CITATION: Rego v. Bayerische Motoren Werke AG, 2023 ONSC 5244
COURT FILE NO.: CV-17-584555-00CP
DATE: 20231005

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
PATRICIA NORTH and DINIS REGO Plaintiffs	)	*Alex Dimson and Jared Rosenbaum*, for the Plaintiffs
– and –	)	
BAYERISCHE MOTOREN WERKE AG, BMW OF NORTH AMERICA, LLC and BMW CANADA INC. Defendants	)	*Peter Pliszka, Zohaib Maladwala, and Lily MacLeod*, for the Defendants
	)	**HEARD:** SEPTEMBER 18-20, 2023

E.M. MORGAN J.:

I. Miles apart

[1] The Plaintiffs seek access to justice for BMW drivers.

[2] The parties in this class action certification motion do not agree on much. The Plaintiffs in their Fresh as Amended Statement of Claim plead that the certain model vehicles made by the Defendants are defective and dangerous; the Defendants submit that there is nothing wrong with the vehicles and that the Plaintiffs have suffered no recoverable loss.

[3] The Plaintiffs purport to represent a class of some 66,600 owners/lessees and former owners/lessees of BMW vehicles, model years 2011 to 2015, with allegedly defective N20 engines (the “Class Vehicles”). In response, the Defendants describe the putative class as not even meeting the statutory threshold of having 2 viable members.

[4] The Plaintiffs state that the Defendants have, in either the design or the manufacture of the Class Vehicles' engine, created for the class an imminent risk of catastrophic damage. In response, the Defendants state that there is no evidence of any damage, catastrophic or otherwise, and no class-wide risk at all.

[5] In terms of class action procedure, the Plaintiffs submit that the majority of contentious issues can be addressed in common by the court and seek certification under section 5(1) of the *Class Proceedings Act, 1992*, SO 1992, c. 6 ("*CPA*"). For their part, the Defendants submit that each vehicle owner's claim raises its own unique issues of causation and liability; they seek to dismiss the request for certification.

[6] In terms of substantive law and policy, the Plaintiffs contend that the Defendants' marketing of automobiles with a defective engine part is the very type of act at which tort law takes aim. In response, the Defendants argue that any harm suffered by putative class members is beyond the reach of what tort law is meant to compensate.

II. Nature of the claim

[7] Each of the Plaintiffs has tendered an affidavit describing an experience with a BMW automobile in which the engine seized up or froze while they were driving. The incidents occurred about a year apart from each other, one in 2017 and one in 2018. Neither of these incidents resulted in an accident, and the problems with the vehicles resulted in no injury to any person or damage to any other property.

[8] The Plaintiff, Patricia North, deposes that just prior to her vehicle's engine ceasing to work, a warning light advising her that the oil was low appeared on the dashboard. The Plaintiff, Dinis Rego, deposes that just prior to his vehicle's engine ceasing to work, a warning light advising him of a "drivetrain malfunction" appeared on the dashboard. Both described the problem as having come on suddenly during the course of driving their respective cars. Both Plaintiffs managed to steer clear of traffic or obstacles and wait until their cars could be towed from where they had stopped.

[9] Both Plaintiffs took their vehicles to a repair shop – the same repair shop in Oakville, Ontario for both, which I can only presume to be a coincidence. Both of the automobiles were diagnosed by mechanics as having likely suffered a broken oil pump chain or timing chain guide, necessitating an entire engine replacement. Neither of the Plaintiffs had their engines repaired or replaced; rather, they each disposed of their vehicle by selling it to a new owner in "as is" condition.

[10] The incidents described by the Plaintiffs are the only two incidents of their kind contained in the record. The Plaintiffs submit, however, that the seizing up of the engine relates to an issue with the timing chain guide that the Defendants were aware of and that was the subject of an extended warranty issued by the Defendants in 2018. That warranty contained a service notice to technicians at authorized BMW retailers that some vehicles with an N20 engine may experience a

"whining noise" that increases in frequency with a "higher engine RPM" due to "wear on the engine oil pump chain drive sprockets."

[11] The extended warranty provided that any eligible vehicle experiencing a "whining noise" would be provided with a replacement, free-of-charge, of the engine oil pump drive chain module and related components of the engine timing chain system and oil pump drive chain. The warranty is valid for up to 7 years or 112,600 kms from the date of purchase of the vehicle. It specifically advises BMW owners that it is not a recall, that there are no ongoing problems with the N20 engines or the timing chain systems, and that repair was not prophylactically required. Similarly, no concern was ever expressed by Transport Canada with respect to the N20 engine's timing chain system.

[12] Moreover, as counsel for the Defendants describe it in their factum, "in the 12+ years that these vehicles have now been on the road, the Defendants have not received a single report of an accident, collision or property damage involving the proposed class vehicles that was caused by the issue described in the service notice." I note that neither of the Plaintiffs' affidavits describe hearing a "whining noise" prior to the engine-freezing incidents they describe, and neither of them had any repairs or replacements done pursuant to the extended warranty.

[13] That said, the Plaintiffs point to the warranty, under which some 800 of the more than 66,000 vehicles with an N20 engine were serviced, as evidence of other vehicle owners encountering the type of timing chain problem that they encountered. It stands to reason, they in effect submit, that where there are 800 incidents of smoke there must be at least some incidents of fire.

[14] The Plaintiffs have filed an expert report of Dr. Peter Frise, a professor of mechanical and automotive engineering at the University of Windsor and an experienced design and investigative engineer. Dr. Frise was asked to opine on whether the BMW vehicles in issue were "prone to a sudden loss of power because of a failure of the Chain Assembly System."

[15] Defendants' counsel point out that Dr. Frise was not instructed to, and did not**,** drive, test or inspect any of the Class Vehicles and did not inspect any N20 engine or any N20 timing chain system. Rather, he reviewed the Statement of Claim, BMW technical service bulletins from the United States that were substantively identical to the Canadian extended warranty, and certain unsubstantiated complaints on an online consumer complaint database.

[16] In cross-examination, Dr. Frise conceded that he has no way of actually verifying the online complaints. It is worth noting that the database accessed by Dr. Frise is the same database found on the website of the National Highway Traffic Safety Administration ("NHTSA")**,** the motor vehicle safety regulator in the United States, that was held to be inadmissible by Perell J. in *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967, at paras 46-47. Justice Perell reasoned, at paras 41-47, that the NHTSA database is untested, unfiltered, and, accordingly, unreliable as a way of establishing the truth of its contents.

[17] I would agree with that conclusion. As Justice Strathy pointed out in *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, at para 66, citing *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319, at para 19 (SCJ), expert evidence must comply with the general rules of admissibility. And if the NHTSA database is not reliable for a court is also not reliable for Dr. Frise. This unreliability puts his opinion on a faulty foundation. At the most, the NHTSA database demonstrates that there have been consumer complaints about the Class Vehicles; but since even those online complaints are unverified, the evidence should be given only minimal weight and the number and nature of the complaints in the database must be viewed with skepticism.

[18] Dr. Frise spent considerable time and effort in his report describing the workings of an N20 engine and the role that the chain assembly system plays. He reviewed in some detail what could happen to the engine if the chain assembly system were to fail. He then concluded his report with the opinion that the BMW vehicles with N20 engines "contain either a design defect or a manufacturing defect – or both" since they are "prone to sudden loss of power due to failures of the chain assembly system."

[19] While I acknowledge Dr. Frise's strong credentials, his conclusion is premised on a subjective and unreliable foundation. Under cross-examination, Dr. Frise conceded that the consumer entries in the NHTSA website cannot actually establish a universal problem with the N20 engines, and that neither the service bulletins issued in the U.S. nor the Canadian extended warranty suggests that the timing chain potential condition causes "a sudden loss of power".

[20] The only other document that Dr. Frise analyzed in reaching his conclusion, and the only one that actually describes a defect in the timing chain system resulting in engine failure, is the Fresh as Amended Statement of Claim. Needless to say, an expert opinion which takes the pleading of the party that retained him as a primary source of information lacks objective credibility. Dr. Frise's conclusion that there is a universal – as opposed to an occasional – problem with the timing chain system in N20 engines, and that this is indicative of negligence in the design or manufacture of the engine, is speculative and largely unsupported.

[21] The evidence presented by Dr. Frise explains what *may* have happened to the engines in the Plaintiffs' vehicles and, perhaps, to anyone else who experienced a similar mishap with their vehicle. But it does not speak to a defect existing in those vehicles across the proposed class which did not have their N20 engines freeze up or their chain assembly system fail.

[22] Furthermore, Dr. Frise makes what might be called the non-logical leap that because the N20 engines were all "reportedly designed and…tested….at a company facility in Germany or elsewhere" and "were reportedly manufactured at one or more BMW engine factories", any defect found in one engine must be common across all of the Class Vehicles. I can see no basis, and Dr. Frise provides no basis, for this assertion. It suggests that there can be no sporadic 'lemons', to use the most common term, in automobile manufacturing, and that any defect in a single car or in sporadic cars signals a mass defect in every car.

[23] In fact, this view of a class-wide design or manufacturing defect is refuted by Dr. Frise's own evidence that BMW had an ongoing "program of redesigning several Chain Assembly System components". This, of course, suggests that different BMW vehicles during the proposed class period must have had different non-uniform designs. If there were multiple versions of the timing chain in the chain assembly system that were designed and manufactured during the proposed class period, the vehicles in question would not necessarily contain the same chain system. As Dr. Frise explained at Q. 173 of his cross-examination:

> Q. So there was not one ubiquitous timing chain system that was used on all of the subject vehicles. There were different configurations of that timing chain system used in the subject vehicles?
>
> A. That would appear to be the case.

[24] The Plaintiffs draw some comfort from the observation by Justice Belobaba in *Panacci v. Volkswagen*, 2018 ONSC 6312, at para 1, another timing chain automotive claim, that, "The timing chain mechanism plays a critical role in the operation of the modern automobile engine. If the timing chain malfunctions and the timing 'skips', the consequences can be dire – engine failure, loss of power and control, risk of serious injury or worse." Much of Dr. Frise's report is devoted to re-establishing this general aspect of the Class Vehicles' engineering.

[25] The next sentence of Justice Belobaba's analysis, however, presents a distinct challenge for the Plaintiffs: "If the malfunction in the timing chain system can be attributed to a common design or manufacturing problem, there may be the basis – as here – for a class action." As indicated, although Dr. Frise may have expressed this conclusion, he did so on the basis of an unreliable database, a misapprehension of the BMW warranty, and the Plaintiffs' own subjective pleading. I accept that there have been timing chain problems in some N20 engines; the record, however, contains no basis in fact for concluding that there is a universal problem with the design or manufacture of the N20 engine and its timing chain system.

[26] In all, the record contains evidence of some defects having appeared in at least two of the vehicles in issue. But it contains no basis in fact for asserting that design or manufacturing defects exist in *all* of the Class Vehicles.

III. The certification criteria

[27] While the onus on the Plaintiffs at the certification stage is not a particularly high one, it is not non-existent. The Divisional Court has made it clear that certification is, at the very least, "an important screening mechanism for claims that '…are not appropriate for class actions'": *Arabi v. Toronto-Dominion Bank*, [2007] OJ No 5035, at para 18.

[28] It has frequently been pointed out that this screening function requires a Plaintiff to demonstrate that there is evidence to support each stage of the certification analysis. That is, the

evidence must establish "not whether there is some basis in fact for the claim itself, but rather whether there is some basis in fact which establishes each of the individual certification requirements": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013] 3 SCR 477, at para 102.

a) Section 5(1)(a) – cause of action

[29] It is well established that identifying a cause of action is the one certification criterion for which there is no requirement that the Plaintiffs demonstrate an evidentiary foundation. The test is similar to that on a motion under Rule 21.01 of the *Rules of Civil Procedure* for striking out a Statement of Claim: to fail, it must be "plain and obvious" that the Fresh as Amended Statement of Claim discloses no reasonable cause of action: *Cloud v Attorney General of Canada*, [2001] OJ No 4163, at para 10 (SCJ).

[30] The principal cause of action pleaded by the Plaintiffs is negligence – i.e. that the Defendants breached the standard of care expected of them in the design and/or manufacture of the Class Vehicles. The Defendants concede that a motor vehicle designer/manufacturer owes a duty of care to users of the vehicle, and that the Plaintiffs have pleaded that the Defendants breached the applicable standard of care (although they deny the veracity of that claim.

[31] The Defendants submit that, separate from those components of a negligence claim, the Plaintiffs have omitted from their pleading one crucial feature of any cause of action in tort: a claim for compensable damages caused by the alleged breach.

[32] The Defendants argue that the losses that the Plaintiffs allege that they suffered are not compensable in a negligence action. Defendants' counsel go on to point out that it is an essential ingredient of a negligence claim that damage be shown to have been caused, in fact and in law, by the Defendant's breach: *Mustapha v. Culligan of Canada Ltd.*, [2008] 2 SCR 114, at para 3. It is the Defendants' position that the omission of any legally compensable loss therefore undermines the Plaintiffs' cause of action and that, accordingly, the pleading fails to pass the section 5(1)(a) threshold for certification.

[33] In *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co*., [1995] 1 SCR 85, the Supreme Court held that the costs of repair of a building were recoverable not just in contract, but in tort, where it was foreseeable that a failure to take reasonable care in constructing the building would create defects that pose a substantial danger to the health and safety of the occupants. Since the cause of action was in tort, recovery was held to be available regardless of whether the occupants were purchasers from the builder or subsequent purchasers or lessees.

[34] The *Winnipeg Condominium* decision represented a change in the common law. The governing rule had previously been that "[i]f the defect is discovered before any damage is done, the loss sustained by the owner of the structure, who has to repair or demolish it to avoid a potential source of danger to third parties, would seem to be purely economic" and thus unrecoverable in tort: *D & F Estates Ltd. v. Church Commissioners for England*, [1988] 2 All ER 992, at 1006 (HL).

[35] Three decades later, in *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, the Supreme Court again embellished upon the *Winnipeg Condominium* rule. There it held that while the builder of a structure or the manufacturer of a product owes a duty in tort with respect to the product's safety, it owed no parallel duty to a remote purchaser with respect to the product's quality. Citing Laskin JA in *Hughes v. Sunbeam Corp. (Canada) Ltd.* (2002), 61 OR (3d) 433 (CA), at para. 36, the Supreme Court found that "compensation to repair a defective but not dangerous product will improve the product's quality but not its safety", and that, "absent a contractual or statutory entitlement, there is no right to the quality of a bargain": *Maple Leaf Foods*, at para 47.

[36] Importantly, the Court in *Maple Leaf Foods* explained that the duty of care for a builder or manufacturer "protects a right to be free from injury to one's person or property [but] also delimits its scope. This is because this basis vanishes where the defect presents no imminent threat": *Ibid*., at para 46.

[37] Thus, the costs of repair incurred in the wake of actual damage caused by the defective structure or product are recoverable in tort, as are the costs of repair done in advance of any harm being done if the work is done to avert imminent damage. Private law scholars have theorized that where the harm is truly imminent, the anticipatory repairs can be "analogized to physical injury to the plaintiff's person or property": *Ibid*., at para 45, citing P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (1995), 427, at p. 429. By contrast, where there is no imminent threat of personal injury or of damage to property, neither the cost of repair work nor the cost of the product itself is recoverable.

[38] In *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4138, the Plaintiff alleged that the proposed class vehicles contained a defect in the water pump systems causing coolant to leak into the vehicles' engine. That, in turn, was alleged to cause catastrophic damage to the engine and create a dangerous situation for drivers and others. Justice Perell observed that the pleading contained insufficiently articulated reference to the imminency of the danger for those class members who were owners of the class vehicles but who had suffered no injurious incident.

[39] In other words, those putative class members whose claim was based solely on having incurred a risk of damage, but had not incurred any damage or any imminent threat of damage, were excluded from the claim. Justice Perell explained the problem in terms of the distinction between dangerous goods and "shoddy" goods, at para 106:

> [T]he alleged defect in the design of the water pump does not present an imminent danger and there is no duty of care to warn a consumer that a manufacturer's goods may be shoddy. The theory of the Plaintiffs' negligence cause of action is that the water pumps at some indeterminate time in the future will degrade and present a danger. The Plaintiffs plead that 'the Defect only manifests itself after each Vehicle reaches moderate mileage.' There is no imminent danger. Thus, for the putative

> Class Members that are in Group 'C', the Plaintiffs have not pleaded a reasonable cause of action.

[40] Although the Fresh as Amended Statement of Claim in the present case does not divide the class into subcategories in the same way as in the *Carter* claim, the problem with the pleading is really the same. The Plaintiffs themselves have experienced a damaging incident (although whether the type of damage they incurred is recoverable is discussed below). But they purport to represent all owners and lessees of the Class Vehicles, including the apparently large number of them who have never had any timing chain issue emerge.

[41] As the Saskatchewan Court of Queen's Bench put it in yet another proposed automotive class action, pleading the damage for the Plaintiffs' vehicles "to support the existence of potentially dangerous defects, says nothing about the nature, quality or imminence of the danger": *Kane v FCA US LLC*, 2022 SKQB 69, at para 113. Likewise, Defendants' counsel submit, accurately, that "beyond a superficial assertion, [the Plaintiffs' pleading] fails to properly plead imminence of the alleged risk of danger."

[42] Although no review of evidence is necessary for an analysis of section 5(1)(a), I will pause to note that the expert evidence of Dr. Frise also does not provide any basis for claiming that damage caused by a malfunctioning timing chain system in the N20 engines is imminent across the board. The problem is not simply a pleading drafting error; for those owners/lessees of vehicles who have experienced no damage and have incurred no repairs, there is simply no evidence of imminence – a critical component of the cause of action for an anticipatory damage claim under *Winnipeg Condominium* and *Maple Leaf Foods*.

[43] The Plaintiffs' pleading omits, and the expert evidence confirms, that there is no basis in fact for the claim of economic loss by class members who have allegedly incurred (non-imminent) risk but have incurred no actual repair costs or other physical harm. As in *Carter*, at para106, "The theory of the Plaintiffs' negligence cause of action is that the water pumps at some indeterminate time in the future will degrade and present a danger." That is not an actionable legal theory.

[44] The Supreme Court of Canada has instructed that, "[t]here is no right to be free from the *prospect* of damage" but "only a right not to *suffer* damage that results from exposure to unreasonable risk": *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, at para 33 [emphasis in the original], citing E.J. Weinrib, *The Idea of Private Law* (rev. ed. 2012), at 153, 157-58. It is this sense of imminence – the causing of unreasonable risk engendered by the immediacy of the potential damage – that must be present for a tort claim based on anticipatory repair costs to be viable. Only in that case will "it [make] little difference whether the plaintiff recovers for an injury actually suffered or for expenditures incurred in preventing the injury from occurring": *Maple Leaf Foods*, at para 45, citing *Winnipeg Condominium*, at paras. 36, 38.

[45] Dr. Frise's theory that at some point all of the timing chain systems in every Class Vehicle might suffer damage is not only speculative; it does not provide a basis for a legally cognizable damages claim. For class members to have a cause of action in negligence (or tort more generally),

they must have incurred physical damage or the risk of physical damage must be discernably imminent.

[46] In addition to all of that, Defendants' counsel point out that the remedy sought in the Plaintiffs' pleading is not repair costs, but rather is the replacement costs for the Class Vehicles. Again, this is what was pleaded, and rejected by the Court, in *Carter*. The Fresh as Amended Statement of Claim is therefore defective for the same reason that Perell J. found the pleading that was before him defective: it embodies "the ironical problem that they appear to be seeking compensation for repairing an allegedly dangerous product by replacing it with the same product, and this is ironic because the case law establishes that the public policy for allowing a pure economic loss claim in negligence and not leaving the parties to their contractual remedies is to take the dangerous product out of circulation not to continue its use by purchasing the same product": *Carter*, at para 100.

[47] The Supreme Court made it clear in *Maple Leaf Foods*, at para 45, that any recovery in tort is for injury to persons or property, and that the recovery where no such damage has yet occurred is limited to a measure of damages that will prevent immediate injury to persons or property. The purely economic loss of having a structure or a product that is less valuable than what the claimant thought they had purchased is precisely what is *not* recoverable in tort. As the Court put it, the "normative basis for the duty's recognition – that it protects a right to be free from injury to one's person or property – also delimits its scope": *Ibid.*, at para 46.

[48] In response to the Defendants' critique of the Fresh as Amended Statement of Claim, Plaintiffs' counsel argue that the inclusion of replacement costs for the vehicle, and the omission of repair costs, can be taken as a drafting error in their pleading and not a conceptual one. They submit, correctly, that only a "radical error" in drafting a pleading should be considered fatal, but that otherwise a pleading containing a more minor drafting flaw should be allowed to proceed to trial: *Atlantic Lottery*, at paras 88-89. In the same way, they contend, a pleading with a relatively minor drafting error like this one should be held to pass the section 5(1)(a) hurdle.

[49] In the circumstances, I would be willing to consider repair costs to be subsumed by, and therefore implicitly included in, replacement costs. While careful drafting would dictate including the costs of repairs as a specific head of damage, it takes no conceptual leap to understand that the cost of repairing a product to bring it up to par is a subset of the concept of the cost of a new product that is already up to par. Accordingly, I would not dismiss the Plaintiffs' section 5(1)(a) argument based on this pleading issue alone; I would merely read it down as seeking actual repair costs rather than full replacement costs.

[50] The other issue raised by the Defendants is that BMW vehicles, with their N20 engines containing a timing chain system, are what the case law has called complex structures. I will note here that a similar allegation of a timing chain defect has been certified in British Columbia with respect to a different car manufacturer; but that determination does not end the inquiry before me. The question of whether the system is an independent piece of engineering or is part and parcel of

a larger engineering complex raises an issue not previously considered: *Mueller v Nissan Canada Inc*., 2021 BCSC 338.

[51] It is self-evident, but bears repeating, that class action certification is not pre-determined by fitting the claim into previously certified factual categories. That point was well explained in *Marcinkiewicz v. General Motors of Canada Co*., 2022 ONSC 2180, at para 126: "As with all genres of class actions, because one example of the genre is certified or not certified does not create a categorical determination of future cases of the same genre. The future case will be determined on their particular facts in accordance with the state of development of the legal principles."

[52] In *Winnipeg Condominium*, at para 15, the Supreme Court cited with approval the distinction drawn by the House of Lords between the manufacture of a defective component of a more complex structure and the manufacture of a defective add-on that is not truly a component of the complex structure. Lord Bridge described the distinction and its ramifications best in *Murphy v. Brentwood District Council*, [1990] 2 All ER 908, at 928:

> A critical distinction must be drawn here between some part of a complex structure which is said to be a `danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated. Thus, if a defective central heating boiler explodes and damages a house or a defective electrical installation malfunctions and sets the house on fire, I see no reason to doubt that the owner of the house, if he can prove that the damage was due to the negligence of the boiler manufacturer in the one case or the electrical contractor in the other, can recover damages in tort on *Donoghue v. Stevenson* principles.

[53] Lord Bridge's illustration demonstrates the question posed by the Defendants' challenge to the cause of action asserted here: is the timing chain system an integral part of the Class Vehicles such that a defect in its design or manufacture is essentially a defect in the vehicle itself? Or is the timing chain system an independent system such that a defect in its design or manufacture is a separate matter that in turn can cause damage to other property – i.e. the rest of the vehicle?

[54] In *Winnipeg Condominium*, the malfunctioning system was traced to defective metal ties anchoring the building's exterior cladding, causing a large section of the cladding to come loose and fall to the ground. The Court found that the metal ties were part and parcel of the building, and that in causing damage to the building the defective ties did not cause damage to "other property": *Ibid*., at paras 14-16.

[55] In other words, if the defective component is an independent system considered on its own, then a malfunction can be said to cause damage to property – e.g. to the vehicle's engine or to the vehicle itself. On the other hand, if the defective component is part and parcel of the vehicle – i.e. to the very property which is damaged – then the damage is purely economic loss. The former is

compensable under ordinary tort principles, whereas the latter is only compensable if the physical damage is actually incurred or if it creates an imminent risk of physical damage.

[56] Counsel for the Defendants take the view that the timing chain system is fully integrated as part of the vehicle itself. Counsel for the Plaintiffs are of the view that the timing chain system can be analogized to Lord Bridge's example of a boiler in a residential building. From the Plaintiffs' perspective, the timing chain system forms a separate system that is independent from the whole in which it is situated.

[57] With respect, Plaintiffs' position is both counter-intuitive and contrary to evidence they have themselves adduced. In the first place, it is self-evident that the timing chain system, like a building's cladding, is not something that has any function outside of its place as a component of larger whole. Secondly, Dr. Frise in his report makes the case that, as Plaintiffs' counsel say in their factum, "The defect lies in the chain assembly system, a core part of the engine that is crucial to the operation of an internal combustion engine."

[58] This integration of the defective system with the vehicle as a whole forms an important part of the Plaintiffs' case, as set out at paragraph 36 of the Fresh as Amended Statement of Claim: "The chain assembly system is integral to the functioning of the N20 engine and, accordingly, of the vehicles." Taking the pleading at face value, as I must in analyzing the proposed cause of action under section 5(1)(a) of the *CPA*, it is evident that the vehicle, or the rest of the N20 engine, is not "other property" with respect to the timing chain system.

[59] With the exception of their claim for the costs of repairs incurred as a result of a breakdown of the engine or to avert a truly imminent breakdown, the Plaintiffs' claim is for pure economic loss. In accordance with the principles laid out in *Winnipeg Condominium* and *Maple Leaf Foods*, such loss is unrecoverable in tort. Accordingly, all of the negligence-based claims contained in the Plaintiffs' pleading lack a crucial element of the cause of action, with the exception of claims for recovery of repair costs incurred in respect of personal or (other) property damage or imminent damage.

[60] The Plaintiffs also plead breach of the duty to warn. That claim would require the Plaintiffs to plead that the negligent design or manufacture of the Class Vehicles caused them to suffer personal injury or property damage – i.e. damage to other property, in the sense described by Lord Bridge in *Murphy* and adopted by LaForet J. in *Winnipeg Condominium* – and that the damage would have been avoided had the Defendants provided a warning. That, however, is not what is contained in the Fresh as Amended Statement of Claim. It is also not what Dr. Frise or any other expert opined on in terms of a damage claim, so there is no factual basis of support for that failure to warn claim even if one assumes that it is properly pleaded.

[61] What the Plaintiffs plead is that the vehicles that they purchased are worth less than the amount paid. Just as that alleged diminution in value cannot be recovered directly through a claim for negligent design or manufacture, it also cannot be recovered indirectly through a claim for

negligent failure to warn. Since the nature of the harm pleaded is pure economic loss, no cause of action for failure to warn has been properly pleaded and no basis in fact has been adduced.

[62] In sum, there is a cause of action pleaded in the Fresh as Amended Statement of Claim. But that cause of action must be reduced to eliminate any claim for pure economic loss.

[63] The only cause of action that can be certified is the claim of negligent design and/or manufacture of the timing chain systems in the Class Vehicles resulting in a loss reflected in the cost of repairing damage incurred to an engine in a Class Vehicle, or the cost of repairing an engine in a Class Vehicle to avert imminent damage to persons or property.

b) Section 5(1)(b) – class definition

[64] The proposed class is defined as: "all persons, except for Excluded Persons, who purchased or leased model year 2012-2015 BMW vehicles in Canada equipped with the N20 Engine."

[65] The definition is objective and membership of the class does not depend on the merits of the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 38. The class membership has a rational connection to the proposed common issues as discussed be in part III(c) of these reasons for decision: *Hollick v. Toronto (City)*, [2001] 3 SCR 158, at para 19.

[66] Given the nature of the claim, however, the class definition appears on its face to be overly broad. The proposed representative Plaintiffs need not demonstrate success on the merits at this stage of the proceedings, but the class must be defined in a way that is limited to those prospective class members who actually have a claim against the Defendants. Otherwise, it will be "fatally over-inclusive": *Dennis v. Ontario Lottery and Gaming Corporation* (2013), 116 OR (3d) 321, at para 61 (CA).

[67] The class cannot, therefore, include individuals whose claim against the Defendants is based on a cause of action not recognized at law. As the Supreme Court of Canada has said, "It falls to the putative representative to show that the class is defined sufficiently narrowly": *Hollick*, at para 20.

[68] Defendants' counsel submit that there is also an indeterminacy problem embedded in the proposed class definition. As the Plaintiffs have defined it, the proposed class is not limited to BMW owners/lessees who allegedly suffered timing chain issues with the Class Vehicles; it includes all persons who ever purchased or leased a Class Vehicle. Without a temporal cutoff date, the proposed class would include persons, currently unknown, who at some point in the future purchase or lease a Class Vehicle.

[69] In order to pass the certification hurdle, the class definition must therefore be read down in two ways. The class is not to be left open into the indefinite future. Rather, as a matter of ordinary interpretation, the class is limited to those who have incurred repair expenses related to the timing

chain system in their vehicles as of the date of this judgment. The class definition will not be temporally open-ended once this certification decision is rendered.

[70] Furthermore, the class is to be restricted to persons who have a cause of action in tort as discussed in part III(b) above. That is, it is to be composed only of persons who purchased or leased Class Vehicles in Canada equipped with the N20 engine who have incurred repair expenses relating to damage incurred, or damage imminently averted, due to malfunction or imminent malfunction of their vehicle's timing chain system.

[71] As indicated in part I above, of the 66,600 owners/lessees of the Class Vehicles, roughly 800 have presented warranty claims. Presumably, those individuals will have incurred no repair costs since their repairs were covered by the warrant. As such, they will have suffered no recoverable damages.

[72] The class could, however, contain other individuals who, like the Plaintiffs had they decided to repair their engines rather than sell their vehicles, incurred repair costs in the aftermath of the failure of their timing chain system; there is no one identified in the record as being in this category, but that does not mean that no one like that exists. The class could also contain owners/lessees of the Class Vehicles who, as described in *Mueller*, at para 79, presented warranty claims that the Defendants did not accept. The class could also contain persons who were unaware of the warranty and who incurred the repair costs on their own; I note that the record contains at least some basis of fact for the allegation that the warranty program was not well publicized and could have been missed.

[73] The numerical threshold under section 5(1)(b) of the *CPA* is minimal; the statute requires only that "there is an identifiable class of two or more persons". Although the evidence is not conclusive about any one class member's claim at this stage, the expert evidence of how the claimed losses might occur, combined with the statistical likelihood of losses suggested by the number of warranty claimants, provides sufficient evidence to satisfy the section 5(1)(b) requirement of an identifiable class of two or more.

[74] I find for the purposes of certification that there are at least two persons that have a cause of action and that can constitute a class.

c) Section 5(1)(c) – common issues

[75] Counsel for the Plaintiffs divides the proposed common issues conveniently into three categories: i) causation, ii) standard of care, and iii) damages. The proposed common issues are:

i. Causation Common Issues

> COMMON ISSUE 1: Were the Vehicles designed and/or manufactured by BMW with one or more design and/or manufacturing defects that make the Vehicles prone to sudden loss of power while they are being driven?

COMMON ISSUE 2: If the answer to common issue (1) is yes, does any such design and/or manufacturing defect make the Vehicles dangerous?

COMMON ISSUE 3: [withdrawn by Plaintiffs]

COMMON ISSUE 4: If the answer to common issue (2) or (3) is yes, when did the Defendants know or ought they to have known of the dangerous design and/or manufacturing defects?

ii. Standard of Care Common Issues

COMMON ISSUE 5: Did the Defendants, or any of them, owe a duty of care to the Class with respect to the design, manufacture and/or testing of the Vehicles?

COMMON ISSUE 6: If the answer to common issue (5) is yes, what is the standard of care applicable to the Defendants, or any of them, with respect to the design, manufacture and/or testing of the Vehicles?

COMMON ISSUE 7: Did the Defendants, or any of them, breach the standard of care owed to the Class in respect of the design, manufacture and/or testing of the Vehicles? If so, when and how?

COMMON ISSUE 8: Did the Defendants, or any of them, owe a duty of care to (i) warn the Class of the dangerous defects in the Vehicles and of the serious safety risks associated with them; and/or (ii) recall and repair the Vehicles?

COMMON ISSUE 9: If the answer to common issue (8) is yes, did the Defendants, or any of them, breach the relevant standard of care by (i) failing to warn the Class of the dangerous defects in the Vehicles and of the serious safety risks associated with them; and/or (ii) failing to recall and repair the Vehicles?

iii. Damages Common Issues

COMMON ISSUE 10: Can the amount of damages payable by the Defendants, or any of them, be determined on an aggregate basis?

COMMON ISSUE 11: If so, who should pay such damages to the Class and in what amount?

COMMON ISSUE 12: Are punitive damages capable of being determined as a common issue at trial?

[76] Having already determined that the causes of action and the class membership are limited by the *Winnipeg Condominium/Maple Leaf Foods* principles – i.e. only those claims by persons

who have incurred repair costs as a result of a malfunctioning timing chain system or in averting an imminent malfunction of the timing chain system – the common issues must be read within the same limitations in mind. Moreover, the proposed common issues must conform with my conclusion that the Plaintiffs have not properly pleaded a cause of action for breach of a duty to warn.

[77] With the exception of common issue 9 discussed below, the causation questions all present valid common issues. As Plaintiffs' counsel point out in their factum, they are shared threshold questions which do not require evidence from individual class members and which are focused primarily on the Defendants' conduct. These questions are "a substantial and necessary factual link in the chain of proof leading to liability for every member of the class": *Jones v. Zimmer GmbH*, 2013 BCCA 21, at para 36.

[78] Likewise, the standard of care questions can be answered in common for the class. There are no individual issues raised here, and, again, the focus of the questions is on the Defendants' conduct which is, of course, common to all class members.

[79] In terms of the the negligent design common issues, the report by Dr. Frise provides some basis in fact for the allegations and a "plausible methodology" to be deployed in analyzing the claim. Although the Defendants take issue with Dr. Frise's conclusions, there is no evidence countering him that shows that his methodology for assessing the vehicles' design is unworkable. The Defendants' objections are essentially merits-based and will have to be tested at a common issues trial.

[80] Dr. Frise shows at least some basis for demonstrating, on a class wide basis, that the design of the timing chain system in the N20 engine is capable of malfunctioning in the way that is alleged. His evidence also provides some basis for demonstrating that an alternative design could have been used which would have been both economical and effective in correcting the defect. The Plaintiffs are not required to "prove every scientific aspect of their case at the certification stage", as long as they have a plausible methodology and expert evidence supporting that methodology": *Kibalian v Allergan Inc.*, 2022 ONSC 7116, at para 36; *Kirsh v. Bristol-Myers Squibb*, 2020 ONSC 1499, at para 63, citing *Pro-Sys*, *supra*, at paras 125-6.

[81] Proposed common issue 9 is premised on the duty to warn. As indicated in part III(a) above, there is no proper pleading of breach of duty to warn before me. While common issue 9 asks about recalling and repairing the Class vehicles, the Fresh as Amended Statement of Claim spoke of replacing them or compensating the Plaintiffs for having purchased the vehicles in the first place. Accordingly, the proposed common issue does not match the pleading, and the pleading does not meet the criteria for liability for failure to warn. Proposed common issue 9 must therefore be removed.

[82] Turning to the proposed common issues on damages, these, too, must be read in light of my conclusions with respect to the limited nature of the damages that can be claimed under

Winnipeg Condominium/Maple Leaf Foods. Those limitations require actual repair expenses to have been incurred by a claiming class member.

[83] That said, the aggregate damages questions in proposed common issues 10 and 11 are workable here. I am conscious of the fact that, as the British Columbia Court of Appeal has observed, "In some cases, the complexities inherent in … changing manufacturing techniques… have made the formulation of a common question problematic": *Ernewein v. General Motors of Canada Ltd*., 2005 BCCA 540, para 33. However, that complexity does not seem to be present when it comes to the costs of repairing the vehicle engines in issue here.

[84] The Defendants' responses to written interrogatories put to them by Plaintiffs' counsel provide some evidence of a uniform cost for repair of the timing chain system – apparently, somewhere in the range of $4,000 per vehicle. The record contains a workable methodology for potentially calculating the amount in the aggregate. As such, common issues 10 and 11 are approved.

[85] As for punitive damages, that assessment is premised on the Defendants' conduct. It is therefore capable of being addressed on a common basis. The Plaintiffs say that the Defendants' negligence with the timing chain system was high handed and known in advance; the Defendants say that any injuries are minimal and accidental. Those determinations will have to be made during the course of a common issues trial.

[86] Whether this is or is not an appropriate case for punitive damages can be left to the common issues trial judge in answering common issue 12.

d) Section 5(1)(d) – preferable procedure

[87] The question of whether a class action is the preferable procedure under the circumstances requires the court to ask "whether a class proceeding would be a fair, efficient and manageable method of resolving the claim": *Shah v. LG Chem, Ltd.* (2018), 142 OR (3d) 721, at para 123 (Ont CA). It also entails an assessment of whether litigation on a class-wide basis will serve the goals of access to justice, behaviour modification, and judicial economy: *Hollick*, *supra*, at para 30.

[88] I see no reason to conclude that a class proceeding is not the preferable procedure here. In fact, Defendants' counsel offer no alternative procedure that will better accomplish the tasks at hand. The only alternative would be individual lawsuits, which is not a realistic proposition.

[89] As indicated above, the Defendants' own evidence is that the costs of repair of any timing chain system would be in the range of $4,000. In that light, the costs of litigation for any individual claimant would be disproportionate to the potential remedy. This, then, makes a class action the preferable procedure in which to pursue the class members' claims. "Class actions improve access to justice by making economical the prosecution of claims that any one class member would find too costly to prosecute on his or her own": *Hollick*, at para 15.

e) Section 5(1)(e) – suitable representative Plaintiff and litigation plan

[90] The Plaintiffs have produced a workable litigation plan that is similar to other plans in certified class actions. In any case, it is well settled that a litigation plan is a work in progress and can be adapted to circumstances as the action proceeds ahead: *Cloud*, at para 95.

[91] The real issue here is that of the representative Plaintiffs themselves. The ideal representative for a case like this was described by the British Columbia Supreme Court in *Mueller*, at para 24, 26:

> [24] In April 2008, Mr. Mueller purchased a used 2007 Nissan Xterra from a Nissan dealer in BC. In February 2017, he started noticing his engine producing "ticking noises". He took the vehicle to a Nissan dealership. He was advised that the timing chain would need repair, but he should come back when the problem got worse. Ultimately, he returned to the dealership and paid approximately $2,579.31 to have the timing chain repaired…
>
> [26[…I find that Mr. Mueller is an appropriate representative plaintiff.

[92] Neither of the Plaintiffs in the present case fit that pattern. Both of them disposed of their vehicles by selling them in "as is" condition rather than repairing them. Their claim of loss therefore demands careful scrutiny.

[93] As noted in part III(a) above, in *Maple Leaf Foods* the Supreme Court of Canada emphasized that a legally cognizable loss is an essential component of a cause of action. In doing so, the Court indicated, at para 54, that "the liability rule in *Winnipeg Condominium* protects a right to be free of a negligently caused real and substantial danger, not to the continued use of a product. If the danger can be removed without repair, the right is no less vindicated."

[94] And while the Court was clear that this logic will for the most part apply to everyday consumer goods and not to an expensive item like an automobile, "it is the feasibility of discarding the thing as the means of averting the danger which will determine whether the plaintiff's loss is recoverable": *Ibid*., at para 51. Accordingly, "where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's rights, along with the basis for recovery, falls away": *Ibid*., at para 50.

[95] The only qualification to this that the Supreme Court provides is found in a brief comment dealing with a claimant's recovery of expenses that might have been incurred in the course of disposing of the damaged property. It is clear that what the Court is referring to is not the loss of value entailed in the disposition of the damaged good – that would be the pure economic loss held to be unrecoverable – but any out-or-pocket costs entailed in the disposal. Thus, the Supreme Court notes, parenthetically, that, "(To be clear, if the plaintiff incurs a reasonably foreseeable cost in

discarding the product – such as a regulatory disposal fee – that is recoverable as a cost of removing the danger)": *Ibid.*, at para 54.

[96] One of the Plaintiffs, Ms. North, relates in her affidavit that she encountered her engine troubles while driving on the highway between Niagara Falls and Toronto. She explains that she pulled over onto the service road abutting the highway, at which point her engine "locked in place" and the vehicle would not drive. Ms. North then states that she had her car towed by CAA to Budds' BMW Oakville, where it was inspected and she was given an estimate of repair costs.

[97] Ms. North deposes that the repair costs would have been prohibitive, so she instead decided to sell her car in "as is" condition to a buyer in Montreal for the price of $1,500. The invoice from Budds' dated October 6, 2017, which is appended to Ms. North's affidavit, indicates that there was no charge for the mechanic's examination of her vehicle or for providing the detailed estimate of repair costs. There is also no indication in the affidavit that CAA charged for the towing service (which was, presumably, included in her membership).

[98] Accordingly, Ms. North is not a proper representative Plaintiff for the purposes of section 5(1)(e) of the *CPA*. "[T]the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant": *Sondhi v. Deloitte Management Services LP*, 2018 ONSC 271, at para 37, citing *Drady v. Canada (Minister of Health)*, [2007] OJ No 2812 (SCJ), at paras. 36-45, and *Attis v. Canada (Minister of Health)*, [2003] OJ No 344 (SCJ), at para. 40, aff'd [2003] OJ No 4708 (CA). Since Ms. North lacks a cause of action against the Defendants, she does not meet these criteria.

[99] The other Plaintiff, Mr. Rego, indicates in his affidavit that he likewise encountered engine troubles while driving on the QEW near Oakville, and likewise had his vehicle towed by CAA (again, without cost). Interestingly, his car was brought to the same service shop as Ms. North's car: Budds' BMW Oakville. Again, a mechanic at Budds' inspected Mr. Rego's vehicle and provided him with a detailed estimate of repair costs. Like Ms. North, Mr. Rego concluded that the repair costs would be prohibitive, and he ultimately sold his car in "as is" condition to the mechanic at Budds' for $7,500.

[100] While there are many similarities between Ms. North's and Mr. Rego's experiences as related in their respective affidavits, there is one noteworthy difference. It appears that, unlike Ms. North, Mr. Rego was charged a fee for the inspection and diagnosis of his engine's problem. The invoice from Budds' dated March 6, 2018, which is appended to Mr. Rego's affidavit, indicates that there was a service charge of $185.89 ($164.50 + $21.39 HST). This service charge constitutes what the Supreme Court describes as a "reasonably foreseeable cost in discarding the product", analogous to a regulatory disposal fee: Maple Leaf Foods, at para 54. It would therefore be a recoverable loss in tort under the *Maple Leaf Foods/Winnipeg Condominium* principle of recovery.

[101] Accordingly, Mr. Rego is a proper representative Plaintiff for the class. He has an out-of-pocket loss related to a repair expense, and therefore can sustain a cause of action. It is a smaller claim than described in the Fresh as Amended Statement of Claim, but that is not relevant to his ability to fairly and adequately represent the class: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 SCR 534, at para 41.

[102] It is in the nature of class actions that the class may often be composed of individuals with small claims, and the representative Plaintiff is no exception to the rule that individuals with small claims make for proper class action claimants. Proceedings under the *CPA* are designed to facilitate claims that would not on their own justify the expense of litigation: see Garry D. Watson, "Class Actions: The Canadian Experience" (2001) 11 Duke J. Comp. & Int'l L. 269, at 269; Ward K. Branch, *Class Actions in Canada*, looseleaf (Aurora: Canada Law Book, 2008), at paras 2.30, 6.20; Matthew Good, "Access To Justice, Judicial Economy, and Behaviour Modification: Exploring the Goals of Canadian Class Actions", (2009) 47 Alta. Law Rev. 185, at 192.

[103] Since there is no requirement under section 5(1)(e) or anywhere else in the *CPA* that there be more than one representative Plaintiff, Mr. Rego will suffice for certification purposes. He has no conflict with the rest of the class, and he appears to be up to the task of instructing counsel and doing what is necessary to steer this action and drive it forward.

IV. Disposition

[104] The action is certified as a class action pursuant to section 5(1) of the *CPA*.

[105] The cause of action is as stated in paragraph 63 above. The class is defined in accordance with the directions contained in paragraphs 69 and 70 above. The common issues are as set out in paragraph 75 above, with the exception of proposed common issues 3 and 9 which are eliminated.

[106] The Plaintiff, Dinis Rego, is the sole representative Plaintiff. The style of cause is to be amended to remove Patricia North as Plaintiff.

[107] A previous iteration of this claim, styled *Rubic v. Bayerische Motoren Werke AG et* al., Court file no. CV-17-00585133-00CP, is discontinued without costs, on consent of all parties.

[108] The result of this motion is mixed. The Plaintiffs have succeeded in having the matter certified. The Defendants have succeeded in narrowing the cause of action and reducing the class. There will be no costs of the motion awarded for or against either side.

Released: October 5, 2023

Morgan J.

CITATION: Rego v. Bayerische Motoren Werke AG, 2023 ONSC 5244
OURT FILE NO.: CV-17-584555-00CP
DATE: 20231005

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

PATRICIA NORTH and DINIS REGO

Plaintiff

– and –

BAYERISCHE MOTOREN WERKE AG, BMW OF NORTH AMERICA, LLC and BMW CANADA INC.

Defendants

REASONS FOR JUDGMENT

E.M. Morgan J.

Released: October 5, 2023