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‘Smart gun’ technology: Class action against Smith & Wesson gets certified

By **Stephen A. Thiele**

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Law360 Canada (July 7, 2025, 2:41 PM EDT) -- Gun violence is a serious social and safety issue, particularly in Canada’s major cities. According to information published by the Government of Canada, Canada has seen an 81 per cent increase in violent offences involving guns since 2009, and one in three homicides in Canada are firearm-related.

Undoubtedly, the use of handguns threatens our most fundamental right — the right to life. Accordingly, there has been much public debate about restricting handgun use and requiring manufacturers to implement “smart gun” technology to prohibit their unauthorized use. In the justice system, the failure of handgun manufacturers to implement smart gun technology has also raised debate about whether manufacturers should be held liable for the misuse of a handgun by persons who injure or kill others using a stolen handgun.

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Although the legal issue has yet to be resolved in Canada, the Court of Appeal for Ontario decision to certify the class action in *Price v. Smith & Wesson Corp.*, 2025 ONCA 452 opens the door to the determination 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 in July 2018 on Toronto’s Danforth Avenue. Armed with an M&P 40 Smith & Wesson (S & W) semi-automatic handgun, which was designed for military and police use, the shooter, FH, indiscriminately opened fire on pedestrians and people coming out of shops and restaurants in the area, killing two people and injuring 13 others.

The handgun had been stolen in 2015 from a Saskatchewan gun dealer.

The plaintiffs essentially pleaded that the deaths and injuries could have been prevented if S & W had manufactured the firearm used in the shooting with “authorized user” or “smart gun” technology and that in the circumstances, S & W was liable for the injuries and deaths.

The plaintiffs showed that as a result of the settlement of civil claims in the United States in 2000 arising out of gun violence, S & W had preliminarily agreed with the U.S. government to incorporate authorized user technology in newly designed handguns by March 2003. However, S & W never complied with the agreement because in 2005 the U.S. Congress passed legislation immunizing gun manufacturers from civil liability to victims from the unauthorized use of a firearm. No such legislation has been passed in Canada.

The plaintiffs pleaded that the theft of handguns in the U.S. and Canada was significant and that stolen handguns represented a substantial threat to public safety and law enforcement. In Canada, the plaintiffs showed that the rate of gun theft had more than tripled between 2009 and 2017 and that during the same period of time, gun-related violence increased by 43 per cent.

The plaintiffs pleaded that S & W was responsible for the damages suffered by the victims and their family members based on negligence, strict liability and public nuisance.

On the certification motion, the motion judge struck the claims for strict liability and public nuisance on the grounds that these causes of action were doomed to fail.

While the claim for negligence was found to disclose a cause of action, the motion judge ultimately concluded that the class action could not be certified because the plaintiffs’ negligence claim failed to satisfy the common issues criterion under s. 5(1) of the *Class Proceedings Act* (the Act).

Under s. 5(1), a court is required to certify a class proceeding if:

> a) The pleadings or the notice of application discloses a cause of action;
>
> b) There is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
>
> c) The claims or defences of the class members raise common issues;
>
> d) A class proceeding would be the preferable procedure for the resolution of the common issues; and
>
> e) There is a representative plaintiff or defendant who,
>
> > i) Would fairly and adequately represent the interests of the class;
> >
> > ii) Has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
> >
> > iii) Does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

Both parties appealed the motion judge’s decision.

S & W submitted that the motion judge should have struck the claim for negligence. In contrast, the plaintiffs argued 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 under the Act.

The Court of Appeal for Ontario upheld the motion judge’s decision to strike the claim for strict liability and public nuisance. In the court’s view, the theory of strict liability 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 that 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, the motion judge had found that the plaintiffs’ action fell into the good 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. S & W argued this approach represented a “shortcut” and that the motion judge should have conducted a full analysis pursuant to *Anns v. Merton London Borough Council*, [1978] A.C. 728 (H.L.) and *Cooper v. Hobart*, 2001 SCC 79 to determine whether relational proximity and reasonable foreseeability were present, and whether any residual policy considerations would negate a *prima facie* duty of care.

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 held that the alleged negligence in the failure of S & W to install authorized user technology was reasonably foreseeable because handguns in the hands of an unauthorized user were often used to harm other people. Based on precedent, proximity was also satisfied because reasonable foreseeability was satisfied.

With respect to residual policy considerations, the court explained that a duty of care was only to be negated in rare cases and that this was not a rare case. Further, the court found 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 court agreed with the plaintiffs’ submissions that the motion judge erred in applying too high a threshold in the common issues analysis. 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?

Although the motion judge found 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 e) implementing the technologies in Canada would have limited impact on the utility of handguns to target shooters and collectors, the motion judge inappropriately applied a merits based analysis to the common issues criterion.

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.

In the result, the Court of Appeal found that all of the criteria under s. 5(1) of the Act were satisfied. 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 within the meaning of s. 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 is an important victory for the proponents of anti-gun violence. However, it should be noted that the certification of the class action does not mean that the plaintiffs will necessarily be successful at trial or that S & W will be inclined to implement smart gun technology in its manufacturing process. Most of S & W’s business is conducted in the U.S., and even if the plaintiffs are ultimately successful, they could face significant challenges if they are required to enforce an award against S & W in the U.S. because of the immunity legislation there. It is currently unclear as well whether S & W will seek leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada.

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