COURT OF APPEAL FOR ONTARIO

CITATION: North v. Bayerische Motoren Werke AG, 2025 ONCA 340
DATE: 20250502
DOCKET: COA-23-CV-1180

Fairburn A.C.J.O., Coroza and Sossin JJ.A.

BETWEEN

Patricia North and Dinis Rego

Appellants

(Plaintiffs/Respondents by way of cross-appeal)

and

Bayerische Motoren Werke AG, BMW of North America, LLC and BMW Canada INC.

Respondents

(Defendants/Appellants by way of cross-appeal)

Proceeding under the *Class Proceedings Act, 1992*

Alex Dimson, Stefani Cuberovic, Justin Smith and David Wingfield, for the appellants/respondents by way of cross-appeal

Peter J. Pliszka, Zohaib I. Maladwala and Hussein Fawzy, for the respondents/appellants by way of cross-appeal

Heard: November 12, 2024

On appeal from the order of Justice Edward M. Morgan of the Superior Court of Justice, dated October 5, 2023, with reasons reported at 2023 ONSC 5244.

Fairburn A.C.J.O.:

A. OVERVIEW

[1] This appeal and cross-appeal arise from a decision on a certification motion. The certification judge certified the action but on a much narrower basis than what was proposed.

[2] Patricia North and Dinis Rego (the "plaintiffs") commenced a proposed class action grounded in negligence against Bayerische Motoren Werke AG, BMW of North America, LLC and BMW Canada Inc. (collectively "BMW"). Each plaintiff acquired a BMW equipped with an N20 engine. Each contends that, several years after acquiring their BMW, their vehicle suddenly lost power as a result of the failure of their vehicle's chain assembly system, resulting in catastrophic damage to the vehicle's engine. The plaintiffs sold their vehicles "as is" instead of repairing them, given the high repair costs quoted to them.

[3] The plaintiffs purport to represent a class of some 66,600 current and former owners and lessees of BMW vehicles, model years 2012 to 2015, with allegedly defective N20 engines.

[4] The Fresh as Amended Statement of Claim that was before the certification judge alleges that the class vehicles were dangerous and defective goods. It is alleged that BMW's negligence in designing, engineering, testing and manufacturing the class vehicles resulted in damage to the plaintiffs and other class members. This included the costs of averting the real, substantial and

imminent danger of personal injury or death by replacing the vehicles. It is also alleged that BMW owed the plaintiffs and class members a duty to warn consumers of serious safety risks associated with the vehicles, and had they been warned they would not have leased or purchased them. There is no claim that the plaintiffs or any class members suffered any physical harm as a result of BMW's negligence. Nor is it alleged that property, other than the vehicles themselves, suffered any damage.

[5] The certification judge declined to certify the duty to warn claim and limited the scope of the negligent design/manufacturing claim. He found that there was "no basis in fact for asserting that design or manufacturing defects exist in *all* of the Class Vehicles" (emphasis in original). In the end, he certified the causes of action of negligent design/manufacturing "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." The certification judge declined to award costs given the split success on the motion.

[6] The plaintiffs challenge the certification judge's decision. They raise four main issues:

> • Whether Ms. North has pleaded losses recoverable in negligence (even though she incurred no repair or disposal costs);

- Whether the certification judge erred in not certifying the failure to warn claim;

- Whether the certification judge erred in failing to certify the claim for breach of the duty to compensate for shoddy and dangerous goods; and

- Whether the certification judge erred in making a distributive costs award.

[7] In the plaintiffs' submission, the certification judge's decision results in an injustice because it excludes Ms. North and class members who incurred no repair or disposal costs. In the case of Ms. North, she reasonably decided not to repair her vehicle since it was uneconomic and now that counts against her. As for class members, BMW never provided them with notice of the defect so that they would know of the need to repair their vehicles.

[8] BMW cross appeals. It submits that not only was the certification judge correct in narrowing the scope of the class action but, indeed, he ought to have either narrowed it even further or dismissed the certification motion in its entirety. In particular, BMW raises the following issues:

- Whether the certification judge erred in not dismissing the certification motion because:

  - he found that the plaintiffs had failed to establish some basis in fact that a design or manufacturing defect was common among class vehicles;

  - the plaintiffs failed to plead losses recoverable in negligence since they sought recovery of the replacement value of the vehicles; and

- there was no adequate representative plaintiff, since Mr. Rego did not incur a compensable loss (contrary to the certification judge's finding that he had incurred a recoverable disposal cost) and, as the motion judge found, Ms. North had no viable cause of action

- Whether, in the alternative, he erred in not further narrowing the class to exclude those owners and lessees who paid engine repair costs after the failure of a class vehicles' timing chain system

[9] As explained below, I would dismiss the appeal, allow the cross-appeal, and set aside the order below certifying this action as a class proceeding. With respect, the certification judge erred in certifying causes of action in negligent design/negligent manufacturing "resulting in a loss reflected in the cost of repairing damage incurred to an engine in a Class Vehicle" and in defining the class to include persons who incurred such costs. He also erred in concluding that Mr. Rego had a cause of action and therefore was a suitable representative plaintiff. Without any representative plaintiff to advance the remaining very narrow claim for pure economic loss, certification of this action is not available.

B. DECISION BELOW

[10] The certification judge began his decision by describing the "[n]ature of the claim". In the course of that discussion, he reviewed the evidence of the plaintiffs' expert, Dr. Peter Frise, a professor of mechanical and automotive engineering at the University of Windsor. Dr. Frise opined 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." The certification judge found that Dr. Frise's conclusion that there was a universal problem with the timing chain system in N20 engines and that that was indicative of negligence in the design or manufacture of the engine was "speculative and largely unsupported." The certification judge concluded, in this portion of his reasons, that "the record … contains no basis in fact for asserting that design or manufacturing defects exist in *all* of the Class Vehicles" (emphasis in original).

[11] The certification judge then considered each of the certification criteria under s. 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.[1]

Section 5(1)(a) – cause of action

[12] The certification judge concluded that there was only one valid cause of action and that it was narrower than what was proposed by the plaintiffs:

> 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.

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[1] Amendments to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, came into force on October 1, 2020. While the certification test remains largely unchanged, subsection (1.1), which introduces the requirements of "predominance" and "superiority", qualifies the question of whether a class proceeding is the "preferable procedure" under s. 5(1)(d). However, given that this action was commenced before that time, the old s. 5(1)(d) continues to apply.

[13] The certification judge explained that the reason for narrowing the negligent design/manufacturing claim was to limit it to a claim for legally cognizable damages. As a matter of law, “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 damages”. In this case, the certification judge was prepared to read the Fresh as Amended Statement of Claim as implicitly including a claim for repair costs.

[14] The certification judge concluded that the plaintiffs’ duty to warn claim was not viable because they had failed to plead that the negligent design or manufacture of the class vehicles caused them to suffer personal injury or property damage and that the damage would have been avoided had BMW provided a warning. Rather, they had pleaded that the vehicles they purchased are worth less than the amount paid. Since the nature of the harm pleaded was pure economic loss, no cause of action for failure to warn had been properly pleaded. Furthermore, even if it were properly pleaded, no basis in fact had been adduced.

Section 5(1)(b) – identifiable class of two or more persons

[15] The certification judge found that this criterion was met, although he narrowed the proposed class:

> [T]he 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.
>
> Furthermore, the class is to be restricted to 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.
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> …
>
> [T]he expert evidence of how the claimed losses might occur, combined with the statistical likelihood of losses suggested by the number of warranty claimants,[2] provides sufficient evidence to satisfy the section 5(1)(b) requirement of an identifiable class of two or more.

Section 5(1)(c) – common issues

[16] The 11 proposed common issues fell into three categories: (1) causation; (2) standard of care; and (3) damages. The certification judge read them down to conform to his cause of action and class definition analysis. The questions are set out in full in Appendix "A".

[17] In the course of discussing the common issues, the certification judge found that "the report by Dr. Frise provides some basis in fact for the allegations and a

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[2] BMW issued an extended warranty in December 2018. That warranty contained a service notice to technicians at authorized BMW retailers advising that some vehicles with an N20 engine could experience a "whining notice" that would increase in frequency with a "higher engine RPM" due to "wear on the engine oil pump chain drive sprockets." 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 was valid for up to seven years or 112,600 kms from the date of purchase of the vehicle. Some 800 vehicles were serviced under the warranty. The warranty specified that it was not a recall and that repair was not prophylactically required.

'plausible methodology' to be deployed in analyzing the claim." On the cross-appeal, BMW argues that this finding is inconsistent with the certification judge's earlier finding that the record contains "no basis in fact for concluding that there is a universal problem with the design or manufacture of the N20 engine and the timing chain system."

Section 5(1)(d) – preferable procedure

[18] The certification judge found that this criterion was met. This finding is not challenged on the appeal or cross-appeal.

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

[19] The certification judge found that this criterion was met. There was a workable litigation plan and a suitable representative plaintiff. Mr. Rego was suitable because he had a valid cause of action. Unlike Ms. North, he had incurred a "reasonably foreseeable cost in discarding" his BMW (i.e., a legally cognizable loss) – a finding that is challenged on the cross-appeal. In contrast, Ms. North was not a suitable representative plaintiff because she had no legally cognizable loss and so lacked a valid cause of action.

Costs

[20] The certification judge declined to award costs against either side since the result of the motion was mixed.

Disposition

[21] The certification judge certified the action but on a considerably narrower basis than what was proposed by the plaintiffs. His order includes the following paragraphs. Both sides take issue with the underlined passages:

> 2. **THIS COURT ORDERS** that the certified causes of action are negligent design and negligent manufacturing of the timing chain systems in model year 2012-2015 BMW vehicles equipped with the N20 engine in Canada (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.
>
> 3. **THIS COURT ORDERS** that the certified 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 (the "**Class Vehicles**"), and who, prior to October 5, 2023, 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. [Emphasis added.]

C. LEGAL PRINCIPLES

[22] A key legal issue in this case is the type of losses recoverable at law in a negligence action involving an allegedly defective product. Some related issues that arise include: (1) whether the plaintiffs pleaded actual physical loss (as opposed to pure economic loss); (2) whether Ms. North has a valid cause of action

if she incurred no repair or disposal costs; and (3) whether the certification judge applied the "complex structure theory" and, if so, whether he erred. In order to answer these and other questions raised by the parties, it is helpful to start by reviewing the relevant legal principles.

(1) Pure economic loss v. claim for damages arising from injury to person or property

[23] This case highlights the distinction between a pure economic loss claim and a traditional negligence claim.

[24] Pure economic loss is economic loss unconnected to a physical or mental injury to the plaintiff's person or physical property: *1688782 Ontario Inc. v. Maple Leaf Foods Inc.*, 2020 SCC 35, [2020] 3 S.C.R. 504, at para. 17, aff'd 2018 ONCA 407, 140 O.R. (3d) 481.

[25] The legal distinction between a standard negligence claim and a claim for pure economic loss relating to a defective product is explained in Lewis N. Klar, *et al.*, *Remedies in Tort*, Vol. 3 (Toronto: Thomson Reuters, 2024), at §23:23:

> In terms of liability, the common [law] draws a significant distinction between a product that is damaged by an external force or incident and a product that is inherently flawed and likely to become damaged and perhaps a safety risk to others. Whereas the former gives rise to a standard negligence claim, the latter raises difficult questions about the recovery of pure economic losses.

[26] So, for example, in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, La Forest J. observed that the losses claimed by the condominium corporation were all quite clearly under the category of “economic loss”. The corporation claimed damages in excess of $1.5 million, representing the cost of repairing the condominium building subsequent to the collapse of some of its exterior cladding. The corporation did not claim that anyone was injured by the collapse or that the collapse damaged any of its “other property”: *Winnipeg Condominium*, at paras. 13-14. Rather, as La Forest J. explained, “its claim is simply for the costs of repairing the allegedly defective masonry and putting the exterior of the building back into safe working condition”: *Winnipeg Condominium*, at para. 13.

[27] Building on *Winnipeg Condominium*, the majority in *Maple Leaf Foods* clarified the basis and limits of recovery for pure economic loss arising from shoddy or defective goods.

[28] The common law imposes liability for negligent interference with and injury to “the rights in bodily integrity, mental health and property”: *Maple Leaf Foods,* at para. 18. There is no general right, in tort, that protects one from the negligent or intentional infliction of pure economic loss. And, to be sure, recovery of pure economic loss is the exception and not the rule.

[29] The current categories of pure economic loss incurred between private parties include “the negligent supply of shoddy goods or structures”: *Maple Leaf Foods*, at para. 21. However, the fact that a claim arises from a particular kind of pure economic loss does not necessarily signify that such loss is recoverable. Rather, the categories are analytical tools adopted “for ease of analysis in ensuring that courts treat like cases alike”: *Maple Leaf Foods*, at para. 22. To establish liability, the plaintiff must prove all of the elements of the tort of negligence, including that the plaintiff sustained damage.

[30] Generally speaking, there is no liability for negligence “in the air” and no right to be free from the “*prospect* of damage”, only a right not to suffer damage resulting from the “exposure to unreasonable risk”: *Maple Leaf Foods*, at para. 44, citing *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 33 (emphasis in original). That said, the law will view the plaintiff as having sustained actual injury to person or property where a design or construction defect poses a real and substantial danger and the plaintiff incurs costs in preventing the injury from occurring: *Maple Leaf Foods*, at para. 45. In other words, economic loss incurred to avert danger “is analogized to physical injury to the plaintiff’s person or property”: *Maple Leaf Foods*, at para. 45.

[31] In such cases, the scope of recovery is limited to the costs of averting real and substantial danger, as explained at paras. 48-49 of *Maple Leaf Foods*:

> It follows that the normative basis for the duty not only limits its scope, but in doing so also furnishes a principled basis for limiting the scope of recovery. As La Forest J. explained [in *Winnipeg Condominium*, at para. 36], the potential injury to persons or property grounds not only the duty but also one's entitlement to "the cost of repairing the defect", that is, the cost of mitigating the danger by "fixing the defect and putting the building back into a non-dangerous state". In other words, allowing recovery exceeding the costs associated with removing the danger goes beyond what is necessary to safeguard the right to be free from injury caused to one's person or property (see *Winnipeg Condominium*, at para. 49).
>
> [W]hat a plaintiff can recover, irrespective of whether the claim is in respect of a building structure or a good, *will* be confined by the duty's concern for averting danger. The point is not to preserve the plaintiff's continued use of a product; rather, recovery is for the cost of *averting* a *real and substantial danger* of "personal injury or damage to other property" (*Winnipeg Condominium*, at para. 35). [Italics in original; underlining added.]

[32] Accordingly, there is no basis for any recovery exceeding the costs associated with removing the real and substantial danger. In the words of *Maple Leaf Foods*, "a breach of the duty recognized in *Winnipeg Condominium* exposes the defendant to liability for the cost of *averting a real and substantial danger,* and *not* of repairing a defect *per se*": *Maple Leaf Foods*, at para. 51 (italics in original; underlining added). In other words, what is protected is a right to be free of a negligently caused real and substantial danger, "not to the continued use of a product": *Maple Leaf Foods*, at para. 54. This means that if the danger can be removed without repair, "the right is no less vindicated": *Maple Leaf Foods*, at para. 54. In that situation, "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": *Maple Leaf Foods*, at para. 54 (emphasis added).

(2) The complex structure theory and damage to "other property"

[33] As will be seen, an issue in this case is the relevance of the "complex structure theory", a theory that has its source in English law.

[34] The "complex structure theory", as it later became known, stems from *D. & F. Estates Ltd. v. Church Commissioners for England,* [1989] A.C. 177, [1988] 2 All E.R. 992, at pp. 1006-7. In that case Lord Bridge mooted the possibility, in *obiter*, that in the case of a complex structure or complex chattel, damage to one part of that structure or chattel caused by a defect in another part of the same structure or chattel could arguably qualify as damage to "other property" for the purpose of applying traditional negligence principles. In other words, rather than seeing the entire structure or chattel as defective and giving rise to pure economic loss, it might be possible to see the damage arising from the defect as damage to "other property" (i.e., actual property damage). Specifically, Lord Bridge mused:

> [I]t may well be arguable that in the case of complex structures, . . . one element of the structure should be regarded for the purpose of the application of the principles under discussion as distinct from another element, so that damage to one part of the structure caused by a hidden defect in another part may qualify to be treated as damage to 'other property'.

[35] In *Winnipeg Condominium*, La Forest J. recognized that Lord Bridge had later criticized the complex structure theory in *Murphy v. Brentwood District Council,* [1991] 1 A.C. 398, [1990] 2 All E.R. 908 (H.L.). In *Winnipeg Condominium*, at para. 15, La Forest J. cited Lord Bridge in *Murphy*:

> In *Murphy*, *supra*, at pp. 926-28, Lord Bridge reconsidered and rejected the "complex structure" theory he had suggested in *D & F Estates*, criticizing the theory on the following basis (at p. 928):
>
> > The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property'.
> >
> > 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. [Emphasis added.]

[36] La Forest J. went on to express "full agreement" with Lord Bridge's criticisms of the "complex structure" theory: *Winnipeg Condominium*, at para. 15. He agreed that in cases involving the recoverability of economic loss in tort, the use of the theory serves to circumvent and obscure the underlying policy questions. Accordingly, he rejected the "complex structure" theory as articulated in *D.& F.* and accepted what Lord Bridge had to say in *Murphy*.

D. ANALYSIS

[37] Both parties raised the standard of review applicable in this case. This court has recently affirmed that the standard of review on appeal from a certification motion depends on the nature of the issue: decisions involving questions of law are reviewable on a standard of correctness, whereas determinations of fact or mixed fact and law are reviewable on a standard of palpable and overriding error: *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682, at paras. 35-37. As will be clear from these reasons, the certification judge made errors of law reviewable on a correctness standard.

[38] I now turn to the legal issues raised by the parties. To avoid repetition, I have grouped them according to theme.

(1) No claim for actual property damage or physical injury

[39] In arguing that Ms. North has a cause of action and that the certification judge erred in narrowing the certified causes of action, the plaintiffs claim that they have pleaded actual property damage, specifically damage to the N20 engines caused by the failure of the timing chain system. In other words, this is not just a case of pure economic loss.

[40] Relatedly, the plaintiffs read the certification judge as having applied the complex structure theory in concluding that there was no actual property damage. They submit that the theory is "neither relevant nor an accepted legal proposition and [they] will contest it at trial".

[41] Additionally, they submit that they have pleaded the likelihood of physical injury, and so, again, this is not a case of pure economic loss.

[42] BMW, on the other hand, submits that there is no actual property damage. They argued that even if the failure of the timing chain system caused engine damage, it is not "property" in any legally relevant sense since it is not damage to "other property". Further, the "complex structure theory" cannot be used to transform the alleged engine damage into damage to "other property". BMW also disputes that physical injury has been properly pleaded.

[43] I am not persuaded by the plaintiffs' submissions.

[44] The certification judge's cause of action analysis was driven by his view that this is a pure economic loss case and so recovery is governed by *Winnipeg Condominium* and *Maple Leaf Foods*.

[45] In the course of his s. 5(1)(a) analysis, the certification judge noted that BMW had raised the issue that the vehicles in question were "complex structures". BMW took the view that the timing chain system was fully integrated as part of the vehicle itself. The plaintiffs disagreed, arguing that the timing chain system could be analogized to Lord Bridge's example of a boiler that was installed in a residential building and then malfunctioned.

[46] In addressing that issue, the certification judge cited the passage from *Murphy*, where Lord Bridge had drawn a distinction between artificially parsing different parts of an integrated structure and a situation where a "distinct item" is incorporated into a structure and then positively malfunctions so as to inflict positive damage on the structure into which it is incorporated. The certification judge noted that the Supreme Court had cited this passage with approval. He correctly recognized that he had to determine whether it could be said that there was damage to "other property" (i.e., actual property damage). He stated:

> 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? [Emphasis added.]

[47] The certification judge did not accept that the timing chain system in this case was a "separate system that is independent from the whole in which it is situated", as the plaintiffs had argued. As he said, it is "self-evident that the timing chain system, like a building's cladding [see *Winnipeg Condominium*], is not something that has any function outside of its place as a component of larger whole." He also noted also that Dr. Frise's report makes clear that 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."

[48] Ultimately, the certification judge concluded that it is evident that neither the vehicle nor the rest of the N20 engine, were "other property" with respect to the timing chain system. In other words, this is not a traditional negligence claim but rather a claim for pure economic loss.

[49] I see no error in that conclusion, which rests upon the case as pleaded in the Fresh as Amended Statement of Claim. As para. 3 states, the "class action concerns dangerous and defective goods – the Vehicles". It is alleged that the reason that the vehicles are defective is because of the assembly chain system, which is an integral part of the vehicles. For instance, para. 36 pleads that "[t]he Chain Assembly System is integral to the proper functioning of the N20 Engine".

Paragraph 38 pleads that "[t]he purpose of the timing, or primary, chain assembly component of the chain Assembly System is to synchronise the rotation of the camshaft and crankshaft which, in turn, control the opening and closing of the valves in the engine's combustion chambers." And, para. 42 pleads that "[t]he oil pump, or secondary, chain assembly … is the component in the Chain Assembly System which drives the oil pump, enabling it to propel oil into the engine, lubricate the engine parts and protect them from the dangerous effects of friction and heat."

[50] The plaintiffs rely on *Carter v. Ford Motor Co. of Canada*, 2021 ONSC 4138, 76 C.C.L.T. (4th) 206, in arguing that Ms. North's claim is a traditional property damage claim. In my view, and respectfully, *Carter* does not assist the plaintiffs.

[51] In that case, it was alleged that when the defect in the water pump manifested, coolant leaked from the water pump into other engine parts, in some cases leading to the destruction of the engine. The certification judge held that there was a certifiable design negligence claim for those who had experienced water pump failure and whose vehicle was damaged from the water pump failure, the so-called property damage claimants. I note that in *Carter,* there was no reference to La Forest J.'s rejection of the complex structure theory or to his holding that allegedly defective products and structures should not be artificially segregated into discrete components so as to find that one component caused compensable "property damage" to another component. Therefore, there is good reason to doubt *Carter* on this particular point.

[52] On appeal, the plaintiffs also note that, although neither Ms. North nor Mr. Rego have pleaded physical injury, they have pleaded that the likely result of the alleged defect is injury to persons. For instance, the Fresh as Amended Statement of Claim, at para. 70, says that the chain assembly component poses "an unreasonable risk of personal injury or death to drivers, occupants of the Vehicles, and members of the public". This, in my view, amounts to a pleading of risk of harm, which is insufficient to ground a traditional negligence claim. As explained in *Maple Leaf Foods*, at para. 44, "there is no liability for negligence 'in the air'", because there is, quite simply, "no right to be free from the *prospect* of damage … only a right not to *suffer* damage that results from exposure to unreasonable risk" (emphasis in original).

[53] In conclusion, I agree that the certification judge correctly held that Ms. North, who has not properly pleaded damage to "other property" or to her person, has not pleaded what the plaintiffs call a traditional negligence claim.

(a) Pleading of replacement value (versus cost of repairs)

[54] On its cross-appeal, BMW submits that the only loss pleaded by the plaintiffs was the cost of replacement vehicles; the certification judge was wrong in finding that they had implicitly pleaded repair costs. BMW submits that since the replacement cost of vehicles is not recoverable as a matter of law, then the plaintiffs have pleaded no recoverable losses.

[55] In making this argument, BMW points to the following paragraphs from the Fresh as Amended Statement of Claim:

> 82. The negligence of the Defendants in the design, engineering, and testing of the Vehicles resulted in damage to the Plaintiffs and other Class Members including, but not limited to, the cost of averting the real, substantial, and imminent danger of personal injury or death by replacing the Vehicles (including those that have not suffered catastrophic engine failure) with vehicles whose engines do not fail suddenly whilst being driven.
>
> …
>
> 99. The negligence of the Defendants in the manufacturing of the Vehicles resulted in damage to the Plaintiffs and other Class Members including, but not limited to, the cost of averting the real, substantial, and imminent danger of personal injury or death by replacing the Vehicles (including those that have not suffered catastrophic engine failure) with vehicles whose engines do not fail suddenly while being driven.
>
> …
>
> 101. BMW has a duty of care to compensate the Plaintiffs and Class Members for the cost of replacing the Vehicles, because they are dangerous and present a real, substantial, and imminent danger to the Class Members, their passengers, and others on the roads on which the Vehicles are driven.
>
> 102. It is not feasible to attempt to repair the Vehicles by installing engines that use a different chain assembly system than the N20 Engine, such as a "B" series engine, because such engines cannot be swapped into the existing Vehicles without substantial re-engineering of the Vehicles or their systems.
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> …

> 111. The Plaintiffs and other Class Members have suffered and will continue to suffer damages as a result of their purchase or lease of the Vehicles and the failure by the Defendants to warn consumers that the Vehicles are dangerous and defective and of the associated safety risks.
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> 112. Class Members whose Vehicles have suffered N20 Engine failure have been forced to incur the significant expense of replacing their Vehicles.
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> 113. Class Members whose Vehicles have not suffered N20 Engine failure are driving inherently dangerous Vehicles and will be forced to incur the significant expense of averting the real and substantial danger posed by the Vehicles by replacing them with vehicles that do not pose a real, substantial, imminent, and unreasonable risk of personal injury or death. [Emphasis added.]

[56] According to BMW, the certification judge erred in determining that a claim to recover repair costs, which is not pleaded anywhere in the Fresh as Amended Statement of Claim, was somehow "subsumed by, and therefore implicitly included in, replacement costs". In BMW's submission, since the plaintiffs expressly pleaded that the class vehicles could not be repaired, it was not open to the certification judge to decide the motion on the basis that the vehicles could be repaired. Notably, there was never any motion brought for leave to amend the Fresh as Amended Statement of Claim.

[57] In response, the plaintiffs submit that the certification judge did not err in reading the pleading generously to include repair costs. They explain that it was not until several months before the certification motion was heard that they were

made aware by BMW, by way of an affidavit and written interrogatories, that instead of replacing the entire engine to avoid real and substantial harm, which is very costly, the timing chain system could be replaced with an updated timing chain system for a more modest $4,000. BMW also disclosed that it had issued an extended warranty in 2018 for the timing chain system of the N20 engine in most of the proposed class vehicles. Although they did not seek to amend the Fresh as Amended Statement of Claim prior to the certification motion, they asked the certification judge to read the pleading generously to include a claim for repair costs. BMW could have objected before the certification judge and the motion would have been adjourned, but that did not happen.

[58] I cannot accept BMW's submissions on this point.

[59] The test under s. 5(1)(a) of the *Class Proceedings Act* is similar to the test on a motion to strike. The Supreme Court has directed that on a motion to strike pleadings are to be read "as generously as possible": *Atlantic Lottery Corp. Inc.*, at paras. 88-89. The key is to focus on whether the pleadings are sufficient to place the defendant on notice of the essence of the claim and whether the facts, as pleaded, would support at least one arguable cause of action.

[60] The certification judge did not make a reversible error in reading the Fresh as Amended Statement of Claim generously. Although it is true that it refers to the cost of replacing vehicles, it does not state that the vehicles could not be repaired.

Rather, it states that it was not feasible to repair them by installing a new engine. It is silent on other forms of repair.

[61] I would also point out that there is no prejudice to BMW. In this case, the information about repairs was provided by BMW after the certification materials were filed. Although it may well have been preferable for the plaintiffs to have sought an amendment of their claim prior to the motion,[3] we were informed at the hearing of the appeal that the issue was raised at the outset of the certification motion. BMW could have sought an adjournment but there is no indication that happened.

[62] I am satisfied that the certification judge did not err in reading the pleading to include repair costs.

(b) Costs of repairing damage incurred to an engine

[63] On its cross-appeal, BMW submits that those who suffered "a loss reflected in the cost of repairing damage incurred to an engine in a Class Vehicle" have no claim. According to BMW, repair costs incurred after the failure of a class vehicles' timing chain system are not legally recoverable and so the persons incurring those expenses should not be included in the class definition. The certification judge fell

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[3] There is a strong presumption in favour of granting leave to amend. In *Fernandez Leon v. Bayer Inc.*, 2023 ONCA 629, at para. 5, this court affirmed that leave to amend a statement of claim should only be denied in the clearest of cases, when it is plain and obvious there is no tenable cause of action, the proposed pleading is scandalous, frivolous or vexatious, or there is non-compensable prejudice to the defendants.

into error, says BMW, due to an incorrect interpretation and application of the complex structure theory.

[64] The plaintiffs take the position that “repair expenses relating to damage incurred” amount to damages arising from actual compensable property damage.

[65] In my view, BMW’s position on this point has traction.

[66] The certification judge agreed that there was no damage to “other property”. As he said:

> 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. [Emphasis added.]

[67] However, in the next paragraph, he concluded that “the costs of repairs incurred as a result of a breakdown of the engine” were recoverable in tort law:

> 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. [Emphasis added.]

[68] Respectfully, if the vehicle, or the rest of the N20 engine, is not “other property”, as the certification judge correctly found, then repair costs incurred as a

result of an engine breakdown would be the costs of repairing the defective product itself. *Maple Leaf Foods* is clear that the costs of repairing a defective structure or product are only recoverable if they are necessary to avert danger; costs exceeding what is necessary to remove the danger is not recoverable through a negligence claim: *Maple Leaf Foods*, at para. 48. As *Maple Leaf Foods* explains, "[t]he point is not to preserve the plaintiff's continued use of a product; rather, recovery is for the cost of *averting a real and substantial danger* of 'personal injury or damage to other property'": *Maple Leaf Foods*, at para. 49, citing *Winnipeg Condominium*, at para. 35.

[69] In this case, it is pleaded that "once the Chain Assembly System fails, the engine is catastrophically damaged". If an engine is catastrophically damaged, it cannot be driven. Repairing the engine would serve to restore the use or functionality of the vehicle as opposed to averting any real and substantial danger. As the plaintiffs themselves acknowledge in their factum, once "[t]he engine has been destroyed … there is no further risk to life or limb and there is no danger to avert." In the words of *Maple Leaf Foods*, "[i]f the danger can be removed without repair, the right is no less vindicated": at para. 54.

[70] In the text Lawrence G. Theall, *et al.*, *Product Liability: Canadian Law and Practice* (Toronto: Carswell, 2023), at p. 9-19, the authors recognize that the limits on recovery for pure economic loss may not seem intuitive:

> It may seem odd to identify a claim for the cost of repairing a product or structure as "pure economic loss" when a defect in the product or structure itself causes damage to the whole of the product or structure. The layperson would have no difficulty finding property damage in these circumstances. However, the Supreme Court of Canada has rejected the so-called "complex structure" theory, which would allow recovery for the cost of repairs where one part damages the whole.

[71] Although this logic has bothered many courts, the legal distinction rests on the ability of parties to allocate the risk among themselves by contract: Allen M. Linden *et al.*, *Canadian Tort Law*, 12th ed. (Toronto: LexisNexis Canada, 2022), at pp. 471-472.

[72] In conclusion, I agree that the certification judge erred by certifying claims resulting in "a loss reflected in the cost of repairing damage incurred to an engine a Class Vehicle" and defining the class to include those who "incurred repair expenses relating to damage incurred" to the vehicles.

(2) Breach of the duty to compensate for shoddy and dangerous goods

[73] The plaintiffs submit that the certification judge erred in law by striking out the claim for what they describe as a breach of the established "duty to compensate for shoddy and dangerous goods": *Carter*, at para. 87; *Coles v. FCA Canada Inc.*, 2022 ONSC 5575, at para. 127; and *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2020 ONSC 1647, at para. 99. They submit that "[e]ach of the class members with vehicles in which the defect has not yet manifested are entitled to recover loss that is unconnected to injury to the plaintiff's person, or to

physical damage to property, for the costs associated with taking measures to put itself or its property 'outside the ambit of perceived danger', including out-of-pocket costs." It is wrong, submit the plaintiffs, "to strike the claims of people who have not yet repaired the chain assembly systems because they did not know of the defect or cannot afford to pay the repair cost." And they submit that it is wrong in law to suggest that because a defect may take time to manifest it is incapable of posing an imminent threat.

[74] In response, BMW submits that the certification judge made no error in "striking" the claim founded upon an alleged "duty of care to compensate for shoddy and dangerous goods", because he did not, in fact, "strike" that claim. Rather, that cause of action was certified, as were the common issues arising from it. As for the question of imminence, BMW argues on its cross-appeal that the plaintiffs have failed to plead material facts in support of imminence and so they have no cause of action.

[75] I agree with BMW that the certification judge did not err in "striking" the claim for the "duty to compensate for shoddy and dangerous goods".

[76] The "duty to compensate" language is found in a number of certification decisions, including *Carter*, at para. 87, where it was held that "manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger."

[77] In this case, the certification judge correctly recognized that, in accordance with *Winnipeg Condominium* and *Maple Leaf Foods*, the cost of repairing a dangerous product that presents a real and substantial danger is legally cognizable damage. He was prepared to certify one cause of action: "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" (emphasis added). Thus, he certified the claim the plaintiffs say was "struck".

[78] The certification judge was correct that recovery is not possible, as a matter of law, where there are no repair or disposal costs. If there is no physical injury or actual property damage, *Maple Leaf Foods* limits recoverable damages to the costs of repair or disposal to avert real and substantial danger. The plaintiffs have not pointed to any case law where plaintiffs were permitted to recover for notional or speculative repair costs, and the language of *Maple Leaf Foods*, at para. 45, talks about "expenditures incurred" or "economic loss incurred" to avert real and substantial danger.

[79] In oral argument, a good deal was made about the question of "imminent risk" and whether it was properly pleaded. According to *Maple Leaf Foods*, a "real and substantial danger" involves "imminent risk" of harm: at para. 45. According to the plaintiffs, one of the key errors made by the certification judge was

misunderstanding the notion of “imminent risk”. BMW, on the other hand, submits that imminent risk was not properly pleaded and so there is no cause of action. In light of my conclusion, explained below, that the action cannot be certified for other reasons, it is unnecessary to delve into whether “imminent risk” was properly pleaded.

(3) Duty to warn

[80] The certification judge found that the duty to warn claim did not satisfy the s. 5(1)(a) test. He found that the plaintiffs had failed to plead any loss recoverable at law, and, in any event, there was no basis in fact to support the claim:

> 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 LaForest 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.
>
> 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.

[81] On appeal, the plaintiffs submit that the certification judge erred in failing to find that their failure to warn claim was legally viable. They contend that had he continued to "read down" the claim (as he did in reading down replacement to include repair), this would have been decided differently.

[82] In *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634, at para. 20, the Supreme Court described the duty to warn imposed on manufacturers as a "duty in tort to warn consumers of dangers inherent in the use of its product of which it has knowledge or ought to have knowledge". That duty is a continuing one, "requiring manufacturers to warn not only of dangers known at the time of sale, but also of dangers discovered after the product has been sold and delivered": *Hollis,* at para. 20. Warnings must be reasonably communicated and describe any specific dangers that arise from the ordinary use of the product.

[83] Because a duty to warn claim sounds in negligence, a plaintiff must plead each of the elements of a negligence claim. The plaintiffs here submit that they have adequately pleaded each of the requisite elements, and that the certification judge made a number of errors, including in misreading their pleading and in finding that the plaintiffs suffered no compensable damage. They also argue that if the pleading is deficient, they should be granted leave to amend.

[84] In my view, the certification judge did not err in reading the pleading, which included the following paragraphs under the heading “Failure to Warn”:

> 107. The Defendants, through their employees, officers, directors and agents (including dealers), failed in their duty to warn the Plaintiffs and Class Members that the Vehicles are defective and dangerous and of the serious safety risks associated with them. In particular, the Defendants failed to warn the Plaintiffs and other Class Members that the Vehicles are defective and dangerous when the Vehicles were marketed, distributed and/or sold in Canada, at any point before the Plaintiffs and Class Members purchased or leased the Vehicles, or at all.
>
> …
>
> 110. The Plaintiffs and Class Members would not have purchased or leased the Vehicles had the Defendants, or any of them, warned them that they are defective and dangerous because the N20 Engine is prone to sudden and catastrophic failure. [Emphasis added.]

[85] As the certification judge recognized, it is not alleged that if the plaintiffs and class members had been warned that they would have averted actual physical harm or actual property damage. Rather, it is alleged that had they been warned they would have not bought a defective vehicle. I agree with the certification judge that this is not a viable cause of action.

[86] The plaintiffs do not seem to dispute this on appeal. Rather, they contend that the certification judge erred in failing to factor in his decision to read down the pleadings to include repair costs in undertaking his duty to warn analysis.

[87] In effect, the plaintiffs argue that the finding that “replacement” implicitly includes repairs also implies that their claim must be read as asserting that, if warned, they would have still purchased or leased the vehicles but would have repaired them. In my view, the certification judge did not err in not implicitly reading that in.

[88] In any event, I have difficulty seeing how that reading would assist the plaintiffs. Essentially, the claim would be that had they been warned they would have acquired defective vehicles that they otherwise would not have acquired and incurred repair costs that they otherwise would not have incurred. In other words, had they been warned they would have incurred pure economic loss (the cost of repairs), not that they would have avoided loss. I agree with the certification judge that in essence the claim is for the diminished value of unrepaired cars, which is not recoverable.

(4) No suitable representative plaintiff

[89] On its cross-appeal, BMW submits that there is no suitable representative plaintiff. In my view, BMW is correct.

[90] The certification judge held that Ms. North is not a suitable representative plaintiff since she has no valid claim. The certification judge was correct. As I have explained, Ms. North has not pleaded a claim for actual property damage or

personal injury, has not pleaded repair or disposal costs to avert real and substantial danger, and there is no valid duty to warn claim.

[91] According to BMW, the certification judge ought also to have concluded that Mr. Rego is not a suitable representative plaintiff. In BMW's view, he is in the same position as Ms. North. In particular, BMW takes issue with paras. 100-101 of the certification judge's reasons:

> 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.
>
> 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. [Emphasis added.]

[92] According to BMW, the service charge was not a "reasonably foreseeable cost in discarding the product". Rather, Mr. Rego contemplated paying repair costs to restore the utility and functionality of his non-operational vehicle and the service charge was incurred in connection with obtaining an estimate of repair costs. Since the vehicle was not operational, it was, by definition, an amount paid with a view to preserving Mr. Rego's continued use of the product.

[93] The plaintiffs disagree. They submit that it is not "plain and obvious" that Mr. Rego's service charge is not recoverable.

[94] In *Maple Leaf Foods*, at paras. 54-55, the majority discussed the recoverability of disposal costs:

> [T]here is the good whose dangerous defect *can* realistically be addressed by discarding it. This will, we expect, apply to most defective consumer goods. Again, 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. (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).
>
> Secondly, there is the kind of good like the RTE meats, for which "repair" is simply not possible. The good must, therefore, also be discarded. While in such circumstances the plaintiff may recover any costs of disposal, that is the extent of its possible recovery under this liability rule. It must be remembered that, because the right protected by this liability rule is that in the physical integrity of person or property, recovery is confined to the cost of removing a real and substantial danger *to that right* – by, where possible, discarding it. Conversely, it does not extend to the diminution or loss of *other interests* that the appellant invokes here, such as business goodwill, business reputation, sales, profits, capital value or replacement of the RTE meats. [Italics in original; underlining added.]

[95] In this case, according to Mr. Rego's affidavit, he was told that it would cost between $1,800 and $2,500 for a full diagnosis of the problem with his car. He was also told that if the problem was what the mechanic suspected it to be, the cost of

repair would be between $10,000 and $20,000. He was provided with a “diagnostic report” at a cost of $185.89, and declined to incur the cost of a full diagnosis. It is this “service charge” that the certification judge described as a “reasonably foreseeable cost in discarding the product”.

[96] According to *Maple Leaf Foods*, “a reasonably foreseeable cost in discarding the product” is recoverable “as a cost of removing the danger”: at para. 54. What is protected is “a right to be free of a negligently caused real and substantial danger, not the continued use of a product”: *Maple Leaf Foods*, at para. 54. Recovery of disposal costs “is confined to the cost of removing a real and substantial danger” to “the physical integrity of person or property”: *Maple Leaf Foods,* at para. 55. In other words, disposal costs, like repair costs, are recoverable if they are incurred to avert real and substantial danger.

[97] Although the certification judge made specific reference to para. 54 of *Maple Leaf Foods*, he did not recognize disposals are recoverable “as a cost of removing the danger”. Since Mr. Rego claims that his engine was “catastrophically damaged”, it is difficult to see how the danger was not already averted: the car was no longer driveable and so any safety threat was already removed. Accordingly, even if the fee that Mr. Rego incurred could somehow be said to be related to disposal of the car, it is nonetheless not recoverable as a “cost of removing the danger”.

[98] In conclusion, since Mr. Rego did not incur a recoverable loss, and therefore cannot sustain a cause of action in negligence, he is not a suitable representative plaintiff.

[99] The lack of any suitable representative plaintiff is fatal to the certification of the action. As this court has recognized, a representative plaintiff is not a mere nominee: *Stone v. Wellington County Board of Education* (1999), 120 O.A.C. 296 (Ont. C.A.), at para. 10. Although *Stone* was not a certification decision, the court's comments, at para. 10, about the continuation of an action absent a representative plaintiff are equally apt in this context, where it is plain and obvious that neither Ms. North nor Mr. Rego have a valid cause of action:

> Where a representative plaintiff, for reasons personal to that plaintiff, is definitively shown as having no claim because of the expiry of a limitation period, he or she cannot be said to be a member of the proposed class. The continuation of the action in those circumstances would be inconsistent with the clear legislative requirement that the representative plaintiff be anchored in the proceeding as a class member, not simply a nominee with no stake in the potential outcome.

[100] Finally, I would note that the plaintiffs did not suggest that should we accept BMW's argument on this point, and find that there is not a suitable representative plaintiff, that they should be granted an opportunity to substitute a new representative plaintiff.

(5) Some basis in fact

[101] BMW contends that there are no certifiable common issues because of what are said to be inconsistencies in the certification judge's reasons – ones that should be resolved in favour of BMW. The plaintiffs, on the other hand, say that any inconsistency should be resolved in their favour.

[102] The findings relied on by BMW are found in the first section of the certification judge's decision, under the heading "Nature of the claim". In that section, the certification judge reviewed Dr. Frise's evidence in some detail. He was critical of Dr. Frise's conclusion that there is a universal problem with the class vehicles. At the end of the section, before proceeding to his analysis of the certification criteria, the certification judge found, at paras. 25-26, that there is no basis in fact for concluding that there is a universal problem with the class vehicles:

> 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.

> 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. [Emphasis added.]

[103] Thus, at this stage of his reasons, the certification judge found that although there is some evidence of some defects in at least two of the vehicles, there is no basis in fact for a universal problem.

[104] After making this finding, the certification judge moved to the certification criteria. In his s. 5(1)(a) analysis, the certification judge considerably narrowed the scope of the claims that could be advanced. Given this narrowing, the scope of the class was also narrowed.

[105] The certification judge then turned to the common issues analysis. It is in that context that the certification judge found, at paras. 79-80, that there is some basis in fact for the negligent design common issues:

> In terms of 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.

> 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". [Emphasis added; citations omitted.]

[106] BMW submits that it is not possible to reconcile the findings, at paras. 25-26, and the later findings, at paras. 79-80. It says that, as the certification judge put it, it appeared that, at most, each of the two plaintiffs had the misfortune of having purchased a "lemon". Even if there were others besides the two plaintiffs who had incurred repair costs, the only inference available on the evidence, says BMW, was that the class members had purchased "lemons" with individualized defects.

[107] I do not accept BMW's arguments on this point. In my view, the certification judge's earlier and later findings are not inconsistent. At paras. 25-26, the certification judge finds that there is no basis in fact that there is a common defect across all of the proposed class. His later findings pertain to the much more limited class that had a valid cause of action. His finding, as I read these paragraphs, is not that there is a single common defect but rather that there is a common malfunction (the Vehicles are prone to a sudden loss of power while being driven). He was aware that Dr. Frise's own evidence was that BMW had an ongoing

program of redesigning chain assembly system components, which meant that there could not be a single common defect.

[108] This reading of the reasons is consistent with the wording of the certified common questions, which contemplate that there may be more than one different defect:

> 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 4: If the answer to common issue (2) … is yes, when did the Defendants know or ought they to have known of the dangerous design and/or manufacturing defects? [Emphasis added.][4]

[4] Common Issue 3 was withdrawn by the Plaintiffs.

[109] In my view, it was open for the certification judge to find, based on the record before him, that once the class was narrowed to vehicles with repairs related to a malfunctioning timing chain system, there is some basis for demonstrating on a class-wide basis that the design of the timing chain system was capable of malfunctioning in the way that was alleged.

E. DISTRIBUTIVE "NO COSTS" AWARD

[110] The plaintiffs submit that the certification judge erred in principle in making a distributive costs award, forcing them to bear their own costs despite their success on the certification motion.

[111] It is unnecessary to address this submission. Given my conclusion that the certification order should be set aside, the costs order below is also set aside. The parties should provide written submissions of not more than three pages within two weeks relating to the costs below.

F. CONCLUSION

[112] I would dismiss the appeal, allow the cross-appeal, and set aside the order below.

[113] The plaintiffs shall pay costs of the appeal in the amount of $25,000.

JMF

Released: May 2, 2025

Fairburn ACJO

I agree. Groza J.A.

I agree. Sossin J.A.

Appendix "A"
Certified common issues

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?

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?

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?