In the Court of Appeal of Alberta

Citation: Hyundai Auto Canada Corp. v Engen, 2023 ABCA 85

Date: 20230313
Docket: 2101-0260AC
Registry: Calgary

Between:

Hyundai Auto Canada Corp., Hyundai Motor Manufacturing Alabama LLC, and Hyundai Motor Co.

Appellants

- and -

Robert Engen

Respondent

The Court:

The Honourable Justice Barbara Lea Veldhuis
The Honourable Justice Dawn Pentelechuk
The Honourable Justice Jolaine Antonio

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice J.D. Rooke, Associate Chief Justice
Dated the 17th day of September, 2021

(2021 ABQB 740, Docket: 1601 17138)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellants (collectively, Hyundai) appeal the certification judge's decision certifying the product liability action of the respondent, Robert Engen, as a class proceeding: ***Engen v Hyundai Auto Canada Corp.***, 2021 ABQB 740 (Decision). The claim alleges that panoramic sunroofs installed in six models of vehicles designed and manufactured by Hyundai were defective as being susceptible to spontaneous shattering under normal driving conditions.

[2] The certification judge ultimately certified 16 of the 18 common issues sought (with minor variations) in respect of the following causes of action:

- negligence (design, manufacture, and failure to warn);
- negligent misrepresentation;
- breach of express and implied warranty;
- breach of the *Competition Act*, RSC 1985, c C-34 [*Competition Act*]; and
- breach of consumer protection legislation in certain provinces.

[3] While Hyundai raises numerous grounds of appeal, they relate to four main complaints:

- There was "no basis in fact" for a "common defect";
- The claim for implied warranty should not have been certified, as the necessary privity of contract does not exist;
- There was no evidence of a common misrepresentation to the putative class and no evidence of reliance on any misrepresentation; and
- There was a failure to plead a legally recognized form of damage in negligence for pure economic loss.

Hyundai seeks to have the certification order set aside in its entirety.

II. Was there some basis in fact for a common defect?

[4] This appeal principally addresses the evidentiary standard of "some basis in fact" as it relates to the criterion for certification in s 5(1)(c) of the *Class Proceedings Act*, SA 2003, c C-16.5 [*CPA*] that "the claims of the prospective class members raise a common issue". Hyundai argues that Mr. Engen, the proposed representative plaintiff, failed to provide some basis in fact for a common defect, thereby undermining the claims for negligence and breach of express and

implied warranty. This in turn engages an assessment of the certification judge's treatment of Mr. Engen's expert evidence and whether, as Hyundai alleges, it demonstrated there was *no* basis in fact for a common defect through its cross-examination of the expert.

[5] Mr. Engen brought a claim against Hyundai for designing, manufacturing, and installing sunroofs in certain vehicle models which Engen claims are defective and dangerous. In his Amended Amended Statement of Claim, he described a number of weaknesses with the sunroofs which make them "susceptible to spontaneous shattering under everyday driving conditions", and that this in turn "endangers drivers, passengers and others on the road".

[6] The claim details an event in August 2016 wherein Mr. Engen was driving his 2013 Hyundai Santa Fe that he purchased from a Hyundai dealership in Lethbridge (not a party to the proceeding). The panoramic sunroof in the vehicle "shattered without warning and with no indication that any object had made contact with it beforehand". This caused shards of glass from the sunroof to fall all over the vehicle, including the front and back seat, "showering everyone inside the vehicle with glass". While the backseat was not occupied at the time, Mr. Engen's wife was in the front seat and "sustained cuts and abrasions over her body".

[7] Mr. Engen brought an application for certification of the action as a class proceeding under the *CPA* in July 2018. The proposed class is comprised of persons who own, owned, lease or leased one of six Hyundai models, variously manufactured between 2011 and 2018.

[8] As part of the certification application, Mr. Engen provided affidavit evidence which further particularized the 2016 event, including the fact that no other vehicles were in close proximity at the time the sunroof shattered, and also listed the names of 36 other individuals from across the country whose Hyundai sunroofs were said to have spontaneously shattered. Exhibits included a photograph of his shattered sunroof as well as a collection of photographs of the shattered sunroofs of some of the 36 listed individuals.

[9] Mr. Engen also retained an expert, Dr. Doug Perovic, a professor of Materials Science and Engineering at the University of Toronto, to provide an opinion as to potential causes of the shattering sunroofs. Dr. Perovic reviewed colour photographs of 13 of the sunroofs as well as actual sample fragments from four of the sunroofs. He proffered a number of possible explanations but no one definitive cause for the sunroofs shattering. Most of the potential causes were said to be "internal", and while Dr. Perovic did not exclude "external impacts" as being a possible cause of the sunroofs shattering, this was thought to be "less probable".

[10] Most aspects of a decision regarding the certification of a class action are entitled to deference. Whether the pleadings disclose a cause of action is a question of law reviewed for correctness. Otherwise, certifying a class action is a discretionary decision, which will not be overturned on appeal unless it reflects an error in principle or it is unreasonable. Deciding whether there is sufficient evidence to support certification is a question of fact or a mixed question of fact

and law that should not be disturbed on appeal absent palpable and overriding error: ***Spring v Goodyear Canada Inc***, 2021 ABCA 182 [***Spring***] at para 16.

[11] As noted, Hyundai's central argument is that the certification judge erred in concluding that Mr. Engen established some basis in fact for a common defect. It argues Mr. Engen provided no basis in fact for a defect in any sunroof, let alone a defect common to the putative class members. In this regard, Hyundai candidly concedes that its burden on appeal is to demonstrate there is *no* evidence of a common defect; otherwise, deference is owed to the certification judge's determination that Mr. Engen had established some basis in fact for the common defect.

[12] In our view, it was open to the certification judge to find that there was some basis in fact for a common defect on this record. There was a sufficient evidentiary basis to conclude not only that any defect in the sunroofs would be class-wide, but also that a defect actually exists. While we accept that the certification judge misunderstood Hyundai as having conceded the existence of a defect at the certification application, none of its arguments on this ground of appeal justify appellate intervention.

[13] First, Hyundai argues that the certification judge erred in failing to consider evidence elicited from Dr. Perovic during his cross-examination, which in its view, demonstrated there was no basis in fact for a defect. As evidence of such failure, they point to the certification judge having stated that he would not get into a "debate" about the "weight" to be ascribed to Dr. Perovic's evidence: Decision at para 43. Hyundai notes that it is not inappropriate for a certification judge to weigh the plaintiff's evidence in its own right: ***Dine v Biomet Inc.***, 2016 ONSC 4039 [***Dine***] at paras 35-36.

[14] We disagree that the certification judge ignored Dr. Perovic's evidence in cross-examination, and find he was simply conveying the fact that expert evidence at the certification stage is subject to reduced scrutiny.

[15] The certification judge (at footnote 32) cited ***Kuiper v Cook (Canada) Inc.***, 2018 ONSC 6487 at para 70, rev'd in part on other grounds in 2020 ONSC 128, to the effect that "the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest". That statement in turn cites ***Griffin v Dell Canada Inc.***, 2009 CanLII 3557 (Ont SC) [***Dell***] at para 76, aff'd on other grounds in 2010 ONCA 29, leave to appeal to SCC refused, 33588 (20 May 2010) as follows:

> … where expert evidence is produced on a motion for certification, the nature and amount of investigation and testing required to provide a basis for a preliminary opinion will not be as extensive as would be required for an opinion to be given at trial. It follows that some lesser level of scrutiny is applied to the opinions offered, if they are otherwise admissible: *Stewart v. General Motors of Canada Ltd.*, [2007] O.J. No. 2319 at para. 19 (Sup. Ct.).

The British Columbia Court of Appeal subsequently adopted this statement from ***Dell*** in ***Pro-Sys Consultants Ltd. v Infineon Technologies AG***, 2009 BCCA 503 at para 66, leave to appeal to SCC refused, 33522 (3 June 2010), and concluded that "where expert opinion evidence is adduced at the certification hearing … it should not be subjected to the exacting scrutiny required at a trial".

[16] A threshold of modest scrutiny of expert evidence at the certification stage recognizes that in many instances – this claim included – the plaintiff does not have the benefit of the defendant's production, nor of evidence elicited through questioning, so any expert evidence produced at the certification stage expresses a preliminary opinion. Further, assessing expert evidence with exacting scrutiny risks bleeding into an assessment of the merits of the claim, which is prohibited at the certification stage: ***Pro-Sys Consultants Ltd. v Microsoft Corporation***, 2013 SCC 57 [***Microsoft***] at paras 99, 102.

[17] In short, the certification judge's decision to refrain from ascribing definitive weight to Dr. Perovic's evidence was consistent with the law that expert evidence is not to be tested as fulsomely at the certification stage as at trial. It does not follow that the certification judge failed to consider Dr. Perovic's evidence as a whole.

[18] Nor do we agree with Hyundai that Dr. Perovic's evidence in cross-examination was a basis to reject the expert evidence in its entirety. Hyundai has set out in detail nine separate points upon which answers in cross-examination are said to neutralize or negate, in one way or another, the opinions expressed by Dr. Perovic in his expert report – most of which Mr. Engen disputes. Measuring the expert report against Dr. Perovic's cross-examination is a "deep-dive" exercise that runs contrary to the notion that a certification judge is not to "engage in the finely calibrated assessments of evidentiary weight": ***Cloud v Canada (Attorney General)***, 2004 CanLII 45444 at para 50 (Ont CA), leave to appeal to SCC refused, 30759 (12 May 2005), cited in ***Microsoft*** at para 102. The words of Belobaba J in ***Dine v Biomet***, 2015 ONSC 7050 at para 2 are particularly apposite here: "Much of the defendants' written and oral submissions were mired in the minutiae of evidentiary analysis. This level of detail is neither required nor appropriate on a certification motion".

[19] Second, Hyundai argues that there is no basis in fact for a defect, let alone a common defect, and the certification judge erred in concluding otherwise. On its account, the mere fact that a number of sunroofs have failed is not itself sufficient to establish "some basis in fact" for a defect, and in any event, an action for an allegedly defective product should not be certified where the evidence allows for multiple possible causes of failure. In short, Hyundai posits that if one does not know *why* the failure happened, one does not know there is a defect. Particular reliance is placed on ***Spring***, where this Court overturned the certification of an action on the grounds that there was no basis in fact for a common defect.

[20] As noted, Dr. Perovic set out a number of possible causes for the sunroofs shattering, most of which were causes "internal" to the sunroofs themselves. While he accepted that "external impacts" were also a possible cause, this was thought to be "less probable". Mr. Engen detailed

not only his own experience with a sunroof shattering "without warning and with no indication that any object had made contact with it beforehand" while his was the lone vehicle in the vicinity, but also provided the names of 36 other individuals from across the country whose Hyundai sunroofs were similarly said to have spontaneously shattered and corresponding photographs.

[21] In our view, Dr. Perovic's evidence was sufficient to establish "some basis in fact" for a "common defect". It is not necessary that an expert provide an opinion as to a single, definitive cause of a product being defective at the certification stage: ***Mueller v Nissan Canada Inc.***, 2021 BCSC 338 [***Nissan SC***] at paras 12, 155, 166, 173-178, aff'd 2022 BCCA 338 [***Nissan CA***], leave to appeal to SCC requested, 40479 (13 December 2022). Moreover, liability for a manufacturing defect can be imposed "in the absence of precise evidence of how the manufacturing defect occurred": ***Rowe v Raleigh Industries of Canada Ltd.***, 2005 NLCA 65 at para 19. Hyundai points to the fact that Dr. Perovic could have availed himself of further testing, countering the argument that Mr. Engen was at an informational disadvantage. However, an expert's ability to do more does not mean that expert did not do enough to meet the low threshold of establishing some evidence, or some basis in fact, that a defect exists.

[22] Indeed, expert evidence is not an invariable necessity in order to establish some basis in fact for a common defect: ***Spring*** at para 27; ***Dell*** at para 83; ***Williams v Canon Canada Inc.***, 2011 ONSC 6571 [***Canon***] at para 174, aff'd in 2012 ONSC 3692; ***O'Brien v Bard Canada Inc.***, 2015 ONSC 2470 [***O'Brien***] at paras 190, 201; ***Dine*** at paras 41-44; ***Panacci v Volkswagen***, 2018 ONSC 6312 at paras 19-21.

[23] While expert evidence may well be prudent, a common defect can sometimes be established on the basis of a large number of complainants providing similar accounts of a defect. ***Dell*** is a case in point, where an action in negligence was certified for five different computer models said to be defective for being prone to overheating, power failure, inability to "boot up" and unexpected shutdowns. While the plaintiff also tendered expert evidence which was accepted, Lax J found that commonality would equally have been made out solely based on the plaintiff having compiled a database of over 400 putative class members who provided similar complaints to that of the representative plaintiff.

[24] A similar situation exists in the present case, suggesting that some basis in fact for a common defect could have been made out by Mr. Engen even absent the expert evidence of Dr. Perovic. In any event, the evidence of the 36 other complainants coupled with the expert evidence meets the requisite evidentiary threshold.

[25] Where certification is denied in product liability cases on the grounds that there is no basis in fact for a "common defect", it is often owing to the proposed class proceeding involving numerous models or versions of a given product such that it is difficult to generalize or extrapolate from a possible defect found in one model or version to the rest of the products used by the proposed class: see, for example, ***Ernewein v General Motors of Canada Ltd.***, 2005 BCCA 540, leave to appeal to SCC refused, 31218 (23 March 2006) (28 models of pick-up trucks manufactured

between 1973 and 1991); ***Poulin v Ford Motor Company of Canada Limited***, 2008 CanLII 54299 (Ont SCDC) (four models of trucks manufactured between 1995 and 2000); ***Canon*** (20 models of cameras sold between 2005 and 2011); ***O'Brien*** (19 medical products).

[26] In the case of the sunroofs, while they do relate to six different models of Hyundai vehicles over a number of years, there is no suggestion in the record that there is any appreciable difference in the sunroofs from one model to the next or from one year to the next. Nor that the sunroofs were manufactured at different plants. Hyundai could have provided evidence on this point but did not. As noted in ***N&C Transportation Ltd. v Navistar International Corporation***, 2018 BCCA 312 [***Navistar***] at para 102, leave to appeal to SCC refused, 38327 (28 March 2019), "[d]efendants to a products liability class action risk an unsatisfactory outcome if they take the position that different models defeat commonality without providing any information explaining how the products materially differ from each other".

[27] This distinguishes the present case from that in ***Spring***. In that case, the representative plaintiff sought certification of an action based on an alleged manufacturing defect in 51 different types of tires, manufactured at three different plants over a number of years. However, the only direct evidence of a defect was a recall notice that was limited to six types of tires manufactured within a 13-week period, and there existed no basis in the evidence to conclude that any defect in those six types would be common to the 51 types of tires, let alone extend beyond the 13-week period. Conversely, as noted by Mr. Engen, there is only one type of sunroof, presumably manufactured at the same plant, meaning it is possible to extrapolate from a defect found in one model in one year to other models and years in the class.

[28] Finally, Hyundai argues certification should have been denied because there was no "workable methodology" to determine "causation" on a class-wide basis. Here Hyundai appears to be referring to what is sometimes called "general causation", which is the first step in any product liability case and refers to whether a product is defective, that is, "capable of causing the harm alleged in its ordinary use": ***Harrington v Dow Corning Corp.***, 2000 BCCA 605 [***Harrington***] at para 42. This is to be distinguished from "individual causation" and corresponding damages, which is the final step and refers to "the determination of whether the product caused the injuries to the individual seeking damages": ***Harrington*** at para 46.

[29] Hyundai refers to this Court's decision in ***Andriuk v Merrill Lynch Canada Inc.***, 2014 ABCA 177 [***Andriuk***] at para 10 as requiring such a methodology. However, as made clear by ***Microsoft***, to which ***Andriuk*** refers, this requirement relates to "*loss*-related common issues", such a methodology having to "offer a realistic prospect of establishing *loss* on a class-wide basis": ***Microsoft*** at paras 113, 118 (emphasis added). By contrast, general causation does not involve proving loss *per se*, as it is possible for a product to have a *propensity to cause* harm but not be the *actual cause* of the harm in an individual instance. To this extent, Hyundai has conflated general and specific causation: see ***Navistar*** at para 101.

[30] In any event, Dr. Perovic did set out various methodologies by which general causation might be established such that there is some basis in fact for a common defect.

III. "Some Basis in Fact" and Common Misrepresentation

[31] Hyundai also argues there was no evidence of a common misrepresentation, thereby undermining the claims for negligent misrepresentation, breach of the *Competition Act*, and breach of consumer protection legislation.

[32] The certification judge correctly found that claims relating to alleged misrepresentations are capable of containing common issues amenable to certification, even if the issue of reliance requires individual determinations: Decision at para 38, citing ***Navistar*** at para 133. That said, we agree with Hyundai that there was no basis in fact for any misrepresentations in this case, let alone ones common to the whole class.

[33] The claim refers to Hyundai having made various representations about the safety of its vehicles. However, the only evidence tendered by Mr. Engen regarding Hyundai's representations as to safety of the sunroofs was a number of sales brochures of various Hyundai vehicles included in the proposed class. While the brochures do contain references to safety in certain narrow contexts, for example, airbags and blind spot detection, we are unable to discern any representations of safety that might reasonably be thought to extend to the sunroofs specifically. Nor was there any evidence that representations regarding safety were made to Mr. Engen; indeed, the brochure attached to his affidavit is dated 2015 whereas he purchased his Hyundai in 2012.

[34] The commonality requirement of some basis in fact not having been met, the common issues found by the certification judge relating to representations (negligent misrepresentation, breach of the *Competition Act*, and breach of consumer protection legislation) cannot proceed.

IV. Claims in Negligence and Implied Warranty

[35] Finally, Hyundai argues the certification judge erred in certifying the claims in negligence and implied warranty because the pleadings do not disclose a cause of action under s 5(1)(a) of the *CPA*. Hyundai did not challenge either cause of action at the certification application (Decision at para 10.b.), but in both cases now suggests that subsequent developments have overtaken its original position.

Implied Warranty and Privity of Contract

[36] In his supplemental decision in ***Engen v Hyundai Auto Canada Corp***, 2022 ABQB 189, the certification judge found that no claims could be certified in breach of sale of goods legislation since each province requires privity of contract and none exists between the parties. It is accepted by Mr. Engen that he and the other proposed class members purchased their vehicles from dealerships or others and not from Hyundai directly. Hyundai now argues that the same logic applies with respect to common law breach of implied warranty. We agree.

[37] As noted by Hyundai, breach of implied warranty at common law requires a contractual relationship between the parties: ***Carter v Ford Motor Company of Canada***, 2021 ONSC 4138 [***Carter***] at paras 131-132. In arguing to the contrary, Mr. Engen seeks to rely on a determination in ***Nissan SC*** at para 87 that an allegation of implied warranties involving a car manufacturer should be sent to trial. However, in that case a contractual relationship between the car manufacturer and vehicle purchasers was found to have been properly pleaded: ***Nissan CA*** at paras 92-96. In the present case, the certification judge found that the pleadings failed to contain a contractual relationship between Hyundai and any of the class members: Decision at para 23.

[38] Accordingly, the common issue certified in relation to implied warranty should not proceed. Hyundai takes no issue with the breach of express warranty allegation having been properly pleaded.

Damages in Negligence

[39] The damages claimed for negligence in the relief sought by Mr. Engen is limited, says Hyundai, to pure economic loss in the form of the diminution of value of the vehicle. Hyundai points to ***1688782 Ontario Inc. v Maple Leaf Foods Inc.***, 2020 SCC 35 [***Maple Leaf Foods***] as having clarified that where damage in negligence is limited to pure economic loss, the defective product must pose a "real and substantial danger" that could cause personal injury or property damage, and moreover, recovery is limited to the cost of averting that danger – which is not necessarily the cost of repairing the defect *per se* and often merely the cost of discarding the product: paras 48-56. The diminution of value of a vehicle from a defect is therefore not recoverable: ***Carter*** at para 97. And since this is the only loss claimed by Mr. Engen (though this is disputed), Hyundai argues that negligence is not sufficiently pleaded.

[40] We disagree. Mr. Engen has pleaded a "loss" (even if purely economic) and this need not be limited to the vehicle having lost value as a result of the alleged defect.

[41] Where a defective product exists in a vehicle, it will often not be feasible to simply discard it – rather, the defective part must be replaced in order to avoid the risk of harm. Moreover, the scope of such a remedy is not always immediately clear, requiring findings of fact and evidence at trial in order to determine a reasonable way to deal with the defect: ***Nissan CA*** at paras 63-65. That is certainly so here, where an allegedly dangerous defect is an integral component of the vehicle and there is no assurance that a replacement sunroof would render the vehicle any less dangerous (particularly if any defect is found to be one of design rather than manufacturing).

[42] The negligence claim can proceed to trial, where the question of how best to remedy any dangerous defect found to exist in the sunroofs can be properly determined on a full evidentiary record.

[43] Nor do we accept Hyundai's argument that common issues relating to a "risk of harm" should not have been certified. Mr. Engen has pleaded a claim in negligence involving a dangerous

defect, which brings the claim within recovery for pure economic loss to the extent that there is a "real and substantial danger" to personal injury or property damage. Hyundai does not suggest the claim is improperly pleaded to this extent. Within these confines, pleading mere risk of harm is acceptable because the negligent supply of dangerous goods interferes with one's right to be free from injury to one's person or property: ***Maple Leaf Foods*** at paras 44-46.

V. Conclusion

[44] The appeal is allowed in part.

[45] Common issues relating to negligence and breach of express warranty were properly certified and can proceed to trial, as there is some basis in fact for a common defect under s 5(1)(c) of the *CPA*. Negligence is also properly pleaded as a cause of action under s 5(1)(a) of the *CPA*.

[46] Common issues relating to negligent misrepresentation, breach of the *Competition Act*, and breach of consumer protection legislation should not have been certified for failure under s 5(1)(c) of the *CPA*. A common issue relating to implied warranty should not have been certified for failure under s 5(1)(a) of the *CPA*.

[47] As there was mixed success on the appeal, each party will bear their own costs of the appeal.

Appeal heard on February 10, 2023

Memorandum filed at Calgary, Alberta
this 13th day of March, 2023

REGISTRAR
FILED
13 Mar 2023
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Court of Appeal of Alberta

Authorized to sign for: Veldhuis J.A.

Pentelechuk J.A.

Authorized to sign for: Antonio J.A.

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