



*Johnson v. Monsanto: American
Success, Canadian Challenge*

Presentation

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Introduction

- ◆ August 2018 verdict of California jury found Monsanto liable to groundskeeper who said company's weed killer (Roundup –active ingredient glyphosate) caused his cancer
- ◆ Jury awarded Johnson \$289 million in damages (\$250 million of which was punitive damages), later reduced to \$78 million (\$39 million of which was punitive damages) by judge on appeal
- ◆ What lessons in *Johnson* for Canada?



Theory of Liability in *Johnson*: Strict Products Liability

- ◆ The legal theory of Monsanto's liability in *Johnson* was that of strict products liability
- ◆ Proof of fault or negligence by defendant not necessary
- ◆ Counsel for Johnson will describe this legal theory in greater detail, its components, how it was applied in the case, and the results



Challenges to Achieving Similar Result in Canada: Overview

- ◆ Products liability law in common law provinces of Canada remains fault-based
- ◆ Problems in bringing suit as a class action
- ◆ Use of juries in civil actions rare in Canada
- ◆ Damages awards are low in Canada
- ◆ Courts' cost principle of loser paying costs of winner discourages bringing civil suits



Products liability law in common law provinces is fault-based

- ◆ Like American product liability law, manufacturer's defect, design defect, and failure to warn are all aspects of Canadian product liability law
- ◆ Unlike state laws where the legal theory is based on strict products liability, product liability in the common law provinces of Canada is fault-based under negligence law principles



Products liability law...continued

“Our Courts do not, in product liability cases, impose upon manufacturers...as is done in some States of the American union, what is virtually strict liability...standard of care exacted of them under our law is the duty to use reasonable care in the circumstances and nothing more” *Philips v Ford* (Ontario Court of Appeal 1971)



Product liability law...continued

- ◆ Having to establish the reasonableness of defendant's conduct can defeat products liability claims in Canada – *Baker v. Suzuki Motor Co.* (Alberta Queens Bench – 1993)
- ◆ If reasonable care taken, liability will not be imposed even if the court finds that the product contained a defect that caused the injuries suffered by plaintiff



Class Action Limitations

- ◆ Product liability issues well suited to class proceedings because businesses mass produce products and a defect in design will usually impact more than one user
- ◆ Because product liability litigation requires experts, a class of plaintiffs can more readily afford costs of litigation that would otherwise be prohibitively expensive for individual plaintiffs

Class Action

Limitations...continued

- ◆ Notwithstanding this advantage, very few environmental class actions being certified by the courts in Ontario for cases involving chronic, or long-term, damage to human health from exposure to toxic substances
- ◆ Reason: class action legislation requires plaintiffs to demonstrate at certification stage (i.e. very early stage of case) that class action is preferable procedure for resolving common questions, such as damages, among class members





Rare Use of Juries in Canada

- ◆ Large jury awards in US courts in defective products cases such as *Johnson* difficult to duplicate in common law provinces of Canada
- ◆ Jury trials in civil cases rare in Canada
- ◆ Most civil trials decided by judges alone who do not make substantial awards of damages for reasons set out below



Low Damage Awards in Canada

- ◆ Supreme Court of Canada has long capped general damages awards (e.g. pain and suffering) at approximately \$100,000, save in exceptional circumstances, on theory once person provided for in terms of future care for injuries & disabilities, large additional amounts should not be awarded



Low Damage Awards...continued

- ◆ Impact of the different approach in Canada compared to US is dramatic
- ◆ 1990s cases in British Columbia and Nevada - difference in damage awards for similar injuries – British Columbia court awarded \$100,000 in general damages; Nevada court awarded \$4 million in general damages



Low Damage Awards...continued

- ◆ Overall, the discrepancy between US and Canadian court damage awards in products liability cases is due to different approach to punitive damages (i.e. where court awards damages to send message of disapproval regarding defendant conduct) – test in Canada is such damages will only be awarded for wanton, reckless, outrageous conduct – even then awards low in Canada



Costs Follow the Event

- ◆ General rule in common law provinces of Canada – unsuccessful party in lawsuit must pay successful party a portion of latter's legal costs (i.e. costs of lawyers, experts, expenses)
- ◆ Rule can have chilling effect on victims wanting to bring civil actions for damages against large corporations who will vigorously defend against such claims



What Can Be Done in Canada?

- ◆ Products liability law in Canada needs to be based on strict liability, not fault-based, principles
- ◆ Class action law must be amended to improve chances of certification for claims alleging damage from chronic, or long-term, harm
- ◆ General and punitive damages principles must be reformed to reflect true pain and suffering of victims and censure egregious defendant conduct
- ◆ Costs principles should be reformed so that loser not obliged to pay court costs of winner



What Can Be Done...continued

- ◆ Make federal /provincial legislation more preventive
- ◆ Enshrine more robust role for public at outset and throughout process
- ◆ Provide public with adequate resources
- ◆ Provide better access to information
- ◆ Recognize right to more environmentally sound and health protective results from laws registering pesticide availability and use in Canada
- ◆ Objective to prevent bad actor pesticides from reaching market in the first place