

Class action lawsuit against gun manufacturer gets certified (*Price v. Smith & Wesson Corp.*)

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The use of handguns can result in a person being seriously injured or killed. Accordingly, there has been much public debate about whether gun manufacturers should be held liable for the misuse of a handgun, particularly where the handgun used in a shooting has been stolen. This debate arises from the fact that handgun manufacturers can utilize technology when making a gun which would limit its use to only the gun's legitimate owner.

In *Price v. Smith & Wesson Corp.*, 2025 ONCA 452, the Court of Appeal for Ontario certified a class action that will permit a court to determine if handgun manufacturers can be held liable for injuries and deaths caused by the use of a stolen gun.

This case arose out of a mass shooting that occurred on Toronto's Danforth Avenue. The shooter, FH, gained possession of an M&P 40 Smith & Wesson ("**S & W**") handgun that had been stolen from a Saskatchewan gun dealer three years earlier and used it to shoot 15 innocent victims, killing two of them.

This model of handgun was designed for military and police use and the plaintiffs pleaded that it could have been manufactured with "authorized user technology".

Indeed, in 2000, S & W had preliminarily agreed with the US government to incorporate authorized user technology in newly designed handguns by March 2003.

However, S & W never complied with the agreement because the US Congress passed legislation immunizing gun manufacturers from civil liability to victims from the unauthorized use of a firearm.

Canada has no such legislation.

The plaintiffs pleaded that the theft of handguns in the US and Canada was significant and that stolen handguns represented a substantial threat to public safety and law enforcement. More particularly, in Canada, nearly 3,500 firearms were stolen between 2013 and 2017.

The plaintiffs pleaded that S & W was responsible for damages based on negligence, strict liability and public nuisance.

The certification motion was bifurcated by the motion judge and at the first phase of the hearing, the claims for strict liability and public nuisance were struck because the motion judge found that they were doomed to fail. The claim for negligence was allowed to proceed to a second phase of the hearing, but the motion judge found that the plaintiffs failed to satisfy the common issues criterion under [section 5\(1\)](#) of the *Class Proceedings Act*. Accordingly, the motion judge denied certification.

Both parties appealed the motion judge's decision. S & W contended that the motion judge should have struck the claim for negligence on the first phase of the motion. The plaintiffs contended that the motion judge erred in striking the claims in strict liability and public nuisance and in finding that the negligence claim did not satisfy the common issues criterion.

The Court of Appeal for Ontario held that the motion judge made no error in striking the strict liability and public nuisance claims.

The theory of strict liability simply did not extend to the facts of the case. The plaintiffs' action was essentially a products liability case and there were sound public policy reasons not to impose strict liability on manufacturers.

Public nuisance also did not apply because public nuisance is defined as an activity that "unreasonably interferes with the public's interest in questions of health, safety, morality, comfort or convenience". The court agreed with the motion judge that selling firearms was not a public nuisance, and there was a difference between the making of firearms and the actions of people who misused guns, which could be a public nuisance.

With respect to the negligence claim, S & W argued that the motion judge had taken a "shortcut" in his analysis to find that it owed the plaintiffs a duty of care. Instead, the motion judge should have conducted a full analysis to determine whether relational proximity and reasonable foreseeability were present, and whether any residual policy considerations would negate a *prima facie* duty of care. This analysis was established in *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79.

The motion judge had found that the plaintiffs' action fell into the goods dangerous *per se* and products liability categories of negligence and therefore it was not plain and obvious that the action had no prospect of success.

The Court of Appeal concluded that the claim disclosed a cause of action in negligence, and that it was capable of success. This decision was supported by a full *Anns/Cooper* analysis.

The analysis in *Anns/Cooper* is comprised of two stages.

At the first stage, a court is required to examine "reasonable foreseeability" and "proximity". The Court explained that reasonable foreseeability asks whether harm to the plaintiff was a reasonably foreseeable consequence of the defendant's negligence, while proximity asks whether the plaintiff and defendant are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law."

At the second stage, a court is required to determine if there are any "residual policy considerations", external to the parties' relationship that would negate a duty of care.

The Court found that the alleged negligence in the failure of S & W to install authorized user technology was reasonably foreseeable because guns in the hands of an unauthorized user were often used to harm other people. Proximity was also satisfied because reasonable foreseeability was satisfied. Based on precedent, in personal injury cases, if physical harm was reasonably foreseeable, proximity was generally established.

With respect to residual policy considerations, a duty of care was only to be negated in rare cases. The Court held that this was not a rare case, and that the duty of care would not result in indeterminable and unreasonable liability to a limitless population as contended by S & W. The class was well-defined and unambiguous.

With respect to the certification criterion, the plaintiffs contended that the motion judge applied the wrong test in assessing the common issues analysis. Rather than adhering to a low threshold, which in this case only required the plaintiffs to establish that there was "some basis in fact" for the claim in negligence, the plaintiffs submitted that the motion judge erred by assessing the merits of the case. Based on cases such as *Pro-Sys Consultants Ltd. v. Microsoft Corp.*, 2013 SCC 57, a court should not engage in the merits of the case on a certification motion.

The Court agreed with the plaintiffs that the motion judge failed to apply a "some-basis-in-fact" analysis when assessing the common issues criterion and the plaintiffs' proposed common issues. The common issues that the plaintiffs sought to have certified, included:

1. Was the defendant negligent in failing to incorporate authorized user technology in the handgun used in the Danforth shooting?
2. Did the failure to incorporate authorized user technology in the handgun cause, contribute to, or individually harm or increase the risk of harm to the proposed class members?

The motion judge concluded that the evidence failed to satisfy the common issues criterion despite finding that S & W had agreed to implement the authorized user technology on all of its guns and that there was some basis in fact that:

- a. There was a risk of unauthorized use of lost or stolen weapons;
- b. S & W was aware of the risk;
- c. S & W had developed technologies to address the risk;
- d. The technologies were feasible; and



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e. Implementing the technologies in Canada would have limited impact on the utility of handguns to target shooters and collectors.

The motion judge also placed too high a burden on the plaintiffs in respect of expert evidence. Based on *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, the plaintiffs' burden was only to produce "some minimal evidence" in support of their claim rather than providing evidence that established the merits of their case. The plaintiffs met their burden.

In the result, the Court of Appeal found that all of the criteria under section 5(1) of the *Class Proceedings Act* were satisfied, and therefore the plaintiffs' class action for a claim in negligence was certified.

The common issues that were certified included the two mentioned above and,

3. Is S & W liable to the family members with the meaning of section 61 of the *Family Law Act* of all persons with the proposed classes?
4. Is this an appropriate case to award punitive damages against S & W?

The certification of the class action, however, does not mean that the plaintiffs will necessarily be successful at trial. It is also unclear at this point whether S & W will seek leave to appeal the Court of Appeal's decision to the Supreme Court of Canada. Accordingly, victims of gun violence will still need to wait for a determination on the issue of whether gun manufacturers can be held liable for personal injury or wrongful death caused by the unauthorized use of a handgun. A PDF version is available to download [here](#).

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