salmonella to consumer health.

On May 10, 1996, Kiamika's representative was informed that salmonella was really involved and that it constituted a danger to human health. Subsequently, Agriculture Canada representatives stepped in and conducted additional tests.

Kiamika and Richard only stopped marketing the eggs coming from the contaminated flocks around May 20, 1996.

Several cases of poisoning occurred, in particular, at the Rouyn-Noranda Hospital where Richard had delivered eggs that came from one of the contaminated flocks. The Ministère de l'Agriculture, des Pêcheries et de l'Alimentation du Québec even noted two "premature deaths". Effective May 31st, Kiamika as well as the Coop hatchery were placed in quarantine and, the next day, so were the Héva and Richard farms

At the beginning of June 1996, Agriculture Canada ordered the destruction of the Kiamika, Héva and Richard flocks. By means of a motion for an injunction, the farms contested the destruction orders but the Court denied their application and upheld the orders to destroy the flocks, which was done in July 1996.

Lastly, Agriculture Canada paid the farms in excess of $900,000 as compensation for the market value of the property destroyed because of the contamination.

2. The recourses

The farms claimed the portion of their losses for which they had not been compensated and which they estimated at more than $2,000,000, made up of the cost of reorganizing their production as well as the impact on the marketing of their eggs caused by the premature loss of the flocks.

Richard sued Boréal Assurances Agricoles, the liability insurer of Héva (its seller), as well as Coop, extracontractually[9], pursuant to Article 2501 C.C.Q.

Héva sued Boréal Assurance Responsabilité, the liability insurer of Kiamika (its seller), as well as Coop.

As for Kiamika, it sued its seller, Coop.

Coop, in turn, called the Attorney General of Canada into the lawsuit, in warranty, alleging that if the farms' contentions were true and that if Coop had a duty to inform the farms the moment it learned that some of its chicks had tested positive for S.E. in January 1996, then only the Attorney General, who had more comprehensive knowledge and had conducted tests, should be held liable for the damages suffered by the farms.

[9] Remember that, in fact, Richard did not buy anything from Coop.

Coop also called into the lawsuit, in warranty, Hutchison, which had sold the contaminated hatching eggs to it.

The farms also claimed punitive damages in excess of one million dollars from Coop.

Lastly, Coop, which had to retain its own lawyers because a significant portion of the damages claimed, that is, the punitive damages, were not covered by its liability insurance policy, counter-claimed against the farms for abuse of process.

3. The Superior Court judgment

Judge Paul Vézina (appointed to the Court of Appeal during the trial) considered Coop equivalent to a manufacturer and ordered it to pay a portion ($98,000) of the damages claimed by the farms. He thus applied the presumptions of knowledge of the defect (1728 C.C.Q.) and of the existence of the defect at the time of the sale (1729 C.C.Q.).

However, he found that the farms also committed contributory faults that caused a portion of the damages claimed, in that:

- Kiamika failed to notify Coop's veterinarian about the abnormal mortality rate of its chicks in November 1995;
- Kiamika and Héva were negligent by continuing their production after having learned about the likely presence of S.E. and, therefore, the damages suffered after they learned this constituted a worsening of the situation that the farms had to assume on their own.

In summary, the trial judge held Coop liable for 37.5% of the damages suffered by Kiamika and 25% of the damages suffered by Héva.

However, he refused to hold Coop liable for the damages suffered by Richard since, in his opinion, hens and eggs are two different goods and the egg is not the "accessory" of the hen. Consequently, the warranty of quality does not apply. Thus, only Kiamika and Héva, which purchased chicks that became hens (*i.e.*, the same goods), could successfully base their recourse against Coop on the warranty of quality.

He dismissed the farms' contentions to the effect that Coop breached its duty to inform by saying nothing about the test results concerning the S.E. detected in January 1996.

The farms' claims for punitive damages were dismissed.

Furthermore, Judge Vézina found that the claims for punitive damages, while not initially abusive, became so during the trial: he ordered the farms to reimburse a portion of Coop's legal fees ($70,000).

He dismissed the recourse in warranty that Coop brought against Agriculture Canada.

Lastly, Hutchison was also found liable, always based on the presumption of the manufacturer's liability, given the similar role played by the agricultural producer.

Finding that Héva's total damages were $46,680 and Kiamika's were $230,328, he thus ordered Coop to pay $11,670 for its fault committed vis-à-vis Héva and $86,373 for its fault committed vis-à-vis Kiamika.

As summarized in paragraph 55 of the Court of Appeal's decision, the trial judge:

- did not find Agriculture Canada liable;
- ordered Coop to pay Héva $11,670, *i.e.*, 25% of the damages it suffered;
- ordered Coop to pay Kiamika $86,373, *i.e.*, 37.5 % of the damages it suffered;
- dismissed Richard's claim against Coop;
- ordered Hutchison, held liable in warranty, to reimburse Coop for the damages it had to pay to both Héva and Kiamika;
- allowed Coop's counter-claim for its legal fees more than $70,000

Lastly, note that on the day preceding the oral arguments Richard and Héva discontinued their recourses against Boréal. The trial judge refused to annul these discontinuances at the request of Coop but instead ruled that, because the fault committed by the farms and the fault committed by Coop were *in solidum*, the portion of the liability of the "twin" farms for which they were suing their liability insurer should be apportioned to them. In fact, in adjudicating on the action with one of the defendants *in solidum*, Coop could not be held liable for this portion of the liability, which the plaintiff farms should bear as a result of the discontinuances.

4. The Court of Appeal judgment

(a) The discontinuances and their consequences

The Court upheld the Superior Court's decision regarding this issue.

Basing himself, among other considerations, on article 1531 of the *Civil Code of Québec*, the trial judge was correct in concluding that in the event of Coop being held liable, and now alone facing the claims, it was discharged toward each of the plaintiff farms up to the limit of the amount for which Boréal would have been held liable (due to the fault of one of its insured persons, the other farms) as a solidary defendant.

[Translation] **"[66] Admittedly, the insured and its liability insurer are bound by a perfect solidary link**[10]**, but that is not the issue here. Rather, the trial judge was dealing with the solidarity between the two defendants in the event both were liable for the damages suffered by the plaintiff farms, one because of an extracontractual fault (Coop) and the other because of a contractual fault (Boréal). The judge concluded that there would then be imperfect solidarity with, as consequences, given the discontinuance filed and the prescription of the recourse against the farms or their insurer, on the one hand, that Coop could no longer petition the court to establish the portion of the damages for which each of the defendants was responsible and, on the other hand, that Coop could no longer exercise any recourse against the Kiamika farm or its liability insurer, after having paid the amount of the judgment. There is no error in this reasoning."**

(b) Coop's warranty of quality

The Court upheld the Superior Court's judgment according to which Coop was liable toward Héva and Kiamika for the warranty of quality. The trial judge based himself on the presumption of the existence of a defect at the time of sale (1729 C.C.Q.) and on the presumption of the seller's knowledge of the defect (1728 C.C.Q.). He dismissed Coop's following arguments:

- the presence of salmonella in the flock of birds constituted a risk inherent in poultry production, which the producers had accepted when buying day-old chicks;
- Kiamika should have conducted screening tests as soon as it received the day-old chicks to avoid any risk of contamination.

In fact, according to the Court, the knowledge available at the time did not confirm that buyers of chicks, even farmers, knowingly accepted the risks of contamination.

In addition, imposing the burden on Kiamika to conduct screening tests did not correspond to preventive standards recognized at the time.

[10] *CGU* v. *Wawanesa, compagnie mutuelle d'assurances,* 2005 QCCA 320, paras 19-22; *Axa Assurances inc.* v. *Immeubles Saratoga inc.*, 2007 QCCA 1807, para 31.

(c) The presumption of knowledge of the defect

The Court broke new ground by upholding the Superior Court's judgment. For the first time, the Court of Appeal ruled that an agricultural producer must be likened more to a manufacturer than to a seller and, therefore, is subject to the applicable presumptions. Coop contended that it did not manufacture anything but rather it was nature that manufactured the eggs.

> [Translation] **"[90] Admittedly, the agricultural producer does not fit within the definition of a manufacturer in the sense that one does not 'manufacture' an egg, a chick or a laying hen but the analogy between the role of one and the role of the other, for the purposes of the presumption of the knowledge of a defect, does not necessarily seem to be ill-founded. In fact, Coop and the farms in question are real industrial concerns. As the trial judge noted, food, the care given to the poultry - from the hatching egg to the laying hen - as well as the environment in which they are raised - are carefully selected and controlled. The decisions made by the producers in this respect have a direct impact on the quality of the product. Human intervention is omnipresent here whereas there is considerably less of it in hunting or fishing for instance. Agricultural producers play a leading role in matters of food safety and, therefore, more generally, in matters of public safety. Therefore, they must assume a level of accountability that corresponds to the potential degree of danger presented by their products.**
>
> **(...)**
>
> [93] **Therefore, failing some legislative intervention similar to what takes place in France, one might think that the modern agricultural producer constitutes an intermediary category, a *sui generis* category, that places it somewhere between the manufacturer and the professional seller, but closer to the former than the latter, to the point that, for the purposes of the presumption of knowledge of a defect, it is fitting to liken it to a manufacturer, subject to taking into account the 'living' and sometimes unforeseeable nature of the raw material at the core of its production."**
> (Emphasis added)

(d) The warranty of quality and Hutchison

The same conclusion was also applied to Hutchison.

(e) The contributory faults committed by the farms

The Court found that the trial judge did not err in ruling that the farms committed a contributory fault.

However, the Court intervened on the issue of the sharing of liability insofar as Kiamika was concerned. Thus, Kiamika's fault in failing to react and notify a veterinarian in November 1995 upon noting an abnormal mortality rate did not carry the same degree of seriousness as Coop's fault. In fact, the latter was at the origin of the contamination in that it sold contaminated chicks. Therefore, Coop had to assume two-thirds of the fault (instead of 37.5%) and Kiamika just one-third.

(f) The other faults committed by Kiamika and Héva

The Court upheld the judgment of the trial judge, finding no grounds to intervene.

(g) The recourse by the Richard farm

Since the eggs purchased by Richard were laid well after Coop had sold the chicks to Kiamika, the Court noted, as the trial judge did, that the recourse by Richard could not be based on the warranty of quality.

Moreover, its extracontractual recourse had to be dismissed because, in the absence of presumptions, Coop could not be held liable if it did not commit any fault.

(h) Coop's duty to inform

The Court upheld the trial judge's conclusion that Coop had not failed in its duty to inform by saying nothing about the fact that certain tests conducted on eggs in its hatchery in January 1996 had proven positive.

(i) Damages

The Court did not intervene in the trial judge's conclusions regarding damages.

(j) Punitive damages

Of course, the judgment of the trial judge was upheld. The Court found that Coop did not fail in its duty to inform and did not cause any intentional damage to the farms.

(k) Order to pay extrajudicial fees

The Court upheld the trial judge's order in these words:

[Translation] **"[182] However, he pointed out that the situation was different at the start of the hearing in 2004. At that time, the efforts at mediation had failed. The conditions for awarding punitive damages have been clarified by case law and doctrine. Coop formally called upon the three poultry farms to withdraw their claim. The judge himself had discussed with the lawyers 'the onerous standard of "illicit and intentional injury" to be met, the insufficiency of the allegations in the written pleadings of the farms and the implausibility of their claims in relation to the entire situation as it was known at that time' (para 297).**

[183] For all these reasons, the trial judge found that the farms demonstrated unseemly recklessness beginning mid-way through the trial. He explained (in para 299):

> "A reasonable and somewhat objective litigant could then see that the crisis faced by the Farms could neither be qualified as an intentional injury nor as tantamount to an "I couldn't care less" attitude on the part of Coop. The evidence regarding the alleged vicious intentions of Coop is drivel and the dismissal of the applications is inescapable. To oblige Coop to keep its lawyers in court, to force it to incur this useless expense, became irresponsible and constituted a fault. The extrajudicial fees are 'an immediate and direct result' thereof and must be reimbursed."

Moreover, Coop went as far as claiming that the appeal from the judgment ordering the farms to reimburse it for its extrajudicial fees was also abusive. The Court dismissed this argument, ruling that nothing implied that the farms had acted in bad faith in filing the appeal.

Conclusions

This judgment breaks new ground by clearly applying the same very strong presumptions to which manufacturers are subject (articles 1726 *et seq.* C.C.Q.) to "sophisticated" agricultural producers.

In addition, we note that the determination to pursue a claim for punitive damages even after the court's comments leaving little room for doubt regarding the chances of having them awarded can result in an order to pay an opponent's legal costs, a rarity given past Court of Appeal decisions in this respect.

In the event one of the parties in question files an application for leave to appeal, it remains to be seen if the Supreme Court of Canada will agree to hear the argument - which came first, the chicken or the egg ...

Bernard Larocque
514 877-3043
blarocque@lavery.qc.ca

You can contact the following members of the Product Liability Group with any questions concerning this newsletter.

At our Montreal offices

Anne Bélanger

Marie-Claude Cantin

Paul Cartier

Louise Cérat

Louis Charette

Daniel Alain Dagenais

Jonathan Lacoste-Jobin

Bernard Larocque

Anne-Marie Lévesque

Jean-Philippe Lincourt

Robert W. Mason

J. Vincent O'Donnell, c.r., Ad. E.

Martin Pichette

Dina Raphaël

Jean Saint-Onge, Ad. E.

Ian Rose

At our Quebec City office

Pierre Cantin

At our Ottawa office

Brian Elkin

Montreal
Suite 4000
1 Place Ville Marie
Montreal Quebec
H3B 4M4

Telephone:
514 871-1522
Fax:
514 871-8977

Montreal
Suite 2400
600 De La
Gauchetière West
Montreal Quebec
H3B 4L8

Telephone:
514 871-1522
Fax:
514 871-8977

Quebec City
Suite 500
925 Grande Allée
Ouest
Quebec Quebec
G1S 1C1

Telephone:
418 688-5000
Fax:
418 688-3458

Laval
Suite 500
3080 boul.
Le Carrefour
Laval Quebec
H7T 2R5

Telephone:
514 978-8100
Fax:
514 978-8111

Ottawa
Suite 1810
360 Albert Street
Ottawa Ontario
K1R 7X7

Telephone:
613 594-4936
Fax:
613 594-8783

Subscription
You may subscribe cancel your subscription or modify your profile by visiting Publications on our website at www.laverydebilly.com or by contacting Carole Genest at 514 877-3071.

LAVERY, DE BILLY

BARRISTERS AND SOLICITORS