CITATION: Barwin v. IKO Industries Ltd., 2013 ONSC 3054
DIVISIONAL COURT FILE NO.: 559/12
DATE: 20130605

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:	)	
KEVIN BARWIN	)	*Charles M. Wright & Linda Visser*, for the Plaintiff/Respondent
Plaintiff/Respondent	)	
– and –	)	
IKO INDUSTRIES LTD., CANROOF CORPORATION INC., and I.G. MACHINE & FIBERS LTD.	)	*S. Gordon McKee & Daniel Stern*, for the Defendants/Respondents
Defendants/Appellants	)	
	)	**HEARD:** April 2 & 3, 2013

LEDERER J.:

Introduction

[1] This motion is brought on behalf of the defendants, IKO Industries, Canroof Corporations Inc. and T.G. Machine and Fibers Ltd. (referred to collectively as "IKO Industries" or the "defendants") seeking leave to appeal an order certifying this action as a class proceeding.

Background

[2] IKO Industries designed, manufactured and sold organic asphalt roofing shingles. Asphalt shingles are, or were, one of the most common roofing materials used in the construction of residential buildings. More than 10.6 billion shingles manufactured by IKO Industries have been sold in Canada, enough to cover over five million homes. IKO Industries stopped selling organic asphalt shingles in 2008. Today, there are no companies making organic asphalt shingles. The plaintiff, Kevin Barwin, lives in Ottawa, Ontario. During September 1998, Kevin Barwin installed asphalt organic shingles, manufactured by IKO Industries, on his home. Sometime later, he became aware that the shingles had begun leaking, falling apart and breaking

down. In order to avoid water leaking into, and damaging, his home he replaced the shingles. He asserted a claim under the applicable warranty, but was dissatisfied by the refusal of IKO Industries to cover the labour costs associated with replacing the shingles. As a result, Kevin Barkin commenced this action. He alleges that the shingles are prone to failure as a result of defects and are not fit for their intended use. He has made claims for negligence and breach of consumer protection legislation. The order certifying the action as a class proceeding is dated May 29, 2012. The reasons of the motions judge were released on July 19, 2012. As of that date, 2,000 putative class members had contacted counsel for the class. Supplementary Reasons were released on September 13, 2012.

Jurisdiction and the Test to be Applied

[3] The jurisdiction for this motion is set by the *Class Proceedings Act, 1992 s.* 30(2)[1] which states:

> A party may appeal to the Divisional Court from an order certifying a proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court.

[4] The test for granting leave to appeal is rigorous.[2] For leave to be granted, one of two tests must be satisfied. They are established by Rule 62.02(4) of the *Rules of Civil Procedure.* It says:

> Leave to appeal shall not be granted unless,
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> (a) there is a conflicting decision by another judge or court in Ontario or elsewhere on the matter involved in the proposed appeal *and* it is, in the opinion of the judge hearing the motion, desirable that leave to appeal be granted; or
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> (b) there appears to the judge hearing the motion good reason to doubt the correctness of the order in question *and* the proposed appeal involves matters of such importance that, in his or her opinion, leave to appeal should be granted.
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> [Emphasis added]

[5] The need for care in the analysis is underscored by a consideration of the nature of the *Class Proceedings Act, 1992.* It is "entirely procedural".[3] The *Class Proceedings Act, 1992*

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[1] S.O. 1992, c. 6, s. 30(2).
[2] *Griffin v. Dell Canada Inc.* 2009 CarswellOnt 4742, 180 A.C.W.S. (3d) 584, at para. 35 (Div. Ct, leave to appeal), for ON SC see: fn. 47.
[3] *Bendall v. McGhan Medical Corp.* 1993 CanLII 5550 (ON SC), (1993), 14 O.R. (3d), 734, [1993] O.J. No. 1948, at para. 39 (Gen. Div.), as referred to in *Williams v. Canon Canada Inc,* [2011] O.J. No. 5049,

provides the court with a procedural tool to deal efficiently with cases involving large numbers of interested parties, as well as complex and, often, intertwined legal issues, some of which are common and some of which are not.[4] Certification is a fluid, flexible procedural process. Certification is not a ruling on the merits. A certification order is not final. It is an interlocutory order and it may be amended, varied or set aside at any time.[5] While it is not intended that defendants be compelled to confront, as class proceedings, actions which are frivolous or inappropriate to the purpose, it is equally clear that certification is not to be treated as an impediment to the action being brought as a class proceeding where it is an appropriate and the preferable mechanism for resolving the dispute. The *Class Proceedings Act, 1992* provides for "flexibility and adjustment at all stages of the proceeding".[6]

[6] Without going further, it would seem that where it is alleged that, through negligence, faulty shingles have been produced and sold to a large number of consumers, causing damage to each of them, the procedure offered by the *Class Proceedings Act, 1992* would be a useful and appropriate tool. The defendants do not agree. As they see it, a closer examination demonstrates the requirement that each consumer bring a separate and independent action. In part, the issue is whether the flexibility in the procedure provided for in the *Class Proceedings Act, 1992* provides an answer to the questions raised on this motion for leave to appeal.

[7] As set out in the *Class Proceedings Act, 1992*, certification begins with the requirement that the pleadings disclose a cause of action.[7] The test for this is the same as on a motion to strike a pleading on the ground that it discloses no reasonable cause of action. On such a motion, it must be shown that it is "plain and obvious" that the action cannot succeed.[8] Thus, in considering whether to grant leave to appeal, a judge is required to find that there are conflicting decisions or sufficient reason to doubt the correctness of the decision such that it is plain and obvious that the action cannot succeed regardless of the flexibility which allows for refinement as the action goes through each stage of the process moving towards trial.

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para. 124; and in the decision of Madam Justice Baltman found at *Barwin v. IKO*, 2012 ONSC 3969 (CanLII), at para. 23.

[4] *Hollick v. Toronto (City)*, [2001] 2 S.C.R. 158, [2001] S.C.J. No. 67, at paras. 14 and 15; *Bendall v. McGhan Medical Corp.* (1993), 14 O.R. (3d) 734, [1993] O.J. No. 1948, at para. 40, as referred to in *Williams v. Canon Canada Inc*, [2011] O.J. No. 5049, para. 124; and in the decision of Madam Justice Baltman found at *Barwin v. IKO*, 2012 ONSC 3969 (CanLII) at para. 23.

[5] *Class Proceedings Act* ss. 5(5), 10(1) and 10(2); *Bendall v. McGhan Medical Corp., supra,* at para. 42; *Hollick v. Toronto (City), supra,* at para. 16, as referred to in *Williams v. Canon Canada Inc*, [2011] O.J. No. 5049, para. 124; and in the decision of Madam Justice Baltman found at *Barwin v. IKO*, 2012 ONSC 3969 (CanLII) at para. 23.

[6] *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (Ont. I.A.), at 677, quoted in *Carom v. Bre-X Minerals Ltd.* 2000 CarswellOnt 3838 (C.A.), at para. 36.

[7] *Class Proceedings Acts.* 5(1)(a): "...the pleadings or the notice of application discloses a cause of action...".

[8] Rule 21.01(1)(b) of the *Rules of Civil Procedure, Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; and *Cloud v. Canada (Attorney-General)*, [2004] O.J. No. 4294 (C.A.), as referred to in *Martin v. Astrazeneca Pharmaceuticals PLC* [2012] O.J. No. 2033 (certification motion), at para. 100.

Negligence: General

[8] The motions judge certified the claim for negligence as a class proceeding. Counsel for the moving parties (the defendants) suggested that this cause of action should not have been certified because there was no demonstration of any common issues applicable to the members of the class.[9]

[9] The motions judge certified common issues respecting whether the defendants owed a duty of care to the class members and whether any such duty of care had been breached. The judge framed these issues as:

> (a) Did the Defendants, or any of them, *owe a duty of care* to Class Members to:
>
> (1) ensure that the IKO Shingles were designed and manufactured properly and in a good and workmanlike manner;
>
> (2) ensure that the IKO Shingles would under normal conditions, usage and applications last a reasonable period of time;
>
> (3) engage in adequate research and testing in respect of the design of IKO Shingles;
>
> (4) accurately represent the nature and quality of the IKO Shingles; and,
>
> (5) upon discovering that the IKO Shingles were defective and prone to premature failure, promptly remove the IKO Shingles from the marketplace, disclose the defects to Class Members, and take other appropriate remedial action?
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> (b) Did the Defendants, or any of them, *breach any of the above-listed duties of care* to Class Members?[10]
>
> . . .
>
> [Emphasis added]

[10] The issues of whether a duty of care was present and was breached are typical of any claim for negligence. Nonetheless, counsel for the defendants said their presence was not properly demonstrated. As counsel sees it, there are two possible foundations for a claim for negligence in an action founded on an allegation of fault in a manufactured product: there may be fault in the design leading to mistakes inherent in the manufactured product (negligent design)

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[9] *Class Proceedings Act, 1992*, s. 5(1)(c): "...the claims or defences of the class members raise common issues...".
[10] Order of Madam Justice Baltman, made Tuesday, May 29, 2012 at para. 6(a).

or fault in the manufacturing process leading to defects in the product that result from the method of its production (negligent manufacture). As counsel sees it, the Statement of Claim did not make this distinction. He submitted that this is fatal to the claim. Negligent design and negligent manufacture must be separated as independent causes of action. In making this submission, counsel relied on *Martin v. Astrazeneca Pharmaceuticals PLC* (see: footnote 8, above) and, in particular, the following quotation:

> The statement of claim does not distinguish between these different negligence claims [(1) negligent design, development and testing, (2) negligent manufacturing, and (3) negligent distribution, marketing and sale]. Rather, it lumps them all together as negligence and provides particulars for this broad group. The plaintiffs wrongly assume that these distinct activities are identical and can be thrown into one single cause of action. As I explain below, these different forms of negligence are not the same. Therefore, to allege one cause of action is a flawed approach.[11]

[11] *Martin v. Astrazeneca Pharmaceuticals PLC* was a putative class proceeding which concerned the production and sale of a drug. Certification of the action was refused. The centerpiece of the decision was not the absence of common issues. The motions judge "... dismissed the plaintiffs' motion for certification on the basis that the... Statement of Claim failed to disclose a cause of action as required by s. 5(1)(a) of the *Class Proceedings Act, 1992*...".[12] The judge found the pleading was confusing and "...lacked clarity as to which defendant did what..."[13]. She "...concluded that the plaintiffs had failed to clearly and properly plead the essential facts required to establish a cause of action. She also found the pleading was fatally defective in other respects."[14]

[12] This is not the case here. In the submissions of counsel, no reference was made to the pleading that supports the action. The Third Fresh as Amended Statement of Claim reveals allegations of negligence identifying duties of care said to be owed and breaches of those duties. It refers to both "design" and "manufacture" and other indicators of negligence such as a failure to warn the public. The request for leave relies on the proposition that it was an error in law not to plead negligent design and negligent manufacture as separate causes of action. It was submitted that this conflation should have been fatal to certification because it resulted in issues that could not properly be said to be common among the members of the class. I do not agree.

[13] In *Anderson v. St. Jude Medical Inc.*[15], the defendants were manufacturers and distributors of mechanical heart valves and other products that were coated with Silzone. The plaintiffs had been implanted with heart valves. They alleged that they suffered health problems

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[11] *Martin v. Astrazeneca Pharmaceuticals PLC, supra,* (certification motion) at para. 130.
[12] *Martin v. Astrazeneca Pharmaceuticals PLC* 2013 ONSC 1169 (Div. Ct. appeal), at para. 3.
[13] *Martin v. Astrazeneca Pharmaceuticals PLC, supra,* (certification motion), at para. 116 .
[14] *Martin v. Astrazeneca Pharmaceuticals, supra,* (Div. Ct. appeal), at para. 6.
[15] [2003] O.J. No. 3556, 67 O.R. (3d) 136 (certification motion).

as a result of the coating on the implants. They moved to have the action certified as a class proceeding. They sought to represent all persons resident in Canada who received Silzone-coated implants. They claimed the defendants were negligent in the development, manufacture and distribution of the devices. The plaintiffs proposed five common issues relating to the design, manufacture and sale of the valves. The defendants argued that the individual responses to the devices and the alternative causal possibilities for the health problems suffered by individual class members made this an inappropriate case for a class action. The action was certified. The issues relating to whether the defendant breached the standard of care were common ones. The fact that class members were affected differently did not detract from that commonality. The first of the common issues that were certified was the following:

> Did the defendants *breach a duty of care owed* to class members by reason of the *design*, free market testing, regulatory compliance, *manufacture*, sale, marketing, distribution and recall of Silzone-coated mechanical heart valves and annuloplasty rings implanted in such members?[16]
>
> [Emphasis added]

[14] This issue was the subject of some re-formulation by the court.[17] Both as proposed by the plaintiff and amended by the court, the common issue demonstrated that it can be possible and appropriate to find a common issue which considers negligence in both the design and manufacture, as well as other activities respecting the development, production and marketing of a product.

[15] A similar approach was accepted in *Lambert v. Guidant Corp.*[18] by the same motions judge (Cullity J.) as in *Anderson v. St. Jude Medical Inc.* and in *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*[19] by the judge (Horkins J.), who refused to certify the action in *Martin v. Astrazeneca Pharmaceuticals PLC* (ON SC) as a class proceeding. In these two cases, a second common issue was added: a consideration of whether the defendants breached any duty of care they owed the class with regard to various functions associated with the design, development, manufacture and marketing of the product.[20]

[16] *Anderson v. St. Jude Medical Inc.* did go to trial.[21] The common issues remained those ordered by the motions judge who certified the action. Common Issue 1 (as quoted in para. [13], above) was, for the purposes of the trial, addressed in two parts. Common Issue 1a concerned

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[16] *Anderson v. St. Jude Medical Inc., supra,* at para. 63 (certification motion).
[17] *Anderson v. St. Jude Medical Inc., supra,* at para. 22 (certification motion) for the common issues as proposed by the plaintiffs.
[18] [2009] O.J. No. 1910, 72 C.P.C. (6th) 120.
[19] [2011] O.J. No. 3746, 19 C.P.C. (7th) 280.
[20] *Lambert v. Guidant Corp., supra,* at para. 119; and *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.* (certification motion), at para. 189.
[21] *Anderson v. St. Jude Medical Inc.*, [2012] O.J. No. 2921 (trial decision).

"premarket design, manufacture and testing". Common Issue 1b dealt with "post-market surveillance, warning and recall".[22] In considering Common Issue 1a, the trial judge referred to the design and testing. Little was said about the manufacture of the products involved. In summarizing her answer with respect to Common Issue 1, the trial judge concluded:

> The defendants exercised reasonable care in the design and testing of the Silzone valve and in the warnings of the risks inherent in their use.[23]

[17] This suggests that there was little, if any, difficulty moving from the certification of a common issue which considered various aspects of the design, development and manufacturing of a product through the remainder of the pre-trial process. The flexibility inherent in the procedure outlined by the *Class Proceedings Act, 1992* permitted the understanding of the true import of Common Issue 1 to evolve and proceed through the trial.

[18] Nonetheless, counsel for the defendants posited that, in this case, this could not happen. In his view, the melding of the allegations on negligent design and negligent manufacture created common issues that were too general to be appropriate or workable. It "...would result in an answer that is so general it would have no impact on the litigation."[24] This submission arose from an analysis of the evidence undertaken by counsel. It purported to show that there could be no viable action for negligent design. It began with the proposition that, in evaluating the claim for negligence, the motions judge used the wrong test. A proper analysis of a claim in negligent design should rely on a "risk utility analysis". This is an examination of the nature of the risk balanced against the value of the benefit associated with the design:

> ...The Health Canada witnesses both testified that [a risk utility assessment] involves weighing the known and potential risks of a device against the known and potential benefits and determining whether the benefits outweigh the risks...[25]

[19] As counsel sees it, the motions judge did not rely on this form of analysis. Rather, she examined the issue of negligence from a consumer protection perspective. Counsel relied on the following comment found in the decision of the motions judge:

> In conclusion, I am satisfied that Rutila's opinion, even after factoring in the alleged deficiencies, provides at least some basis in fact that IKO shingles have a common defect across all class members and do not perform in accordance with

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[22] *Anderson v. St. Jude Medical Inc., supra,* (trial decision), at para. 56.
[23] *Anderson v. St. Jude Medical Inc., supra,* (trial decision), at para. 594.
[24] *Martin v. Astrazeneca Pharmaceuticals PLC, supra,* (certification motion), at para. 322.
[25] *Anderson v. St. Jude Medical Inc., supra,* (trial decision), at para. 61.

> the reasonable expectation of consumers that they be durable and suitable for use as an exterior roofing product.[26]

[20] Counsel for the defendants submitted that this approach was a fundamental error. Applying a consumer protection analysis to a general allegation of negligence (as opposed to applying a risk-utility assessment to an allegation limited to negligent design) led to a consideration of a common issue that was so broad that it could not assist in advancing the litigation. As counsel put it, this led the judge, on the motion, to "fall into the trap that Horkins J. warned of in *Astrazeneca*". This was said with reference to the comment that, in that case, it was wrong to lump the different negligence claims together and provide particulars of the broad claim that remained (see the quotation: para. [10], above).

[21] *Martin v. Astrazeneca Pharmaceuticals PLC* dealt with the design of a drug. It is self-evident that a drug, by its nature, will be intended to have benefits for those who use it and almost inevitably will have side effects which, depending on how serious they may be, will entail some measure of risk. From this, it is apparent that a drug can be readily subjected to a risk-utility assessment. The benefits and risks are identified as part of a proper process of developing and testing any new drug. It is part of the "design" process. Thus, a risk-utility assessment appropriately deals with negligent design. It is possible that a drug, once designed and approved, may be manufactured in a fashion that is not consistent with the specification set by the design. This would be a different problem. It suggests the possibility of negligence in the manufacturing of the drug. It would require a different analysis and demonstrates why, in *Martin v. Astrazeneca Pharmaceuticals PLC*, the judge, on the certification motion, determined that it was inappropriate in describing the cause of action to join allegations of negligent design and negligent manufacture into a single claim of negligence.

[22] Having said this, I point out the obvious. Shingles are not drugs. They are a different kind of product. It seems unlikely that shingles are developed knowing that there is a risk of harm inherent in the design against which the benefit should be weighed. For shingles, the questions are: how well will they do the job for which they are designed and how long will they last? These are exactly the questions to which the findings of the motions judge respond (see: para. [19], above). If the answer to these questions is unsatisfactory and an action is commenced, the problem may implicate either *or both* design and manufacture.

[23] The approach proposed by counsel for the defendants presumes there is only one method to be used to determine whether there is a cause of action, in negligence, involving a faulty product. It suggests that the *Class Proceedings Act, 1992* is more than procedural. It requires the application of a particular analysis. It denies the flexibility inherent in the legislation and the potential for the understanding of the issues in the action to evolve through the pre-trial process, including discovery.

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[26] *Barwin v. IKO* 2012 ONSC 3969, at para. 71.

Negligence: Some Evidence

[24] This is not the end of the matter. While the common issues criterion is not a high legal hurdle, a plaintiff must adduce some basis in the evidence to show that the issues are common.[27] Counsel for the defendants does not accept that such evidence was present to support the decision of the motions judge. It was submitted that, if she had considered the allegation of negligent design and negligent manufacture separately, it would have been apparent that there was no evidence that would justify the certification of this action as a class proceeding.

[25] This is based on the understanding that, while the Third Fresh Amended Statement of Claim alleges that the design of the shingles did not comply with the applicable Canadian standard,[28] when cross-examined, the witness for the plaintiffs appeared to give different answers. He acknowledged that specifications found within the Canadian Standard (for "dry felt", "percent saturation", "net mass", "top surfacing" and "back coating") were met by certain of the shingles that had been produced by the defendants ("Renaissance", "Chateau" and Armor Seal 20"). The witness said that: "In terms of the prescribed goals, those that I've examined have met or exceed CSA 123.1".[29] On this basis, counsel said that there was no evidence that could support the claim for negligent design.

[26] The same witness undertook a review of 168 shingles from different sources. Three came from the plaintiff, Kevin Barwin. Of the remaining 165, some were "warranty shingles"; that is, shingles that had been the subject of warranty claims. Counsel advised that they were 9 to 16 years old and had come from roofs that had been the subject of weathering. Others were "attic stock shingles", which is to say, shingles that, while old, had never been used. They had been stockpiled. These samples were from a range of different models that had been produced by the defendant. The witness subjected them to testing. In his report, the witness noted that:

> The shingles we collected from these homes, and the samples from other homes, are 9-16 yrs. old, and all show one or more of the following:
>
> - Loss of surfacing and top coating (Photo 4)
> - Weathering of felt after surfacing and top coating loss (Photo 4)
> - Cupping of shingle
> - Curling (clawing) of shingle tabs (Photo 5)

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[27] *Hollick v. Toronto (City), supra,* at para. 25, as referred to in *Kafka v. Allstate Insurance Co. of Canada,* [2011] O.J. No. 1683, 12 C.P.C. (7th) 367, at para. 141; and in *Martin v. Astrazeneca Pharmaceuticals PLC, supra,* (certification motion), at para. 216.

[28] Third Fresh as Amended Statement of Claim, at paras. 11 and 19; and Canadian Standard CSA A123.1.

[29] Cross-examination of Dean A. Rutila, April 10, 2012, at pp. 63-72.

- Cracking of shingle tabs (Photo 6)
- Ridging of shingle tabs
- Blistering of coating[30].

[27] Counsel for the defendants submitted that, with this range of flaws, it could not be said that there was a common defect on which the plaintiffs could rely. These concerns may arise from negligence in the manufacture of the product but, in the absence of a common defect, each claim would have to be analyzed on its own. Thus, the action was not suitable for certification as a class proceeding. It is this submission which led counsel for the defendants to assert that each claimant should be required to bring an independent action.

[28] The motions judge dealt with this at length.[31] She concluded that the expert report provided by the witness "provides the requisite 'some basis in fact' that the defective nature of the IKO shingles can be determined on a class wide basis".[32] The witness "opined that, as a result of moisture invasion, the shingles crack, curl, blister, split, warp, delaminate, blow off and otherwise deteriorate prematurely."[33] "He concluded that these defects cause shingles exposed to the weather to prematurely fail as a result of excessive moisture in the top coating, surfacing and felt."[34] The motions judge considered the concerns raised on behalf of the defendants and determined that the opinion of the expert "...even after factoring in its alleged deficiencies, provides at least some basis in fact that IKO shingles have a common defect across all class members and do not perform in accordance with the reasonable expectation of consumers that they be durable and suitable for use as an exterior roofing product."[35]

[29] I do not agree that there is any error in this. For the purposes of certification, in the circumstances of this case, there is no reason why the evidence should be split, divided and directed to separate allegations of negligent design and negligent manufacture. The issue is whether, through the negligence of the defendants, the shingles deteriorated prematurely causing harm to the members of the proposed class. The common issues, as ordered by the motions judge, reflect on the elements of negligence that would have to be addressed (see: para. [9], above). The findings made by the motions judge demonstrate that there is some evidence to support the allegation of negligence causing defects in the shingles which are common to the members of the class. Neither the suggestion that the applicable Canadian standard was not breached nor that negligence resulted in several and not a single type of defect takes away from that finding.

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[30] Affidavit of Dean A. Rutila, sworn October 31, 2011, Exhibit B, Report entitled: IKO Organic Shingle Investigation and Testing, dated October 31, 2011, at p.14.
[31] *Barwin v. IKO, supra*, at paras. 58 to 71.
[32] *Barwin v. IKO, supra*, at para. 58.
[33] *Barwin v. IKO, supra*, at para. 59.
[34] *Barwin v. IKO, supra, at para. 60.*
[35] *Barwin v. IKO, supra*, at para. 71.

[30] The litigation plan, which was approved as part of the order certifying the action as a class proceeding, includes direction dealing with (1) Document Exchange and Management; (2) Examinations-for-Discovery; (3) Experts Reports; (4) Mediation; and, (5) Clarification of the Common Issues. Each of these will contribute to a more refined understanding of the issues the case presents. They are a confirmation of the flexibility that is part of a class proceeding. They should lead to a more refined understanding of the action and the issues it raises.

Negligence: Methodology

[31] Counsel for the defendants makes a further attack on the decision to certify the action in negligence. He submitted that the evidence of the expert relied on by the plaintiff should not have been accepted by the motions judge. It was not reliable and it should not have been admitted. I do not agree. The reliability of expert evidence is obviously a matter which is most often dealt with at trial. Testing protocols, sampling methodologies and questions concerning the efficacy of the analysis require the full hearing provided by a trial. Reliability is a consideration in determining the admissibility of evidence, but its use for that purpose in limited:

> The reliability of expert opinion evidence is considered both at the stage of assessing its admissibility (threshold reliability) and at the stage of determining what weight, if any, should be given to that evidence (ultimate reliability). The assessment of threshold reliability is an assessment of the principles and methodology underlying an expert's opinion to determine if they are of sufficient reliability that the opinions based upon those methods ought to be admitted into evidence...[36]

[32] The issue of reliability, at this early stage, considers the general acceptance of the science that underlies the evidence. In this case, the issues raised on behalf of the defendants go well beyond this. By way of example, counsel expressed concern for:

- whether proper sampling methods were used;
- whether it was appropriate to rely on standards that are "primarily intended to apply to newly-manufactured shingles"[37];
- whether the test results were statistically significant;
- whether the testing could only be applied to newly-produced shingles and not to shingles that had been exposed;
- whether the expert had failed to factor in wear that could have occurred after manufacturing; and,

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[36] *Anderson v. St. Jude Medical Inc., supra,* (trial decision), at para. 43

[37] Testimony of Dean A. Rutilla, December 2011, Plaintiff's Supplementary Motion Record, Vol. 3, Exhibit G.

- whether the test methodology used by the expert was different from that previously used by his company.

[33] These are issues that address "ultimate reliability" and should be addressed at trial where the weight that should be given the evidence is determined.

[34] This is underscored in the context of a class proceeding. On a certification motion, a plaintiff need only show a "credible or plausible methodology" for proving class-wide issues. The threshold is a low one and conflicting expert evidence is not to be given the level of scrutiny to which it would be subject at a trial.[38]

[35] In this case, it was submitted that the motions judge failed to examine whether the evidence of the expert was sufficiently reliable that it should be admitted for the purpose of the certification motion.

[36] It is not clear to me that, at the time the motion was argued, the motions judge was asked to consider this question. Be that as it may, she was at pains to review the expertise of the witness and to address an assortment of alleged weaknesses in his work. There is more than enough to demonstrate the level of reliability required to find the evidence admissible (threshold reliability). Counsel for the defendants relied on the decision of the motions judge where she said:

> Finally, the defendants attacked Rutila's testing methodology as unreliable and unscientific. In my view, that is an issue for trial, where based on a full record and viva voce evidence the common issues judge can determine whether Rutila's methodology is sufficient to support his conclusions.[39]

[37] It is not appropriate to separate this from the rest of the reasons. When read in that context, it is clear that this paragraph refers to "ultimate reliability" which is the domain of the trial judge.

Negligence: Pure Economic Loss

[38] The defendants assert that, in any event, it is plain and obvious that the claim in negligence cannot succeed because it is a claim for pure economic loss. "[A] pure economic loss is a financial loss which is not causally connected to physical injury to the plaintiff's own person or property".[40] The circumstances where claims in negligence can be made for pure economic

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[38] *Pro-Sys Consultants Ltd. v. Infineon Technologies AG*, [2009] B.C.J. No. 2239 (C.A.), leave to appeal to S.C.C. ref'd, [2010] S.C.C.A. 32; *Steele v. Toyota Canada Inc.*, 2011 BCCA 98, leave to appeal to S.C.C. ref'd, [2011] S.C.C.A. No. 200.

[39] *Barwin v. IKO*, supra, at para. 70.

[40] Allen M. Linden and Bruce Feldthusen *Canadian Tort Law, Eighth Edition*, pg. 441; and see *Ontario (Attorney General) v. Fatehi*, [1984] 2 S.C.R. 536 at p.

loss are limited.[41] The motions judge referred to *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*[42] It explains one circumstance in which such a claim may succeed:

> I conclude that the law in Canada has now progressed to the point where it can be said that contractors (as well as subcontractors, architects and engineers) who take part in the design and construction of a building will owe a duty in tort to subsequent purchasers of the building if it can be shown that it was foreseeable that a failure to take reasonable care in constructing the building would *create defects that pose a substantial danger to the health and safety of the occupants.* Where negligence is established and such defects manifest themselves before any damage to persons or property occurs, they should, in my view, *be liable for the reasonable cost of repairing the defects and putting the building back into a non-dangerous state.* [43]
>
> [Emphasis added]

[39] In this case, the plaintiff alleges that he replaced faulty shingles that had been installed on his roof in order to avoid the water penetrating into his home and the attendant damage that could flow from it. The plaintiff claims that this represents the sort of danger referred to in *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* The plaintiff did not allege that he incurred water seepage but, rather, that he removed the shingles in order to avoid it.[44] As the motions judge observed: "...a danger need not be immediate in order to constitute a 'real and substantial danger'. As the [C]ourt [of Appeal] stated, 'the operative principle is explicitly preventative.' Recovery for repairs is permitted in order to avoid the greater damages associated with personal injury, should the danger materialize."[45] She went on and referred to the policy justification for such an approach by quoting from *Roy v. Theissen*:[46]

> The policy goal must be to encourage homeowners to make any necessary repairs as soon as possible in order to mitigate potential losses; they should not have to delay such repairs until there is an imminent danger of harm.[47]

[40] On this basis, it is not plain and obvious that the action in negligence cannot succeed because it is a claim for a pure economic loss.

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[41] Allen M. Linden and Bruce Feldthusen, *Canadian Tort Law, Eighth Edition* pg. 442.
[42] [1995] 1 S.C.R. 85, 1995 CanLII 146 (SCC).
[43] *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co., supra,* at para. 43 (per La Forest J.), as quoted in *Barwin v. IKO, supra,* at para. 28.
[44] *Barwin v. IKO, supra,* at para. 29.
[45] *Barwin v. IKO, supra,* at paras. 30 and 31, referring to *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd., supra,* at paras. 21, 36, 38, 41 and 49; and to *Mariani v. Lemstra,* [2004] O.J. No. 4283, at para. 32.
[46] [2005] S.J. No. 195.
[47] *Barwin v. IKO, supra,* at para. 31, quoting from *Roy v. Theissen, supra,* at para. 38.

[41] The motions judge went further in her reliance on *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.* She found that the case did not foreclose the possibility of damages being awarded for pure economic loss even where there was no immediate danger. In coming to this conclusion, she relied on the following:

> Given the clear presence of a real and substantial danger in this case, *I do not find it necessary to consider whether contractors should also in principle be held to owe a duty to subsequent purchasers for the cost of repairing non-dangerous defects in buildings.* It was not raised by the parties. I note that appellate courts in New Zealand and in numerous American states have all recognized some form of general duty of builders and contractors to subsequent purchasers with regard to the reasonable fitness and habitability of a building. In Quebec, it is also now well-established that contractors, subcontractors, engineers and architects owe a duty to successors in title in immovable property for economic loss suffered as a result of faulty construction...*For my part, I would require argument more squarely focused on the issue before entertaining this possibility.*[48]
>
> [references omitted, emphasis added by the motions judge]

[42] This is not the only time it has been suggested that the door has not been closed on the possibility of damages being awarded where there is pure economic loss as a result of a defective product but no apparent danger.[49] In *Gariepy v. Shell Oil Co.*[50], after referring to the same quotation from *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, the following was observed:

> It would seem, therefore, that the possibility exists that claims for repairs in non-dangerous situations may yet be held to be recoverable. It is at least clear that the issue is not foreclosed.[51]

[43] Counsel for the defendants pointed out that there is a conflicting case. In *Arora v. Whirlpool Canada Inc.*[52], the judge stated:

> In my opinion, and as supported by the case law that I shall discuss below, it is a mistake to read Justice La Forest's comment as supporting the proposition that there can be recovery for pure economic losses from negligently designed or

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[48] *Barwin v. IKO, supra*, at para. 33, referring to *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co. Ltd., supra*, at para. 41.
[49] *Gariepy v. Shell Oil Co.*, [2002] O.J. No. 2766, 23 C.P.C. (5th) 360, at paras. 41 and 42; *Bondy v. Toshiba Canada Ltd.* 2006 CanLII 13416 (ON SC), at paras. 11 and 15; *Griffin v. Dell*, 2009 CarswellOnt 560, 72 C.P.C. (6th) 158, at paras. 54-57 (ON SC), leave to appeal to Divisional Court refused, *supra*, at fn. 2; and *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2007 NSCA 70 (CanLII) at paras. 26-30.
[50] *Supra.*
[51] *Gariepy v. Shell Oil Co., supra*, at paras. 41 and 42.
[52] [2012] O.J. No. 3865.

> manufactured products that are not dangerous. And, in my opinion, it is also a mistake to read his statement as supporting the proposition that pure economic claims beyond repair costs or perhaps costs similar to repair costs can be recovered. Justice La Forest's statement mentions only the cost of repair of a dangerous good as a recoverable head of damage, not economic losses generally. Thus, in the context of the case at bar, there is, in any event, no support here for a head of damages based on the diminishment in value of the washing machines.[53]

[44] He reviewed a number of recent cases considering this issue and concluded:

> ...in my opinion, [*Sable Offshore Energy Inc. v. Ameron International Corp.* (see fn. 47)], does not overcome the numerous Ontario authorities binding on me that hold that there is no recovery in negligence for shoddy goods that are not sources of danger directly or indirectly. I conclude that as a matter of decided case law, it is plain and obvious that the Plaintiffs have not disclosed a reasonable cause of action in negligence.[54]

[45] The question is whether or not leave to appeal should be, or could be, granted in respect of the finding of the motions judge that the action should be left to proceed. The question of whether the plaintiff, or any member of the class, may succeed in circumstances where no danger is demonstrable is not identified as a common issue in the decision made by the motions judge. If the plaintiff cannot succeed on this basis, that will not end the action. The plaintiff may still win at trial. It may be that the requisite danger is present. This determination is a question of fact and is better left to the trial judge.[55] In any case, in the event that a decision is made that there must be imminent danger before a claim can succeed, it may be necessary for there to be individual inquiries as to whether that danger was, or is, present. This is in accord with the procedure recognized by the *Class Proceedings Act, 1992*:

> Idiosyncratic and difficult issues of causation and damages did not prevent certification in *Bywater, Cloud, Tiboni, Medtronic Inc., LeFrancois, Heward*, and *Andersen v. St. Jude Medical Inc.* 2003 CanLII 5686 (ON SC), (2003), 67 O.R. (3d) 136 (Ont. S.C.J.) These are all cases where disparate harm to class members required individual assessments of causation and damages.[56]

[46] This is another demonstration of the flexibility that is inherent in the procedures governing class proceedings in Ontario. Finally, *Arora v. Whirlpool Canada Inc.* has been appealed. There would not be much purpose in these reasons attempting to resolve whether there

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[53] *Arora v. Whirlpool Canada Inc., supra,* at para. 224.
[54] Arora v. Whirlpool Canada Inc., *supra,* at para. 258.
[55] *M. Hasegawa & Co. v. Pepsi Bottling Group (Canada), Co.*, [2002] B.C.J. No. 1125 (C.A.), at para. 50, as referred to in *Barwin v. IKO, supra,* at para. 32.
[56] *Griffin v. Dell, supra,* at para. 91, as quoted in *Barwin v. IKO, supra,* at para. 69.

can be a claim for negligence in the absence of a danger when that issue will be shortly dealt with by a higher court.

[47] In the circumstances, I am not prepared to find that it is desirable that leave to appeal be granted with respect to this issue as required by Rule 62.02(4)(b).

Negligence: Conclusion

[48] I wish to make one further observation. It is true that, in considering whether there is some evidence to show issues are common, it is open to the motions judge to consider the evidence of the defendant and not just that of the plaintiff:

> This limitation on the role of the certification judge does not mean that the court should accept the plaintiffs' affidavit without regard for the defendants' evidence. The court must consider all of the admissible evidence, including the cross-examinations, to decide if there is some evidence to support the s. 5 test.[57]

[49] It is also true that a certification motion is not the place for an in-depth evaluation of the evidence leading to a finding on the merits:

> ...While the motions Judge must take into consideration any evidence lead by the defendants, neither *McCracken* nor *Chadha* suggest that a motions Judge who is satisfied that the plaintiff has adduced evidence that meets the requirements of s. 5(1)(c) and (d) of the CPA should then go on to a second phase and 'appropriately' weigh the defendant's evidence on those issues.[58]
>
> .....
>
> Most fundamentally, the purpose of the certification stage of a class proceeding is to determine whether the requirements in section 5(1) of the CPA are satisfied and, if so, to define the issues to be tried. It would be a reversal of the process to permit certification to be determined by deciding issues that are likely to be front and centre at a trial.[59]

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[57] *Martin v. Astrazeneca Pharmaceuticals PLC, supra*, (certification motion), at para. 39 .
[58] *Toronto Community Housing Corp. v. Thyssenkrupp Elevator (Canada) Ltd.*, [2012] O.J. No. 143 (leave to appeal certification), at para. 13.
[59] *Lambert v. Guidant Corp., supra*, at para. 70.

Consumer Protection: General

[50] The motions judge included, in the certification of the class proceeding, relief "for conduct contrary to certain provincial consumer protection legislation."[60] Her reasons state:

> The consumer protection law claims are asserted solely in respect of those provinces where the legislation explicitly states that it applies in the absence of privity of contract, namely British Columbia, Saskatchewan, Manitoba, Quebec, and New Brunswick. During argument the defendants mounted no serious attack on these claims, and I see no reason why they should not proceed. Those claims will be determined under the consumer protection legislation of the particular province in which the class member resides.[61]

[51] Despite this, the defendants argued that the certification should not have been made and that leave to appeal this determination should be granted. It was submitted that there can be no common issues where the legislation in each of the five provinces referred to is different and where legislation for others is not relied on (Ontario). The certification recognized the putative class members from the five provinces where legislation was identified as a subclass[62].

[52] The seven issues identified in the decision of the motions judge refer to each of the statutes in each of the five provinces.[63] The issues deal with concerns consistent with consumer protection legislation: whether the shingles are fit for the purpose, whether the shingles are durable for a reasonable length of time, whether the shingles are unreasonably dangerous because of a defect in design, materials or workmanship and whether the defendants engaged in unfair or deceptive practice in violation of particular provisions of certain of the identified statutes.[64] Certification of these issues is consistent with the *Class Proceedings Act, 1992.* The statute is explicit: certification cannot be denied on the basis that the class includes a subclass whose members raise common issues not shared by all members of the class.[65] If one were to accept the position of the defendants, the differences in the language in the consumer protection legislation would require that separate actions be commenced in each of the five provinces. This would defeat the purpose behind the *Class Proceedings Act, 1992.* It would deny the flexibility inherent in the process it provides. There is nothing that suggests that a trial judge could not provide answers that acknowledge and account for the difference in language found in the

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[60] Order of Madam Justice Baltman, dated Tuesday, May 29, 2012, at paras. 1 and 2.
[61] *Barwin v. IKO, supra,* at para. 43.
[62] *Class Proceedings Act, 1992,* s. 5(2), 6 (para. 5), 8(2), 11(1)(b), 14(1), 15(3), 22(2), 27(1)9b), 27(1)(c), 27(2) and 27(3).
[63] *Barwin v. IKO, supra,* at para. 4.
[64] *Barwin v. IKO, supra,* at para. 8.
[65] *Class proceedings Act, 1992,* s. 6.

applicable statutes.[66] There are cases where courts in Ontario have certified national classes where the claims are based on different provincial legislation.[67]

[53] It was further submitted that, for some of the issues, there was no evidence that they were common to the class. In her reasons, Madam Justice Baltman observed:

> To the extent that the consumer protection law claims related to implied warranties, breach of the implied warranties can be determined through a finding that IKO shingles are defective and prone to premature failure. Rutila's evidence provides some basis in fact that this can be determined on a class-wide basis.[68]

[54] This is enough to justify the finding that there is some evidence to demonstrate that there are common issues that call for the certification of the consumer protection claims. It is worth remembering that, for an action to be certified under the *Class Proceedings Act, 1992,* not all issues must be resolvable as issues common to the class. The question is whether the resolution of the issues that are common will assist in resolving the litigation. It is possible that, at the end of the day, some matters will have to be determined on an individual basis. The order made by the motions judge recognized that there will be issues to be decided on an individual basis. It states:

> THIS COURT ORDERS that common issue (d)2 shall be determined following the resolution of individual issues and the quantum of compensatory damages.[69]

Consumer Protection: Conclusion

[55] As with the claim for negligence, I will not grant leave to appeal the order granting certification of the claim alleging breach of consumer protection legislation as class proceeding. There is no decision which conflicts with the findings of Madam Justice Baltman and no reason to doubt the correctness of the order she has made.

Decision

[56] This motion is dismissed.

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[66] *Rumley v. British Clumbia,* 2001 CarswellBC (SCC), at para. 32.
[67] *Banerjee v. Shire Biochem Inc.* 2010 CarswellOnt 647 (S.C.J.), at paras. 1, 12 and 27; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees) v. SNC-Lavalin Group Inc.* 2012 CarswellOnt 11520 (S.C.J.), at para. 55; *Anderson v. St. Jude Medical Inc., supra,* at paras. 17 and 20; and, *Arora v. Whirlpool Canada LP, supra,* at paras 163 and 384.
[68] *Barwin v. IKO, supra,* at para. 75.
[69] Order of Madam Justice Baltman, dated Tuesday, May 29, 2012, at para. 7.

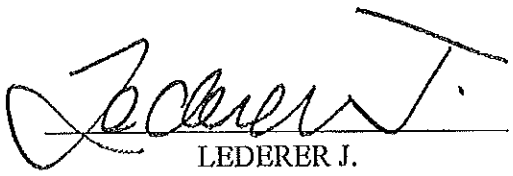
Costs

[57] If the parties are unable to agree as to costs, I will consider written submissions on the following terms:

1. On behalf of the plaintiff, no later than fifteen days after the release of these reasons. Such submissions are to be no longer than five pages, double-spaced, not including any Costs Outline, Bill of Costs or case law that may be included.

2. On behalf of the defendant, no later than ten days thereafter. Such submissions are to be no longer than five pages, double-spaced, not including any Costs Outline, Bill of Costs or case law that may be included.

3. On behalf of the plaintiffs, if necessary, in reply, no later than five days thereafter. Such submissions are to be no longer than two pages, double-spaced.



LEDERER J.

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DATE: 20130605

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

BETWEEN:

KEVIN BARWIN

Plaintiff/Respondent

– and –

IKO INDUSTRIES LTD., CANROOF CORPORATION INC., and I.G. MACHINE & FIBERS LTD.

Defendants/Appellants

JUDGMENT

LEDERER J.

Released: 20130605