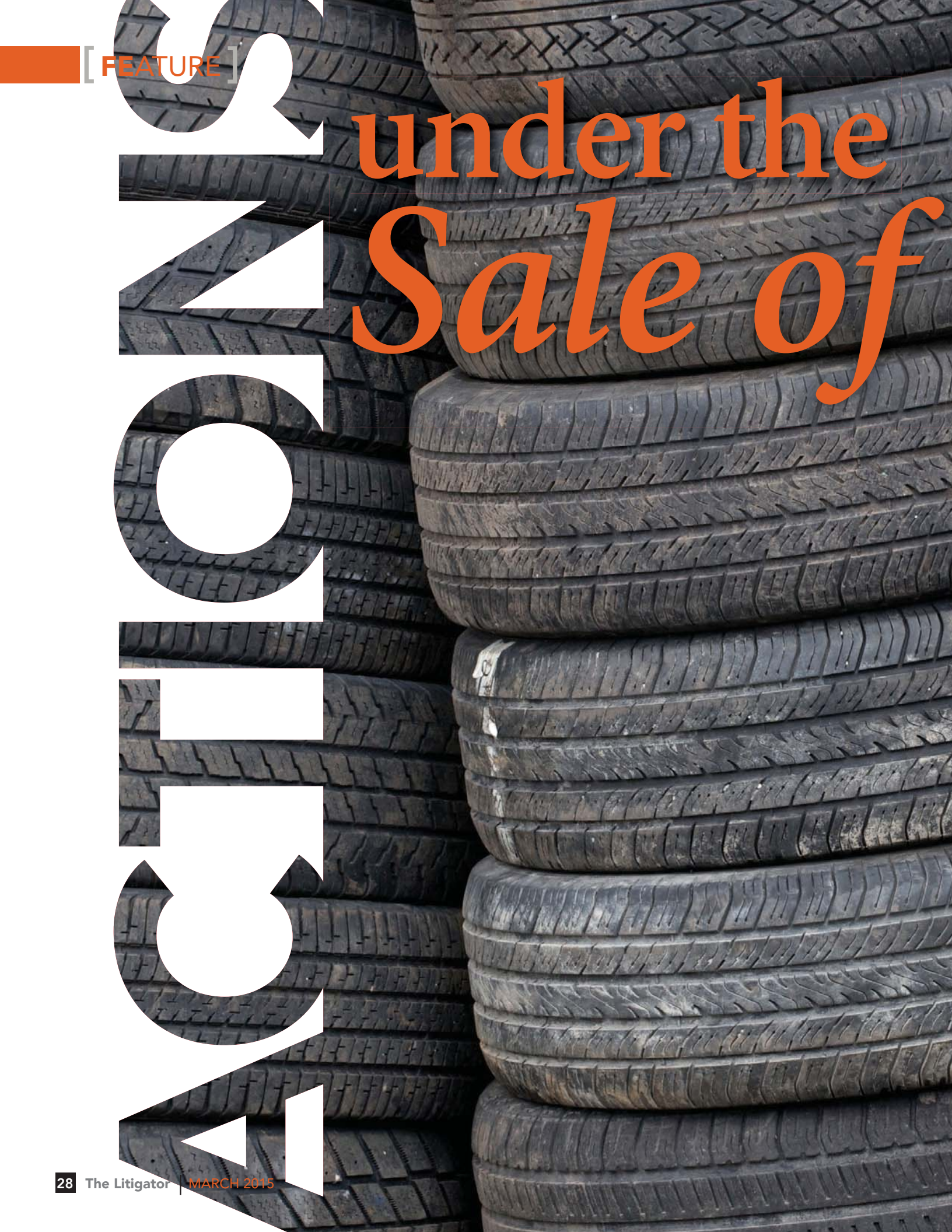
ACTIONS under the *Sale of*



Goods Act

BY ADAM TANEL

Products must be fit for their ordinary use or their primary purpose.

The *Sale of Goods Act (SGA)* was initially conceived as consumer rights legislation, meant to protect the masses from unscrupulous merchants. However, a survey of recent *SGA* decisions shows more sails than sales. That is to say that a plurality of reported *SGA* decisions deals with the sale of yachts, equestrian facilities and other less than "everyday-Joe" pursuits.

This phenomenon is not surprising. With the ever-rising costs of litigation, the value of the good being sold must be significant for litigation to be viable. Can you therefor ignore the *SGA* if your practice is not populated by jilted yacht-buyers? Absolutely not.

The *SGA* remains a potent weapon for Plaintiffs' counsel in the class actions context. It is time that we took this weapon off the shelf to see how best we can use it.

The *SGA* and the common law tradition that gave rise to it allow for actions against both retailers and manufacturers. Plaintiffs have several options when framing damages. Damages can be as simple as the replacement cost of the defective goods. However, damages can also be significantly more complicated (and lucrative). Actions can be brought for unjust enrichment or for damages flowing from use of or reliance on a defective good.

Actions against retailers are based, in effect, on strict liability; the Plaintiff(s) need not show negligence. In an action against a manufacturer, the Plaintiff

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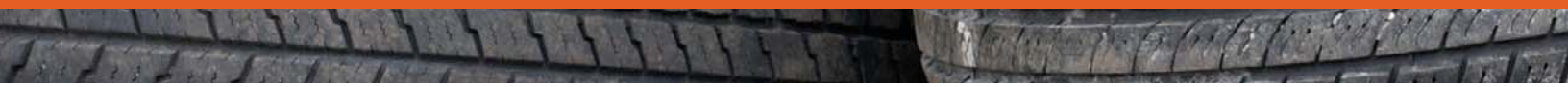

must show that the manufacturer made an inaccurate representation about the product, and that the consumer/plaintiff relied on this representation. Despite the fact that the Plaintiff's burden is greater in manufacturer cases, claims against manufacturers have supplanted actions against retailers in both quantity and importance.

Sale of Goods Act – A Brief History and Primer

The *SGA* is a codification of warranties law that dates back to the fifteenth century.[1] Tracing this evolution reveals several key elements of the modern *SGA*

There are two separate duties imposed on a retailer. Under section 15 of the *SGA*, goods must be 1) fit for a particular purpose; and 2) in a condition of merchantability.

Fitness for a particular purpose creates liability if the goods are not fit for a purpose that the buyer expresses or implies to the seller. For example: Customer walks into a hardware store and asks "Can I use this hedge-trimmer to cut a bothersome hydro-line". Clerk says "Sure". Hardware store is liable for the customer's injuries when he inevitably electrocutes himself.

In order for this duty to be imposed, the goods must be sold in the ordinary course of the seller's business. The Plaintiff must also show that it reasonably relied on the "skill and judgment" of the seller. In a recent case in which the author was involved, the Plaintiff successfully argued that *Home Depot's* slogan "You can do it. We can help." was an invitation to rely on the "skill and judgment" of their clerks. In practical terms, it will be easier to establish liability against a specialized retailer.

The required condition of merchantability does not mean fitness for an expressed or implied purpose but, rather, fitness for the goods' obvious/primary purpose. No purpose need be expressed or implied by the buyer if he or she intends to use the goods for their obvious purpose. If, in the example above, the customer used the hedge-trimmer to trim a hedge, but was injured as a result of an inherent mechanical defect, his cause of action would be that the hedge-trimmer was not in a condition of merchantability.

One of the most important evolutions in sale of goods law is with respect to damages. Initially, sellers were only liable for the price difference between the goods actually sold, and the value of the expected goods. Fortunately, the law has evolved to cover any personal injury or property damage occasioned by the use of the defective goods, or any unjust enrichment of the retailer/manufacturer as a result of the defective goods.

SGA actions against retailers under section 15 are strict liability actions. The retailer will be liable "even when the defect is undiscoverable and the seller is in no way at fault".[2] However, the retailer is protected insofar as it may have a cause of action against the distributor/wholesaler, who in turn may have a cause of action against the manufacturer.[3]

The Plaintiff's obvious recourse under the *SGA* is an action against the retailer. The *SGA* is rooted in contract law, and privity of contract demands that a Plaintiff only have a cause of action against the party with whom they contracted. However, there is an important exception. Where the plaintiff/purchaser was influenced by the manufacturer's advertising, they may have a cause of action directly against the manufacturer. When considering a *SGA* action it will be important to canvass with your client whether they were in any way influenced by the manufacturer's advertising (including advertising on the actual product or its packaging).

If pursuing a class action, an action against the manufacturer is preferable for several reasons. Firstly, the potential class will be much larger. Perhaps more importantly, certification may be easier in an action against a manufacturer.

In a class action against a retailer, it may be challenging to demonstrate a common issue. The tort involved will have arisen out of a specific interaction

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between the individual purchasers and the retailer(s). The representations made to each purchaser may be entirely different. Furthermore, each plaintiff will have made different express and implied indications of intended use. On the other hand, in a class action against a manufacturer, all members of the class were likely exposed to the same marketing campaign, and relied on the same representations when purchasing the goods.

Practical Applications for Plaintiffs

There seems to be a hesitancy on the part of Plaintiffs' counsel to bring actions based on the Plaintiffs' reliance on a seller's "skill and judgment". In this era of online research, a consumer often acquires as much, if not more, knowledge than the average store clerk. However, a careful reading of early products liability cases suggests that this hesitancy is unwarranted.

The court has had no difficulty finding reliance, even where the Plaintiff has significant experience in the particular area of commerce. In two defining cases, *Kendall v. Lillico*[4] and *Ashington Piggeries v. Christopher Hill*,[5] the House of Lords held that experienced farmers relied on the skill and judgment of the feed suppliers. Reliance need not be total or exclusive. A Plaintiff may come to the table with significant knowledge and experience. However, if he or she partially relies on the skill and judgment of a retailer, that retailer may be liable.[6]

The duty to ensure goods are of merchantable quality has an important limit, of which Plaintiffs should be wary. If a consumer examines the goods prior to sale there is no liability "as regards defects that such examination ought to have revealed".[7]

It has been pointed out that this caveat can lead to unjust results. A reckless purchaser who does not examine the goods is fully protected. A moderately cautious consumer who conducts a cursory examination will not be entitled to recover for damages flowing from defects that a cursory examination ought to have revealed. Finally, an exceptionally cautious consumer who undertakes a thorough examination receives little protection at all.

Aside from the unjust result, this situation leads to serious concerns for counsel considering a class action. Again, it may be difficult to have a class certified where putative class members have engaged in varying degrees of inspection. There may not be sufficient common issues where some plaintiffs did not have an opportunity to inspect the goods, and others performed examinations with varying degrees of thoroughness.

The most promising area for class actions is with respect to manufacturers' liability. The vast majority of proposed, ongoing and settled class actions cases involving product liability are claims against manufacturers.

Identifying Current Trends

One group of products that has attracted significant product liability actions is pseudo-pharmaceuticals.[8] Weight loss supplements, acne cream and muscle relaxing creams have all been the subject of product liability class actions. There are several reasons for the proliferation and success of these actions. Firstly, they are products about which representations must be made. It may be possible to sell a pen without making representations as to its effectiveness. It is much more difficult to sell a weight-loss supplement without some kind of representation as to its efficacy. There is also the question of the risk associated with the product. Damages for a defective weight-loss product are likely to be greater than damages for a defective pen.

More recently, there has been a surge in product liability claims against electronics manufacturers. These claims have been quite a shock to industry giants from Apple to Samsung. With the proliferation (and short lifespan) of modern handheld devices, electronics manufacturers are leaving themselves exposed to claims when their products do not live up the representations

they put forth. While the individuals' damages may be much lower than in pharmaceutical and pseudo-pharmaceutical cases, the class sizes can be much larger with the collective damages a reflection of that size.

In Sale of Goods class actions, as in all class actions, it is always worthwhile to follow developments south of the border. Currently, US courts are dealing with an uptick in claims against automobile manufacturers. With the ever-increasing electronic gadgetry in new cars, there are more and more electronic malfunctions. In turn, these widespread malfunctions are leading to class actions over everything from ignition switches to electric windows.

Bringing things full circle, there has also been an increase in claims against pet-food manufacturers. From pig-feed to dog-food, sometimes the more things change the more they stay the same.

Conclusion

Our U.S. friends have had quite a head start when it comes to class action litigation. However, the Ontario Plaintiffs' Bar has done an admirable job of catching up (and sometimes piggy-backing). Sale of Goods litigation is no exception.

The *SGA* and other consumer protection legislation creates opportunities for significant actions with exceptionally large classes. These actions are not just lucrative, they also fulfill an important function in terms of corporate responsibility: deterrence of malfeasance in the design, manufacture, distribution and sale of products.

When assessing potential *SGA* claims, the first question one must ask is: "am I targeting the retailer or the manufacturer"? As discussed above, counsel should always explore avenues that lead to manufacturer liability.

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NOTES

[1] Waddams, S.M., *Products Liability: Fifth Edition,* Carswell, Toronto; 2011, at page 84

[2] Crooked Post Shorthorns, *A Partnership v. Masterfeeds Inc.,* 2008 ABQB 641, 2008 CarswellAlta 1523, [2008] A.J. No/ 1153 (Alta. Q.B.), at para. 207, affirmed 2010 ABCA 106, 2010 CarswellAlta 586, 477 A.R. 280, 483 W.A.C. 280 (Alta. C.A.), citing this passage. See *Frost v. Aylesbury Dairy Co.,* [1905] 1 K.B. 608 (C.A.); *Buckley v. Lever Bros.,* [1953] O.R. 704, [1953] 4 D.L.R. 16 (H.C.); *Godley v. Perry* [1960] 1 W.L.R. 9, [1960] 1 A11 E.R. 36; *McMorran v. Dom. Stores Ltd.* (1977), 14 O.R. (2d) 559, 1 C.C.L.T. 259, 74 D.L.R. (3d) 186 (H.C.); *Sigurdson v. Hillcrest Services Ltd.,* [1976] 1 W.W.R. 740, 73 D.L.R. (3d) 132 (Sask. Q.B.); *Brunski v. Dom. Stores Ltd.* (1981), 20 C.C.L.T. 14 (Ont. H.C.). *Gregorio v. Intrans-Corp.,* 18 O.R. (3d) 527, 4 M.V.R. (3d) 140, 115 D.L.R. (4th) 200, 72 O.A.C. 51, 15 B.L.R. (2d) 109, 1994 CarswellOnt 237 (C.A.); additional reasons at 15 B.L.R. (2d) 109n, 1994 CarswellOnt 3827 (C.A.).

[3] *Kasler & Cohen v. Slavouski,* [1928] 1 K.B. 78 (involving four successive indemnities of the retailer's liability to a purchaser who had contracted dermatitis); *Biggin & Co. v. Permanite,* [1951] 2 K.B. 314 (C.A.).

[4] [1960] 2 A.C. 31 at 84, [1968] 2 A11 E.R. 444 at 457 (H.L.)

[5] [1972] A.C. 441, [1971] 1 A11 E.R. 847 (H.L.).

[6] An aside here about access to justice is too obvious to ignore. Forty years ago, pig and poultry farmers could afford to litigate and appeal *SGA* cases. Now, the plurality of litigated *SGA* cases concern yacht and equestrian purchases.

[7] *Sale of Goods Act* R.S.O. 1990, c.S.1, section 15.2

[8] True pharmaceutical class actions are beyond the scope of this paper, as they tend to fall under the area of law involving sales through learned intermediaries, not the general sale of goods.