THE UNPREDICTABILITY OF CHILDREN AND SPORTING GOODS: PRODUCT LIABILITY AND THE CHILD PLAINTIFF

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Product liability claims by minor plaintiffs with respect to injuries sustained while using sports equipment are very prevalent. These claims can range from sports equipment malfunctioning to equipment failing to perform as expected.

This paper will first discuss to whom the manufacturer owes a duty of care, and what a plaintiff must establish to demonstrate that the defendant owed them a duty of care. The paper will then discuss to what standard of care the defendant will be held, and what evidence a plaintiff must lead to show that the defendant fell below the standard. This paper will discuss the difference between child and adult plaintiffs, and the standard of reasonableness the child plaintiff is held to. This paper will also discuss recent cases involving child plaintiffs and product liability and their trends and implications for manufacturers. Finally, the paper will detail available defences, as well as risk management strategies for manufacturers.

Liability of the Manufacturer: Duty of Care

Manufacturers of products owe a duty of care to the users of their products. This requires the manufacturer to manufacture reasonably safe products, and exercise due care to ensure that their products do not cause harm.[1] The duty owed extends to anyone who may foreseeably be injured by a product, within reason.[2] This duty is general in nature; it does not go as far as to consider whether a specific person would be injured in a specific manner; instead, the duty of care is concerned with whether a reasonable class of people, in this case, children, would be affected in the same way.[3] Thus, to proceed, the plaintiff must prove that they are owed a duty of care by the particular manufacturer in order to bring a successful products liability claim.

Further, manufacturers must ensure that their products are not defective. Product liability claims against manufacturers framed in negligence can be made by plaintiffs on one or more of the following three bases:[4] 1) defect in manufacture of the product (i.e., it was not manufactured in accordance with its design); 2) defect in design (i.e., it was manufactured as intended but the design creates an unreasonable risk of harm that could have been reduced through the use of a reasonable alternative design); and 3) failure to warn of all potential dangers associated with the use of the product.[5]

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[1] S.M. Waddams, *Products Liability*, (Toronto, Carswell: Thomson Reuters), 5th Edition at p 14 [hereinafter Waddams].
[2] *Ibid*.
[3] *Good-Wear Treaders Ltd v D & B Holdings Ltd,* [1978] 8 CCLT 87 (NSCA) [hereinafter *Good-Wear Treaders*].
[4] *More v Bauer Nike Hockey Inc,* [2010] BCSC 1935, aff'd 2011 BCCA 419. [hereinafter *More*].
[5] Sabrina Lucibello, "Product Liability Claims in Sports: The Decision in *More v Bauer Nike Hockey Inc*" McCague Borlack, March 28, 2012, online: http://mccagueborlack.com/emails/articles/product_liability_sports.html [hereinafter Lucibello].

Liability of the Manufacturer: Standard of Care

To determine whether a manufacturer of a product was negligent, they must meet a standard of care, as determined by the facts of the case.[6] Concerning sports equipment, the standard that must be met by the manufacturer (and supplier) is whether the equipment supplied, selected and fit was not defective; *not* that the equipment could be made safer.[7]

In typical product liability cases, the plaintiff rarely has enough evidence to prove that a defect existed when the product left the factory[8]. Instead, circumstantial evidence can be used to establish the existence of a defect at the material time.[9] In order for the plaintiff to be successful, they must show that they have used the product properly, and that the product simply failed in its normal use.[10]

Why the Child Differs from the Adult Plaintiff: The Reasonable Child Test

There are two resulting categories for the manufacturer of the product: whether the product was designed for an adult, or whether the product was designed for a child. When the product is designed for a child, the manufacturer must consider that the risks associated with use may be obvious to an adult, but may not be obvious to a child.[11]

The primary concern regarding the infant, or child plaintiff, is the relative capacity between that of a child, and of an adult. According to McGarry J in *Amin (Litigation guardian of) v Klironomos*,[12] a child and an adult have differing capacities with respect to their ability to appreciate risks.

In order to determine if a risk is reasonably obvious to a particular child, the court in *Amin* held that the principles employed for determining the applicable standard of care for children beyond tender years ought to be applied. According to *Good-Wear Treaders*, the test considers "what is reasonable for a child of like age, intelligence and experience."[13]

Previously Litigated Claims Involving Children and Products

There are a number of cases that involve children being injured by sports equipment and products, highlighting the trend that where liability is found, the courts are requiring manufacturers to have more diligent and inclusive warning labels. The court cases also show that a defendant can escape liability when the court finds that the product met all the applicable standards.

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[6] *Supra* 1 in Waddams at 44.
[7] *MacLeod v. Roe*, [1947] SCR 420, 3 DLR 241 at para 3 [hereinafter *MacLeod*]. See also Sabrina Lucibello, Dana Doige, Malak Nassereddine & Alyssa Caverson, "Product Liability Claims against Ski Hill Operators: Defective Equipment or Participant Error?" McCague Borlack, March 20, 2013, online: http://mccagueborlack.com/emails/articles/defective_equipment.html
[8] *Smith v Inglis Ltd.,* 25 NSR (2d) 38, 83 DLR (3d) 215, 36 APR 38 (NSCA).
[9] *Supra* 1 in Waddams at 65.
[10] *Grant v Australian Knitting Mills,* [1936] AC 86 (PC).
[11] *Supra* 3 in *Good-Wear Treaders.*
[12] *Amin (Litigation guardian of) v Klironomos*, [1996] OJ No 826 at para 19 [hereinafter "*Amin*"].
[13] *Ibid*.

In *Amin*, the 9 year old plaintiff was accidentally struck in his left eye by a dart that was fired from a toy known as the "Bandit Crossbow", resulting in the plaintiff losing his sight. One of the defendants, also a minor, modified the crossbow to shoot different projectiles further than originally intended. The defendant child was found to be 80% liable for the plaintiff's injuries as he had previously modified the crossbow. However, the defendant manufacturer was also found to be 20% liable as the design of the crossbow did not prevent the modifications from being made. The court also noted that the defendant's crossbow had insufficient warnings concerning the risks of misuse and modification.[14]

In *More v Bauer Nike Hockey Inc*, the plaintiff suffered a severe brain injury playing ice hockey, while wearing a helmet manufactured by the defendant. The plaintiff brought an action against Bauer, responsible for the design and manufacture of the hockey helmet, and the Canadian Standards Association ("CSA"), the organization responsible for setting minimum standards for impact resistance applicable to ice hockey helmets. The action was dismissed as the helmet met the applicable standards.[15]

In *Kowalchuk v. Middlesex (County) Board of Education*, the 12 year old plaintiff was injured while playing an improvised game on a high jump mat, despite being warned not to play on the mat. The court's decision turned on the lack of supervision of the child plaintiff, and found that the mat by itself was not dangerous.[16]

In *Walford et al v Jacuzzi Canada Ltd*, the plaintiff's mother warned the plaintiff not to use the backyard pool slide other than instructed. The plaintiff followed her mother's instructions the first time she used the slide, but not the second time, which resulted in her becoming a quadriplegic. The court held that the warning label on the slide was not sufficient, rendering the defendant manufacturer 80% liable for the plaintiff's injuries. The plaintiff herself was found to be 20% contributorily negligent.[17]

In *Resch v Canadian Tire Corp*., the plaintiff's family purchased a mountain bicycle from the defendant store for the use of the plaintiff's son, who made a small contribution to the purchase price of the bicycle. The boy was injured while riding the bicycle and his father brought a claim under the *Sale of Goods Act*.[18] The plaintiff was unsuccessful as the court held that the son was not a buyer under the *Act*. Therefore the *Act* was not applicable in this case.[19]

In *Stiles v Beckett*, the plaintiff was rendered paraplegic when the three-wheeled all-terrain vehicle (manufactured by the defendant) that he was driving did a forward flip and threw the plaintiff. The plaintiff pled defective design and that the manufacturer failed to warn users that the vehicle was unstable, unsafe and required special precautions in its operation. The

[14] *Supra* 12 in *Amin*.
[15] *Supra* 4 in *More*.
[16] *Kowalchuk v Middlesex (County) Board of Education*, 1991 CarswellOnt 3265, add'l reasons (1992), 3 WDCP (2d) 140 (OSCJ.); aff'd 1994 CarswellOnt 2692 (OCA) [hereinafter *Kowalchuk*].
[17] *Walford et al v Jacuzzi Canada Ltd* et al [2007] 87 OR (3d) 281 (OCA), [hereinafter *Walford*].
[18] *Sale of Goods Act*, RSO 1990, c S1 [hereinafter *Act*].
[19] *Resch v Canadian Tire Corp*., [2006] 17 BLR (4th) 301 [hereinafter *Resch*].

court dismissed the plaintiff's claim, as it found that the plaintiff knew that it would be unsafe to drive a three-wheel all-terrain vehicle over rough and unfamiliar territory.[20]

In *Burley v Kytec Innovative Sports Equipment, Inc.,* a high school athlete was injured while using a piece of sports equipment (the "Overspeed Trainer") that connects two runners by a cord. The South Dakota Supreme Court held that while the manufacturer had not tested the product prior to distribution, the plaintiff's coach had altered the equipment, resulting in a failure by the plaintiff to establish liability arising from the defective design.[21]

Finally, in *Sanchez v. Hillerich & Bradsby Co,* the plaintiff brought an action against the bat manufacturer and college sports association for severe brain injuries sustained resulting from being hit in the head with a baseball. The California Court of Appeal held that the issue of whether the design and use of a newly designed aluminum baseball bat caused the pitcher's severe brain injuries by increasing the speed at which the baseball left the bat compared to other metal and wood bats precluded summary judgment, and sent the action back to trial. The ultimate decision in *Sanchez* has not been reported to date.[22]

Defending the Claim of a Child Plaintiff: The Warning; The Design; and Apportionment of Liability.

Common defences include asserting that the warning was sufficient, that the standard of care was met, that contributory negligence negates any defect in the product which may be used in whole or in conjunction with other defences. Further, there are specific defences, such as: misuse of product, alteration of the product as well as defences pursuant to the *Sale of Goods Act* that also can be efficiently utilized to defend manufacturers.[23]

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The Warning

Courts often consider whether the warning on products created for or used by children clearly sets out the risks associated with the use of the product. The test for duty to warn is set out in *Lambert v Lastoplex Chemicals Co*. Namely, that manufacturers and suppliers are required to warn all those who may reasonably be affected by potentially dangerous products.[24]

This does not extend to obvious dangers; i.e. something the plaintiff reasonably ought to have been aware of prior to partaking in the particular use of the product. [25] A simple example is

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[20] *Stiles v Beckett* [1993] 22 CPC (3d) 145 (BCSC), aff'd 45 CPC (3d) 48 (BCCA), leave to appeal denied.
[21] *Burley v Kytec Innovative Sports Equipment, Inc., 2007 SD 82, WL 2206942 (SD 2007)* [hereinafter *Burley*]
[22] *Sanchez v Hillerich & Bradsby Co.,* 2002 WL 31839238 (Cal. App. 2 Dist., December 19, 2002) [hereinafter *Sanchez*].
[23] *Supra* 12 in *Amin* at para 17.
[24] *Lambert v Lastoplex Chemicals Co, [1972] SCR 569.*
[25] *Schulz v Leeside Developments Ltd* (1978) 90 DLR (3d) 98 (BCCA), leave to appeal refused in 90 DLR (3d) 98n. See also *Deshane v Deere & Co,* [1993] 15 OR (3d) 225 (OCA) [hereinafter *Schulz*].

that knives do not need to carry warnings that they are sharp and likely to cut someone. This principle equally applies to the use of products by children.

For example, in *Schulz v Leeside Developments Ltd*., an 18 year old boy who rented a motor boat from the defendant stood on top of the speeding boat, while holding a rope attached to the bow. When the boat lurched, the boy fell out of the boat, and was paralyzed after coming into contact with the propeller. The court held that commonly known, or obvious dangers do not have to be warned against. Thus, the plaintiff could not shift liability to the defendant sea craft rental company.[26]

In *Petersen v Surrey School District No 36*, the 16 year old plaintiff was playing an indoor sport known as rag ball. The plaintiff was not warned of the risk of being struck by the flying bat used in the game, and was later struck in the face by a bat with inadequate padding. The plaintiff suffered severe injuries to his face, teeth and nasal structures as a result of being hit with the bat.[27]

In *Petersen*, the court set out 4 principles concerning findings of liability in a sports liability context, where sports equipment is being used: (1) Suppliers are not required to warn against obvious dangers. (2) Teachers are often adult supervisors and are held to the standard of a prudent parent. (3) Supervisors will be found liable where the child uses the product in an obviously dangerous way. (4) If the child is unsupervised, the manufacturer will likely be liable unless there was an obvious danger.[28]

However, where the nature and extent of the danger of using a product is not obvious, and the product has the potential to be dangerous or misused, the consumer must be so informed. Specifically, the consumer must receive clear cautions from the manufacturer, which must not be misleading, or the manufacturer may be liable for negligent misrepresentation.[29] With regards to products likely to be used by, or designed for children, the standard differs from that of products used by adults only. In the recent case of *Walford v Jacuzzi Canada*,[30] the Ontario Court of Appeal discusses what is considered ‘common knowledge’ and what is not, in the case of pool slides for backyard pools.

In *Walford*, the infant plaintiff’s mother had installed a pool slide for their backyard pool, which the daughter proceeded to slide down, breaking her neck when she hit her chin on the bottom of the pool. The court held that consumers would consider a common use of the slide to be sliding down head first, on one’s belly. But, the court held they would not know that once the body hits the water, there is an uncontrollable flipping of the body, which forces the head down towards the floor of the pool. Further, it was held that the consumer would not know that this can and does cause paraplegia, quadriplegia, and other catastrophic injuries. The Court of Appeal thus held that but for the lack of warnings on the slide concerning the risk of catastrophic injury,

[26] *Ibid*.
[27] *Petersen v Surrey School District No 36,* [1992] 89 DLR (4th) 517, BCWLD 986 [hereinafter *Petersen*].
[28] *Ibid* at para 24.
[29] *Queen v Cognos,* [1993] SCJ 3, 1 SCR 87 at para 110.
[30] *Supra* 17 in *Walford*.

the plaintiff's mother would not have installed the slide, and her daughter would not have been rendered a quadriplegic.[31]

This decision highlights the trend in the jurisprudence to ensure that products used by children have proper warnings. Here, compliance is your strongest defence. The court clearly suggests that where there is a risk of catastrophic injury to a child in using a product, the warning given, including the warning label must err on the side of inclusive, rather than exclusive.

The court in *Walford* also suggests that rather than presuming that a consumer has sufficient knowledge to understand *why* instructions are given, the manufacturer is under a duty to explain the entirety of the risk of catastrophic injury.[32] This trend is exemplified in the case of *More*. In *More*, the defendant manufacturer was held to have clearly represented the risk of severe head and brain injuries, and further, that helmets do not protect against neck, spinal or rotational force brain injuries.[33]

The Design

When a product is designed for the use of a child, the court is especially concerned with whether the product is durable enough to withstand the uses and abuses a child could reasonably be seen to put the product to.[34] In *Amin*, it was held that a manufacturer has a duty, beyond designing and manufacturing products free from defect, that the product also must be safe for its intended use.[35]

However, the manufacturer is only liable for what is 'reasonably foreseeable' in the design of its products. This standard arises from the UK decision of *The Wagon Mound (No 1); Overseas Tankship (UK) Ltd. V Morts Dock & Engineering Co*.[36] In *The Wagon Mound (No 1),* Viscount Simmonds held that "a man must be considered to be responsible for the probable consequences of his act. To demand more of him is too harsh a rule, to demand less is to ignore that civilized order requires the observance of a minimum standard of behaviour."[37]

In *Amin*, this standard required the defendant manufacturer to be alive to the possibility that a child could hurt someone with the product, as it lacked safety restraints. The court held that it was reasonably foreseeable that children may abuse or modify the product. Therefore, a child's potential modifications ought to be addressed in the design stage of the product. To do otherwise would render the manufacturer liable in negligence.[38]

Another recent decision regarding negligent design is that of *More v Bauer*.[39] In *More*, "the court considered the liability of Bauer (a manufacturer of hockey helmets) after a 17 year

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[31] *Ibid* at paras 61-65.
[32] *Ibid*.
[33] *Supra* 6 in *More*.
[34] *Supra* 16 in *Kowalchuk.*
[35] *Supra* 12 in *Amin* at para 24.
[36] *The Wagon Mound (No 1); Overseas Tankship (UK) Ltd. V Morts Dock & Engineering Co*., [1961] AC 388 (PC) at p 422-423.
[37] *Ibid*.
[38] *Supra* 12 in *Amin* at para 25.
[39] *Supra* 4 in *More.*

old hockey player was injured during a game. After sustaining a check to the hip, More crashed into the boards, hitting his back and the back of his head." [40] As a result of the hit, More suffered from a subdural hematoma, resulting in bleeding of the brain and severe brain damage.[41]

Regarding the duty of care owed to More, the court held that "there is no issue that Bauer, as a manufacturer of consumer products, had a duty to take reasonable steps to ensure that its hockey helmets were safe for their intended use. Bauer must design products to minimize the risks arising from their intended use and to minimize the loss that may result from reasonably foreseeable mishaps involving the product." [42] Thus, while Bauer clearly owed More a duty of care, Bauer's allegedly negligent design of the helmet was dealt with as a standard of care issue.

If a plaintiff intends to challenge the reasonableness of the design, they must prove that the product designed was not reasonably safe in accordance with a two part test: (1) there was a substantial likelihood of harm; and (2) it was feasible to design the product in a safer manner.[43] Regarding the standard of care owed in *More*, the court held that the manufacturer does not need to use the safest design, as long as the design chosen appears reasonable in the circumstances.[44] In *More*, the defendants were successful in proving that there was no helmet that could protect against the injury suffered by More, as well as proving that the helmet met every stringent testing standard required by the CSA.[45]

The defendants also defeated any argument made by the plaintiff on causation. In order to prove causation, the plaintiff had to prove but for the negligent design by the defendant, the injury would not have occurred. As the helmet could not protect against the injury suffered, the helmet was not causally connected to the injury.[46]

The case of *More* clearly demonstrates that the standard of design required of manufacturers is not one of perfection, but one of reasonableness in the circumstances.

Apportionment of Liability: Co-Defendants

Despite the fact that younger children are held to a lower standard of care than adults, older children are not exempt from liability. For example, in *Amin*, the defendant teenager, Peter, made several dangerous modifications to a crossbow intended for children. Despite being able to shoot 1-2 feet when purchased from the manufacturer, Peter modified the crossbow by tightening the ends of the string, enabling it to shoot from 15 to 20 yards.[47] Peter also removed the safety darts' rubber tips and then affixed metal tips to the darts, although these were taken off prior to the occurrence of the plaintiff's injury. Peter was found to be 80% liable. The plaintiff was held to not have any contributory negligence. The reasons the manufacturer was found to

[40] *Ibid*. See also *supra* 7 in Lucibello.
[41] *Ibid.*
[42] *Supra* 4 in *More* at para 193.
[43] *Tabrizi v Whallon Machine Inc*., [1996] BCWLD 1747, 63 ACWS (3d) 755 at para 35.
[44] *Ibid* at para 202.
[45] *Ibid* at para 230.
[46] *Ibid* at para 224.
[47] *Supra* 12 in *Amin* at para 8.

be 20% liable were because they did not have a proper restraining device to deal with misfires, and as they did not do enough to prevent modification of the crossbow.

It is important to note that liability will be apportioned to the adult defendant or older children defendants where they are found to have breached the duty of care, or have fallen below the standard of care owed to the plaintiff.

Apportionment of Liability: Contributory Negligence

This trend of apportioning some amount of liability to the infant party (in proportion with their conduct), continues in Ontario. For example, in *Walford*, the Court of Appeal held that the plaintiff, Correena, listened to her mother's instructions the first time she went down the slide, properly entering the water feet first. However, the second time Correena slid down the slide, she positioned herself as she had at Canada's Wonderland on the larger slides, and crouched over on her knees. As a result, despite the negligence on the part of the manufacturer for not warning users of the slide adequately about potential risks, the court held that the infant plaintiff's contributory negligence was 20%.[48]

A court will be willing to find contributory negligence on the part of the minor plaintiff where their behaviour contributes to them being involved in an accident. However, older minor plaintiffs will likely attract a higher portion of contributory negligence than younger plaintiffs will.

Defending the Claim of a Child Plaintiff: Specific Defences

Misuse of Product

While the defence of misuse of a product is available whenever a plaintiff uses a product other than for its intended purpose, manufacturers are often still held liable if the use was "reasonably foreseeable, and not taken into account in the product's design."[49] This may require the manufacturer to go as far as undertaking product testing to determine the possibilities for misuse.[50]

For example, in *Walford*, the plaintiff child knew how to use the water slide, but then chose to use it in a way that was not recommended by the manufacturers. At trial, the court held that she was 100% responsible for the accident, and did not award her any damages.[51]

The Court of Appeal held that as the plaintiff was a child, she had a good basis for thinking: a) her sliding technique was safe, as she undertook the same actions at Canada's Wonderland on their larger water slides; and b) that she would not be catastrophically injured by sliding in such a manner. The Court of Appeal focused on the manufacturer's failure to

[48] *Supra* 17 in *Walford* at para 65.
[49] *Ibid* at 53-55.
[50] *Rae v T Eaton Co (Martimes) Ltd*, [1961] 28 DLR (2d) 522 (NSSC).
[51] *Supra* 17 in Walford at para 24.

adequately warn the users of their product of the extent of the injuries that may come with improper use of the product.[52]

It is important to consider the defence of misuse of product where the plaintiff uses the product for a purpose for other than what it was intended. It is also important to discover what the exact use of the product was put to when the injury occurred.

Alteration of Product

If a plaintiff alters a product from its original design, that action may suffice as a partial defence if the alteration itself caused or contributed to the injury. For example, when a child makes modifications to a toy, the manufacturer may still be held liable if there is original negligence.

In *Amin*, the co-defendant teenager made multiple, dangerous modifications to a crossbow that was designed for children. But, the manufacturer had not equipped the crossbow with a proper restraining device to prevent accidental discharge of the bow. This created an unreasonable risk of injury, as it allowed for the modifications to be made. Thus, the crossbow was held to be negligently designed by the manufacturer.[53] However, the manufacturer was only liable for 20% of the overall damages, as they successfully argued that their co-defendant had modified their product to such an extent that the level of danger could not be foreseen by them.[54]

It is important to obtain the product used in the action to have an expert examine it, in order to determine whether or not the plaintiff made any alterations or modifications to the product.

Risk Management

All sports have some inherent element of risk. However, prudent practice dictates that manufacturers need to focus on reducing unacceptable risks, while maintaining a balance between those that are considered to be acceptable and reasonable for the activity or use of the product.[55] However, product liability claims for malfunctioning or defective equipment will continue to be brought, as the level of play is elevated, and product users rely more and more on their protective equipment.[56]

According to Corbett et al, there are three general steps for risk management: risk identification, risk assessment, and risk treatment.[57] The goal is to identify, measure and control the risks associated with the use of a manufacturer's product by children.

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[52] *Ibid* at para 67.
[53] *Supra* 12 in *Amin* at paras 25-6.
[54] *Ibid* at para 27.
[55] Rachel Corbett, Hilary A Findlay, David W Lech, Legal Issues in Sport: Tools and Techniques for the Sport Manager (Toronto: Emond Montgomery Publications Ltd, 2008) at 229. ("Corbett et al").
[56] Cassandra McAboy, " Family of Tim Robinson, who suffered debilitating football injury, settles with helmet maker", October 08, 2011, online: http://blog.al.com/live/2011/10/family_of_tim_robinson_who_suf.html.
[57] *Supra* 58 in Corbett at para 232.

Risk identification typically arises at the design phase of production, whereas the manufacturer identifies flaws in the design of the product. However, it may also arise when a plaintiff commences a claim against the manufacturer, if the initial design flaw was not dealt with.

Risk assessment is a weighing of the costs and benefits of the situation. For example, the benefit of having a less expensive product should be weighed against the cost of expensive litigation, if the product's low cost could result in a higher amount of defects. However, if the plaintiff has already commenced litigation, risk assessment then becomes a weighing of whether to settle, or to push ahead to trial.

Finally, risk treatment is the decision to take steps to reduce or transfer the risk.

Reduce the Risk

The court provides guidance to manufacturers concerning what manufacturers can do to reduce and address risks inherent in the product. Namely, manufacturers ought to ensure that their products are properly labeled, clearly spelling out the risks inherent in using the product, the extent of potential injuries that may be sustained while using the product, and the limitations of the product.[58] Further, when creating products for children, the courts have clearly set out that the standard of reasonableness the manufacturer must consider is that of a reasonable child, not a reasonable adult.[59]As a result, the prudent manufacturer should consider whether children are unpredictable, and are likely to play roughly with products designed for them.[60] Therefore, these products must be able to withstand attempted modification, and have the appropriate safety devices.[61]

Transfer the Risk: The Adult Supervisor

When a manufacturer of sports equipment is facing a lawsuit, the ability to transfer liability to other parties always should be a consideration. Manufacturers of children's products should consider whether to cross claim against the adult supervisor.[62]

These cases tend to be aggressively litigated. The reason for this is that more often than not, the product that the child used in injuring him or herself was not defective; instead, it was the lack of proper instructions or supervision that caused the injury to occur while the child utilized a product.[63] The standard that will be attributed to the adult supervisor is that of a prudent parent, as discussed in one of the additional papers at the seminar.[64]

[58] *Supra* 4 in *More*.
[59] *Supra* 3 in *Good-Wear Treaders*.
[60] *Myers v Peel County Board of Education,* [1981] 123 DLR (3d) 1 (SCC) at para 13.
[61] *Supra* 12 in *Amin* at para 26.
[62] *Clost v Colautti Construction Ltd*, 52 OR (2d) 339, 5 CPC (2d) 11.
[63] *Hussack v Chilliwack,* School District No 33, 2011 BCCA 258.
[64] *Supra* 16 in *Kowalchuk* at para 19. See also other papers presented at this seminar.

Transfer the Risk: The Supplier

We often see efforts to shift liability to the distributor, supplier or retailer who actually sold the product to the plaintiff. According to the *Sale of Goods Act*, distributors may be strictly liable for supplying a defective product. In turn, distributors may pass on some or all of this liability to the next party in the chain above them, such as the wholesaler.[65]

However, according to section 15(1) of the *Sale of Goods Act*,[66]

> "where the buyer, expressly or by implication, makes it known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description that it is in the course of the seller's business to supply (whether he is the manufacturer or not), there is an implied condition that the goods will be reasonably fit for such purpose, but in the case of a contract for the sale of a specified article under its patent or other trade name there is no implied condition as to fitness for any particular purpose."

Thus, if it can be established that the distributor knew the particular purpose for which the goods were required, and distributed the goods to be sold in the normal course of its business, there will be a rebuttable inference that the buyer relied upon the distributor's skill and judgment to provide goods that would be reasonably fit for the communicated purpose.

However, if the buyer in question does not fall within the definition of buyer according to the Act, section 15(1) will not save the plaintiff's claim.[67] The court in *Resch* held that as the plaintiff's son had no evidence that he contributed to the purchase price of the bicycle, he could not fall under the definition of buyer; thus, the Act did not apply to his claim.[68]

Merchantable Quality

If it can be proven that the distributor deals in the goods sold, whether or not they are also the manufacturer of the goods, there is an implied condition that the goods will be of merchantable quality.[69]

As per the *Act*, distributors may be strictly liable for supplying a defective product. In turn, distributors may pass on some or all of this liability onto the next party in the chain above them, such as the wholesaler or another distributor. However, the amount of liability passed on will depend on the terms of any applicable contracts.

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[65] *Supra* 17 in *Walford* at paras 20-23.
[66] *Supra* 18 in *Act.*
[67] *Supra* 19 in *Resch* at para 23.
[68] *Ibid* at para 31.
[69] *Supra* 1 in Waddams, at Appendix p1-2. See also Jason Rabin and Alyssa Caverson, "Distributors' Liability in Canada for Defective Products", McCague Borlack, September 24, 2012, Online: http://mccagueborlack.com/emails/articles/distributors_liability.html, [hereinafter Distributors' Liability].

Liability pursuant to the *Act* will depend on the essence of the contract. In *ter Neuzen v. Korn*, the Supreme Court of Canada held that if the sale of the goods is only an incidental part of a contract for services, then the *Act* does not imply a warranty of fitness under section 15(1).[70] Therefore, if the distributor contracts for a service that requires the use of a product, the *Act* does not automatically imply a warranty of fitness for the product used. However, the main purpose of the statutorily implied warranty under the *Act* is to hold the manufacturer responsible to the recipients of their products (regardless of whether the manufacturer was negligent). Thus, depending on the circumstances, the court may still imply a common law warranty (for the fitness and merchantability of the goods and services used) into a contract for services.[71]

Conclusion

The defence of claims where minor plaintiffs allege injuries due to defective or malfunctioning sports equipment is a complex and rapidly evolving area of the law. The reason for the complexity is the inherent sympathy to minor plaintiffs and the risk that the damages awarded in claims of this nature can be substantial. In addition, there is the potential risk to the reputation of the sports equipment manufacturer. The defences employed to respond to these claims must consider the recent trends in the law. This creates a minefield for those defending these claims, and requires an advanced understanding of recent developments in the law. This knowledge can be used to employ defences that not only respond to the claim, but also navigate through the minefield of obstacles created by the complex nuances associated with these claims.

[70] *ter Neuzen v. Korn,* [1995] 3 SCR 674, 127 DLR (4th) 577, at para 80. [hereinafter *ter Neuzen*]
[71] *Ibid* at paras 86, 91, 97. See also *supra* 69 in Distributor's Liability.