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**PRODUCT LIABILITY: CANADIAN LAW &  
PRACTICE**

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**Release No. 23, December 2018**

This unique resource serves as a legal reference and practical guide — offering insight into the tactics and strategies used to effectively bring and defend a product liability case. This vital text includes: a review of substantive law of product liability; an examination of procedural law as it relates to product liability actions; a discussion of tactical and strategic issues and considerations; and checklists and precedents.

**What's New in this Update:**

This release features valuable updates to chapter L2 — Negligent Design and Manufacture, chapter L3 — Failure to Warn or Instruct, chapter L4 — Breach of Warranty and Representations and chapter L9 — Liability for Economic Loss. There are also updates to the Words and Phrases tabs, the Selected Literature on Product Liability tab, and Appendix L.

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## Case Highlights

### **Failure to Warn or Instruct — Common Law Duty — Unheeded Warnings:**

However, note that on a certification motion, a British Columbia court suggested that a plaintiff making a pure economic loss claim might not have to prove that he or she would not have used the product if there was a proper warning, even though such proof may be required in a personal injury case. The court provides no reason for this distinction, and it appears to run counter to product liability jurisprudence discussed in Chapter L9 which argues that recovery for pure economic loss should be more difficult than recovery for personal injury damages. *Cantlie v Canadian Heating Products*, 2017 BCSC 286 at para. 209.

### **Liability for Economic Loss — Judicial Reluctance to Compensate Pure Economic Loss:**

The failure to demonstrate proximity arose in an Ontario Court of Appeal decision involving whether a manufacturer of tainted meat owed a duty of care to restaurant franchisees. Although some people became ill and some died after eating the meat, there was no evidence that any of the franchisees' customers were harmed. Instead, they claimed economic losses due to reputational harm they suffered from being associated with the manufacturer of contaminated meat. After first finding that the relationship between the parties was not analogous to a previously established proximity category, the Court of Appeal considered whether the relationship satisfied the *Anns* test. Although the motions judge found that there was a proximate relationship, the Court of Appeal held that the motions judge erred by failing to consider the scope of the proximate relationship. The Court of Appeal held that the manufacturer owed a duty to supply meat fit for human consumption to the franchisees' customers, but that duty did not extend to the franchisees to protect their reputation. Economic losses for reputational harm did not fall within the scope of duty that the manufacturer owed to the franchisees. Although it was not necessary, the Court of Appeal also considered any residual policy considerations. The Court stated that to the extent that the alleged damages relate to the recall itself, there was a strong public interest in encouraging manufacturers to act quickly to recall products, and that imposing liability for damages related to the recall could run counter to that goal. *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2018 ONCA 407.

## Words and Phrases Highlights

### REASONABLE EXCUSE

**Nova Scotia** — My review of the Supreme Court jurisprudence leads me to think that the Learned Justices of that Court are very much concerned that the principles of natural justice be given full effect, particularly in relation to ensuring that both sides are heard. Those Judges seem, in my respectful view, to take quite a broad and lenient view as to what a reasonable excuse is. The cases where the judgment has been upheld and a hearing denied, are where the court process is essentially ignored ... In the cases where the motion was granted, there was some but quite minimal act expressing an intention to defend and/or an honest attempt to obtain representation or to attend to getting a defence filed in some manner ... Overall the standard does not seem to me to be very high.

*(Wilson Equipment Limited v. Simpson (2018), 2018 NSSM 16, 2018 CarswellNS 280 (N.S. Small Cl. Ct.) at para. 41 Nickerson (Adjudicator))*

