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Proposed Danforth Shooting class action against Smith & Wesson relating to “authorized user technology” allowed to proceed

By James R.G. Cook

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The Ontario Superior Court of Justice has dismissed a motion by Smith & Wesson Corp to throw out a potential class action for negligent manufacturing of the firearm used in a mass shooting in Toronto: *Price v. Smith & Wesson Corp.*, 2021 ONSC 1114.

In July 2018, a loan gunman shot and killed two people on a busy street in Toronto and injured several others in a notorious incident known as the “Danforth Shooting.” The firearm used in the shooting was a Smith & Wesson handgun which had been reported stolen in 2015 by a gun dealer in Saskatchewan.

The plaintiffs — victims of the shooting and their family members — subsequently commenced an action against Smith & Wesson for negligence relating to the design, manufacturing and/or distribution of the firearm, as well as strict liability and public nuisance. The action has not yet been certified as a class proceeding.

In 2020, Justice Paul M. Perell heard a preliminary motion to determine whether

the proposed causes of action met the first stage of the certification test under the [Class Proceedings Act, 1992](#). Concurrently, Smith & Wesson brought a motion to have the plaintiffs’ action dismissed on the basis that it failed to disclose a reasonable cause of action pursuant to Rule 21 of the [Rules of Civil Procedure](#).

In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.

In the decision, released in February 2021, Justice Perell reviewed the established law for product liability claims regarding goods that are dangerous *per se*, which includes firearms. Justice Perell noted that in the seminal negligence case of *Donoghue v. Stevenson*, [1932 CanLII 536 \(FOREP\)](#), [1932] A.C. 562 (H.L.),

which involved a contaminated bottle of ginger beer, the Law Lords recognized an established category for duty of care cases involving goods that were dangerous in and of themselves (as opposed to a food product such as ginger beer).

As the law of product liability negligence developed thereafter, there was a recognized duty of care for products without regard to whether the product was dangerous or non-dangerous, but the dangerousness of the goods remained a factor in determining the standard of care. A heightened standard of care is prescribed for dangerous goods commensurate to the risks and threats therein.

A handgun is an article dangerous in itself, and manufacturers have a duty to take care imposed on them when it is necessarily the case that other parties will come within proximity of the handgun.

For the motion, Smith & Wesson argued that the plaintiffs' claim must necessarily fail because the proximate cause of the injuries to the Danforth Shooting victims was not due to its alleged negligence but due to the criminal acts of the gunman.

The problem with Smith & Wesson's argument, however, was that there *was* a modern safety precaution that could have been used in the manufacturing of the firearm, and which the plaintiffs' pleading alleged could have prevented the unauthorized use of the firearm in the Danforth Shooting.

In particular, the plaintiffs argued that Smith & Wesson could have implemented "smart gun" or "authorized user technology," which is designed to prevent the criminal use of weapons by unauthorized persons. Authorized user technology is based on personalized user-

based systems such as biometrics (fingerprints or palm-print recognition), voice identification, or similar electronic identification methods to prevent use of a firearm by an unauthorized person. Justice Perell noted that such technology had been in existence since the 1970s and by the 1990s many gun manufacturers were using smart technology to promote safety and prevent the weapon being fired by anyone other than the authorized user.

Smith & Wesson acknowledged that its products were not equipped with a device that fully blocks use by unauthorized users. The decision also reported that Smith & Wesson handguns were the most common make of stolen handgun in the United States. Unauthorized use of firearms, the plaintiffs argued, was a reasonably foreseeable consequence that should be prevented by the manufacturer.

For the purposes of the preliminary motion to dismiss the action, it is was therefore not plain and obvious that the plaintiffs' negligence claim was doomed to fail based on the allegation of a duty of care in relation to the manufacturing and distribution of a product that was dangerous. The thrust of the cause of action, rooted in *Donoghue v. Stevenson*, is that Smith & Wesson manufactured a product that was dangerous *per se* and that it did not take available precautions (*i.e.* it was careless), when it is necessarily the case that innocent parties would come within proximity of that dangerous product. While the claim may still fail, it was not a certainty; there were issues to be tried, and the putative class members should not be instantly denied a day in court.

Justice Perell was clear that all that was presently being decided was that there was an established duty of care relationship between the plaintiffs and Smith & Wesson and it remained



to be determined whether or not there was culpable carelessness. Further, Smith & Wesson was not being blamed for the shooting on the Danforth. Rather, the alleged wrongful activity of Smith & Wesson was selling a handgun that did not utilize smart gun or authorized user technology that was available at the time the product was manufactured.

The plaintiffs' other causes of action for strict liability and public nuisance were dismissed as failing to disclose a reasonable cause of action. In particular, the Court noted that the manufacturing of weapons was a time-honored business practice that could not ground a claim in public nuisance:

Society from the days of the Neanderthals until today does not regard fabricating weapons as a public nuisance although the misuse of those weapons – by others – may be. A manufacturer of a product cannot be made liable in nuisance for simply distributing its product in its course of business because the product is then misused by others causing harm to the plaintiffs.

In the result, the plaintiffs' claim will now proceed through the remaining stages of the certification test for a class action against Smith & Wesson based on the negligent design, manufacturing and/or distribution of a product, namely the firearm used in the Danforth Shooting.

Whether a firearm manufacturer will be held liable for failing to include "smart gun" or "authorized user technology" to prevent the unauthorized use of a gun remains to be seen. If such liability is imposed on Smith & Wesson in the case at hand, there would likely be significant consequences for other manufacturers of firearms that could have contained technological safeguards preventing their unauthorized use.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact **James Cook**, at **416.865.6628** or via email at **jcook@grllp.com**.

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