The warranty of fitness for purpose in consumer law – Court of Appeal judgment

February 5, 2016

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Lavery is closely monitoring developments in consumer class actions and, in order to keep the business sector informed on the subject, publishes regular newsletters on recent case law and legislative changes that are likely to affect, if not transform, business practices.

INTRODUCTION

In ***Fortin*** v. ***Mazda Canada Inc.***[1], the Québec Court of Appeal reversed the judgment of first instance[2] and ordered Mazda to pay damages to the drivers of 2004, 2005, 2006 or 2007 Mazda 3 vehicles affected by a particular design flaw. The locking mechanism on the driver's side appeared to be defective, such that a strategically delivered impact above the door handle on the driver's side would be enough to neutralize the car's locking system.

The members in the class action were divided into two sub-classes. The first consisted of the owners of vehicles that had been attacked and who claimed the value of stolen items, the cost of damaged doors and their insurance deductibles, if any ("Group 1"). The second sub-class claimed compensation for the inconvenience of having to bring their cars to their dealerships for the installation at no charge of a reinforcement device for the car's door locking system ("Group 2"). In addition, both groups claimed a reduction in the sale price on the grounds that Mazda had failed to disclose an important fact, as well as punitive damages.

THE JUDGMENT OF FIRST INSTANCE

The Superior Court of Québec dismissed the class action on its merits on the ground that the door's locking mechanism did not have a design flaw because, according to the use for which it was intended, the mechanism created a sufficient obstacle, substantially reducing the possibility of theft. It should be noted that there are no security standards governing the efficacy of car locking systems.

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Consequently, the ease with which the protection system could be circumvented did not amount to a loss of use. The Court also did not agree that Mazda had engaged in a prohibited business practice in failing to disclose an important fact concerning a security feature. In any event, the criminal intervention of a third party broke the chain of causality between the alleged defect and the damages sustained.

As for the claims of the members whose vehicles were not broken into (Group 2), the Court was of the view that they had not suffered any manifestation of the defect. The fact that they had to bring their cars to their dealerships for installation of a reinforcement mechanism in the locking system was one of life's little annoyances and did not therefore warrant an award of damages.

As there was no evidence that Mazda had been reckless regarding its legal obligations, the Court also dismissed the claim for punitive damages.

THE COURT OF APPEAL JUDGMENT

THE *CONSUMER PROTECTION ACT* (CPA) AND THE CONCEPT OF LATENT DEFECT

The CPA stipulates that goods must be fit for the purpose for which they were normally intended (section 37 CPA) for a reasonable length of time, which will vary according to the price paid, the terms of the contract and the conditions of their use (section 38 CPA). If the goods cannot be used for the consumer's reasonably expected purpose, there is a presumption that the defect existed prior to the sale. Furthermore, neither the merchant nor the manufacturer can argue that they were unaware of the defect (section 53 CPA).

The Court confirmed that the aforementioned warranties are a particular application of the concept of latent defect in Quebec civil law. The Court added an important qualification: by operation of the CPA, a consumer wishing to argue loss of fitness for purpose under section 37 CPA has a less onerous burden of proof than a purchaser invoking the warranty of quality under the *Civil Code of Québec* (CCQ).

Indeed, an action invoking the warranty of quality under the CCQ must satisfy four tests, namely, the defect must: 1) be latent, 2) be sufficiently serious, 3) be unknown to the buyer and 4) have existed at the time of the sale. The Court was of the view that, like the warranty provided in section 38 CPA, the warranty against loss of use under section 37 CPA exempts the consumer from having to prove the existence of a latent defect, provided that the consumer conducts an ordinary examination of the item before purchasing it.

The Court stated that the presumption of the existence of a hidden defect broadens the [translation:] "traditional concept" of latent defect in that a consumer could benefit from the fitness for purpose warranty under section 37 CPA without the item being affected by a material defect. The consumer need only show that there is a serious loss of use and that he or she was unaware of its existence at the time of the sale.

APPLICABILITY OF THE FITNESS WARRANTY

The Court noted that the fitness warranty imposed on merchants and manufacturers creates an obligation of result. That obligation is assessed primarily on the buyer's reasonable expectations. The courts must apply an objective standard, namely the average consumer's expectations assessed in light of the nature of the product and of its intended use.

The Court noted that although often raised as a defence, the fact that a merchant is in compliance with legal or industry standards does not exonerate it unless there has been a finding of loss of use. Furthermore, it stated that [translation:] "the absence of standards does relieve the manufacturer of its obligation to take into account the needs and reasonable expectations of its customers".

The Superior Court therefore erred in holding that under normal use the locking mechanism worked

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very well. That analysis does not consider the expectations of the consumer who legitimately believes that his or her vehicle has a locking system capable of creating [translation:] “a reasonable obstacle against malicious intrusions”.

Applying the presumptions provided in section 37 CPA regarding the prior existence of the defect and the presence of a latent defect, the consumer need only show that the weakness in the locking system was substantial and that, had the consumer known about it, he or she would not have bought the vehicle. In that respect, the Court accepted the appellant’s arguments and held that any consumer aware of the weakness of the locking system would have refused to purchase that model for the price paid.

The Court therefore reversed the judgment of first instance and held that the Mazda vehicles covered by the class action were affected by a significant loss of use giving rise to the compensatory measures provided for in section 272 CPA.

THE DUTY TO INFORM

Section 228 CPA prohibits the merchant, manufacturer, or advertiser from failing to mention an important fact. Unlike the judge of first instance, the Court of Appeal was of the view that the “important fact” referred to in section 228 CPA is not [translation:] “aimed solely at protecting the physical safety of consumers”, but also targets any key element of a contract. An element will be key if it is likely to interfere with the consumer making an informed decision. Mazda had the obligation to disclose the defect in the protection system as soon as it became aware of it given that the members of the group would not have contracted under the same terms and conditions. Therefore, all consumers who purchased a vehicle between the date Mazda learned that its locking system was defective (October 3, 2006) and the date it launched its special correction program (January 28, 2008), and who were unaware of the defect in the security system, are entitled to claim a reduction of the price pursuant to section 272 CPA.

PUNITIVE DAMAGES

The Court of Appeal reiterated that violation of a provision of the CPA does not automatically give rise to punitive damages, emphasizing the onerous nature of the burden of proof required in this instance. Agreeing with the judge of first instance, the Court of Appeal stated that an analysis of the facts does not demonstrate that Mazda acted [translation:] “in a deliberate, malicious or vexatious manner, or that its conduct could be characterized as seriously ignorant, reckless or negligent of such a degree of severity” and, hence, the members are not entitled to punitive damages.

EXTRACONTRACTUAL DAMAGES (GROUP 1)

According to the Court of Appeal, the criminal intervention of a third party did not break Mazda’s chain of responsibility (*novus actus interveniens*). The protection system of the vehicles was affected by a design weakness, and it is because of that weakness that wrongdoers were able to take advantage of that condition.

The damage sustained by members whose vehicles were damaged or stolen is therefore the result of the fault committed by Mazda of not having designed a locking system that could provide [translation:] “a reasonable obstacle against malicious intrusions”.

TROUBLE AND INCONVENIENCE

The Group 2 members claimed compensation for the inconvenience resulting from Mazda’s recall campaign aiming to correct the defect of the safety system of its vehicles. Now, although the Court of Appeal acknowledged that the campaign may have caused inconvenience, it was of the view that it did not exceed the [translation:] “normal inconvenience suffered by all vehicle owners here and there over the normal course of a year”.

From a procedural perspective, the Court again acknowledged that where adjudication of such a claim requires consideration of subjective elements specific to each member of a group, collective

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action is not the appropriate recourse. Indeed, claims based on inconvenience sustained present highly individual aspects. Referring to the latin maxim *de minimis non curat lex*, the Court of Appeal noted that it would be inadequate to take up the time of the courts to deal with claims of small consequence.

Both groups also claim damages for trouble and inconvenience for having been under the fear that their vehicles would be vandalized and the inconvenience associated with the constant search for safe parking. That claim was dismissed. The Court of Appeal noted that the purpose of compensating a party is not to indemnify all the [translation:] “frustrations and sensitivities associated with the slightest breach by a person with whom that party interacts”. It further noted that considering its individual nature, this type of claim does not readily lend itself to collective indemnification.

CONCLUSION

The Court of Appeal held that Mazda 3 vehicles for the years 2004 to 2007 were affected by a significant loss of use. However, Mazda has proved that it remedied that effect in its correction campaign (272 (a) CPA). The members of Group 1 may not therefore obtain, in addition to that remedy, additional indemnification in the form of a reduction of their obligation.

However, the members of Group 1 are entitled to compensatory damages (272 CPA) pursuant to the independent action for any of the specific remedies provided for in section 272 (a) to (f) CPA.

As far as Group 2 is concerned, the Court was of the view that their claims were unfounded.

Lastly, in the Court’s view, Mazda had failed to disclose important information to its customers (228 CPA) and that violation of the law allowed certain members in Group 1 and Group 2 to have their obligations reduced (272 CPA), namely those consumers who were unaware of the defect in the security system and who purchased a vehicle between the date Mazda learned that its locking system was defective and the date it launched its special correction program.

COMMENTS

This Court of Appeal decision clarifies a number of aspects of procedural and substantive law. The Court stated that under the legal warranty a merchant may acquit its obligations in kind, pursuant to section 272 (a) CPA. This shows the importance of swift reaction by a manufacturer who becomes aware of the existence of use affecting a product that it puts on the market. In such cases, the Court imposes stringent transparency obligations on manufacturers, who in return receive a measure of comfort resulting from the preventive or curative measures that they may implement and that will help them eliminate potential liability or reduce it to a minimum. If the Court’s decision is followed, claims for compensation on the grounds that a recall procedure that was launched inconvenienced those affected by the recall, would be disallowed. The importance of informing its customers of defects affecting its products is an integral part of performing the obligation to inform incumbent on all manufacturers and merchants.

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1. 2016 QCCA 31.
2. 2014 QCCS 2617.

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