CITATION: Klassen v. City of Hamilton, 2022 ONSC 3660
COURT FILE NO.: CV-19-69208
DATE: 2022/06/20

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
CORINNE KLASSEN, BRIAN KLASSEN, ESTATE OF MICHAEL SHOLER by his Estate Administrator, Edwin Sholer, EDWIN SHOLER, MELISSA SHOLER, NATASHA SHOLER and MATTHEW SHOLER	)	*Robert J. Hooper, Mary Grosso, David Thompson* and *Matthew G. Moloci,* on behalf of the Plaintiffs
Plaintiffs	)	
- and –	)	
CITY OF HAMILTON	)	*Scott Kugler, Michael Bordin, Heyla Vettyvel, Deborah Berlach,* and *Andrea LeDrew* on behalf of the Defendant
Defendant	)	
	)	
Proceeding under the *Class Proceedings Act, 1992*	)	**HEARD**: March 28 and 29, 2022 (by videoconference)

D.L. Edwards, J.

REASONS FOR DECISION

A. INTRODUCTION

[1] This is a motion for certification under the *Class Proceedings Act*[1] (the "*CPA*") brought by the plaintiffs against the City of Hamilton (the "City"). The plaintiffs seek to certify an action for failure to warn and for negligence, resulting in injury, death, damage to property, and pecuniary loss. They assert that the City negligently designed, engineered, constructed, and maintained the Red Hill Valley Parkway (the "RHVP") and failed to warn motorists of the unsafe conditions.

[2] For the reasons that follow, this motion is dismissed.

[1] *1992*, S.O. 1992, c 6.

B. OVERVIEW

1. The RHVP

[3] The City is a municipal corporation pursuant to the *City of Hamilton Act*.[2] It is responsible for, among other things, the construction and maintenance of roads and infrastructure in the municipality. The RHVP is among the roads for which the City is responsible.

[4] The RHVP is a municipal highway in the City. It is an 8.1-kilometer parkway that extends from the top of the Niagara escarpment down through the Red Hill Valley, connecting the Lincoln Alexander Parkway ("LINC") with the Queen Elizabeth Way ("QEW").

[5] The RHVP has six full access interchanges which vary in design.

[6] The City began the design process and environmental assessment for the RHVP in the 1980s, with initial construction beginning in the early 1990s. The City completed construction of the RHVP in 2007.

[7] The City submits that traffic volumes on the RHVP had increased significantly since its opening in 2007 when it saw approximately 40,000 vehicles per day, to over 90,000 vehicles per day in 2018.

2. Surface of the RHVP

[8] The RHVP was constructed using a "perpetual pavement" asphalt design. The perpetual pavement involves a deep, multi-layered pavement design, intended to last for up to 50 years with occasional resurfacing. The design included a surface layer of stone mastic asphalt ("SMA") on the mainline. The City contends that the ramps were paved with SuperPave12.5 FC2 ("SP 12.5 FC2") asphalt, and the shoulders were paved with HL3 asphalt. The decision to use SP 12.5 FC2 and HL3 asphalt in these areas was because SMA is more expensive and there is less traffic on the ramps and shoulders.

[9] The City submits that maintenance and repairs to the RHVP, since it became operational, result in a non-uniform condition over its length and width. Typically, small potholes on the RHVP were filled using cold mix asphalt. Larger potholes, dips in the RHVP surface, and repairs following car accidents or fires, were repaired with readily available hot-mix asphalts. SMA was usually not used because it is primarily a mix for new construction and not readily available for emergency repairs. As a result, once repairs began to be made to the RHVP, the travelled portion ceased to be paved with a single type of asphalt.

[10] The City also submits that other circumstances have resulted in changes in the surface of the RHVP. For example, in November 2018, 44,000 litres of liquid asphalt spilled across the northbound lanes of the RHVP and parts of the southbound lanes. Once the spill was contained, it began to cool and harden in place. The spill was addressed by milling off the top 50 mm of existing pavement from the mainline and replacing it with SP 12.5 FC2 asphalt.

[11] The perpetual pavement design was novel technology in North America at the time of construction. City employees co-authored a report titled "Innovative, Comprehensive Design and Construction of Perpetual Pavement on the Red Hill Valley Parkway in Hamilton," for the 2008

[2] *1999*, S.O. 1999, Ch. 14, Sched. C.6.

Annual Conference of the Transportation Association of Canada.

[12] The plaintiffs allege that the RHVP was unsafe when it was opened in 2007, resulting in nearly 2,000 Motor Vehicle Accidents ("MVAs") since its opening.

[13] The RHVP was resurfaced in 2019; the shoulders, ramps and mainline were all paved with SP 12.5 FC2 asphalt.

3. The Tradewind Report

[14] The plaintiffs contend that Golder Associates Ltd. ("Golder") was the City's consultant for geotechnical, subsurface and pavement design throughout construction of the RHVP and afterwards. They submit that in 2005, the City commissioned Golder to prepare a feasibility study for the use of the perpetual pavement design. Both parties agree that in 2013, the City retained Golder to evaluate the performance of the RHVP. Golder retained Tradewind Scientific Ltd. to conduct special friction testing.

[15] The Tradewind Report is a special friction testing survey dated November 20, 2013, concerning the LINC and the RHVP. The City acknowledged that in January 2014, it received the Tradewind Report, which was enclosed in Golder's report entitled "Red Hill Valley Parkway – Performance Review after Six Years in Service" (the "Golder Report").

[16] The plaintiffs allege that The Tradewind Report concluded that the overall friction averages on the RHVP were "below or well below" the applicable UK standards, which applies to roadways like the RHVP. As a result, the Tradewind Report recommended that "a more detailed investigation be conducted and possible remedial action be considered to enhance the surface texture and friction characteristics of the [RHVP], based on the friction measurements recorded in the current survey."

[17] It is the plaintiffs' allegation that despite receiving this report, the City did not carry out further friction testing as recommended by the Tradewind Report, nor did it warn the public about the Tradewind Report findings.

[18] On February 6, 2019, the City issued a press release stating it had just been made aware of the Tradewind Report.

4. The CIMA Reports

[19] The plaintiffs allege that CIMA Canada Inc. prepared three safety analysis reports, dated November 2015, January 2019, and April 2020 (the "2015 Report", the "2019 Report" and the "2020 Report", respectively, and collectively the "CIMA Reports"). Similar to the Golder Report, the CIMA Reports were commissioned and provided directly to the City.

[20] The plaintiffs allege that the 2015 Report once again recommended pavement friction testing, given findings that the proportion of collisions under wet road surface conditions was significantly higher on the RHVP than the provincial average.

[21] In 2019, the City had scheduled resurfacing work, and the 2019 Report presented a roadside safety assessment in anticipation of this scheduled work. The 2019 Report recommended that the City ensure pavement design for the resurface, consider the history of wet surface collision, and investigate the need for a higher friction surface.

[22] The plaintiffs allege that despite these reports, the City did not undertake further friction testing until the RHVP had been resurfaced.

[23] The 2020 Report concluded a statistically significant reduction in total and injury collisions on the RHVP after the resurfacing work, educational safety campaigns and speed enforcement. The 2020 Report noted a reduction in both total and injury collisions after the resurfacing "treatments," and these reductions were found to be statistically significant. This finding was conditional in that it may have been the result of some combination of repaving, the speed limit reduction (including enforcement) and safety enhancements.

5. The Judicial Inquiry

[24] On April 24, 2019, the City passed a resolution requesting a judicial inquiry to investigate matters related to the Tradewind Report (the "Judicial Inquiry"). The Judicial Inquiry was called to "improve transparency and accountability, and ultimately better understand issues related to the Red Hill Valley Parkway." In May 2019, the Honourable Mr. Justice Herman J. Wilton-Siegel was appointed as the Commissioner in the Judicial Inquiry.

[25] The City asked the Commissioner to consider 24 issues regarding the failure of disclosure of the Tradewind Report, safety of the RHVP, and standards for friction on Ontario Highways. I take Judicial Notice of the fact that the Judicial Inquiry is still ongoing.

C. LEGAL FRAMEWORK

[26] Certification under s. 5(1) of the *CPA* requires the following five elements:

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

Upon satisfying these five elements the Court "shall" certify the class action. There is no discretion of the Court on whether to certify once it has found that these elements have been met.[3] The new amendments to the *CPA* do not apply to this action, as it was commenced prior to October 1, 2020.[4]

[27] The Supreme Court of Canada has affirmed that the three "principal advantages" of class actions are (1) judicial economy, (2) improved access to justice, and (3) behaviour modification of tortfeasors who have the potential to cause widespread damage.[5] These advantages inform my analysis by contextualizing the proposed class action within the intended purpose of these actions as a procedural vehicle.

[28] The party seeking to certify an action bears the evidentiary burden of proving "some basis in fact" for each of the certification criteria found in section 5(1) of the *CPA*, other than the requirement that the pleadings disclose a cause of action.[6]

D. EVIDENCE AT CERTIFICATION

[29] At certification, I am required to determine whether the action meets the certification criteria. This is not a determination or a preliminary review of the merits of the claim. The plaintiffs have the onus to establish "some basis of fact" for each of the certification criteria— other than the requirement under s. 5(1)(a) of the *CPA* requiring that the pleadings disclose a cause of action. The evidentiary requirement is not a high standard at the certification stage. The Supreme Court of Canada has said "[t]he question at the certification stage is not whether the claim is likely to succeed, but whether the suit is appropriately prosecuted as a class action."[7]

1. Plaintiffs' Supporting Documents

[30] The plaintiffs provided the following documentary evidence in support of this motion:

a. Affidavit of proposed representative plaintiff Corinne Klassen, sworn June 26, 2020;

b. Affidavit of proposed representative plaintiff Brian Klassen, sworn June 26, 2020;

c. Affidavit of proposed representative plaintiff Edwin Sholer both in his own right and as administrator of the estate of Michael Sholer, sworn June 25, 2020, containing as an exhibit a police report for the MVA of the accident of Michael Sholer;

d. Plan of Proceeding and appendixes; and

e. Affidavit of law clerk at plaintiff law firm Grosso Hopper Law, Sarah Hollingworth, and appendixes.

2. The Defendant's Supporting Documents

[31] The defendants provided the following documentary evidence in response to this motion:

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[3] *R.G. v. The Hospital for Sick Children*, 2017 ONSC 6545 at para. 119.
[4] CPA, at s. 39.
[5] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at paras. 27-29.
[6] *Pinon v. Ottawa (City),* 2021 ONSC 488 at para. 9.
[7] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 16.

a. Affidavit of Construction Manager for Hamilton Public Works Department, Marco Oddi, sworn February 23, 2021, and exhibits;

b. Affidavit of Director of Transportation Operations and Maintenance for the City, Edward Soldo, sworn February 24, 2021, with exhibits, transcript of cross-examination dated November 30, 2021, and undertakings and refusals chart;

c. Affidavit of Mechanical Engineer with expertise in accident reconstruction, Craig Wilkinson, affirmed February 22, 2021, and exhibits;

d. Transcript of cross-examination of proposed representative plaintiff Corrinne Klassen, dated November 17, 2021;

e. Transcript of cross-examination of proposed representative plaintiff (and estate administrator) Edwin Sholer, dated November 17, 2021, and;

f. Transcript of cross-examination of proposed representative plaintiff Brian Klassen, dated November 17, 2021.

E. ANALYSIS

1. Pleadings Disclose Cause of Action s. 5(1)(a)

[32] In determining whether the pleadings disclose a cause of action, the court will presume the facts alleged in the pleadings are true and will determine whether it is plain and obvious that no claim exists.[8]

[33] The plaintiffs plead negligent failure to warn and negligence, resulting in injury, death, damage to property and pecuniary loss. More specifically, they assert that the City negligently designed, engineered, constructed, and maintained the RHVP, and then failed to warn motorists of the unsafe conditions.

[34] The defendant argues that a claim for defective design, and engineering (which is an aspect of design) requires the plaintiffs to set out the particulars of the design defect and to identify the specific design alternative that would have been safer. The defendants say that the plaintiffs' claim does not set such particulars.

[35] In cases of negligent design, the underlying rationale is that as the manufacturer has a duty of care to not design a product negligently, the manufacturer can be fairly held responsible for the choices it makes affecting the safety of the product.[9]

[36] In *Price v. Smith & Wesson Corp*., Perell J. explains that to succeed in a cause of action for negligent design, the plaintiff must "identify the design defect in the product", establish that "the defect created a substantial likelihood of harm", and further establish that there are "safer and more economically feasible ways to manufacture the product."[10]

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[8] *Hollick*, at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57, [2013] 3 S.C.R. 477 at para. 63.

[9] *Kuiper v. Cook (Canada) Inc*., 2018 ONSC 6487 (*Kuiper*) at para. 112, rev'd on other grounds, 2020 ONSC 128 (Div. Ct.) ("*Kuiper* Appeal").

[10] 2021 ONSC 1114, 154 O.R. (3d) 675 at para. 92.

[37] In *Kuiper* Appeal, the Divisional Court affirmed that the plaintiff did not initially properly plead the cause of action of defective design as it did not set out the particulars of the design defect and of the specific design alternative that would have been safer. Further, the plaintiffs were still found to have not met the pleading requirements after amending their pleadings given that their revisions did not "contain any reference to the specific alternative design that would have been safer. Rather, the amendments [remained] generic, leaving the defendants to guess at what the plaintiffs say was the better or safer design."[11]

[38] In this case, the only portion of the Statement of Claim that notes a specific defect in the design of the RHVP is at para. 59 where the plaintiffs plead:

> The City did not take into consideration that it was building this roadway in an area where a creek was rerouted causing significant water issues which was not considered when the section of the type of design, construction and materials were chosen for the roadway.

[39] I find that the plaintiffs' pleadings are not sufficient to disclose a cause of action with respect to negligent design and engineering.

[40] Further, the defendant says the plaintiffs' Notice of Motion requests the court certify a claim for product liability that is neither addressed in the plaintiffs' factum nor the Statement of Claim. The defendant argues that the only reference that the plaintiffs make to "products" are that the City used "inferior products" to surface the RHVP, with no further particulars at para. 58 of the Statement of Claim.

[41] I find that the product liability claim has not been properly pleaded. If the plaintiffs wished to have product liability certified on this action, they should have filed a motion to amend their pleadings prior to the certification hearing.

[42] The defendant does not dispute that the claims for negligent construction, maintenance, and failure to warn are adequately pleaded. I agree. Therefore, I find that the plaintiffs meet the s.5(1)(a) criteria with respect to these causes of action.

2. Identifiable Class s.5(1)(b)

[43] The definition of an identifiable class serves the purposes of (i) identifying persons who have a potential claim against the defendant; (ii) defining the perimeter of the lawsuit, so as to identify those bound by the result; and (iii) describing who is entitled to notice.[12] There must be a rational relationship between the class and the common issues and the class must not be unnecessarily broad or over-inclusive.[13]

[44] The plaintiffs propose that the following class definitions meet the s.5(1)(b) criteria:

> **Class:** "All persons who drove a motor vehicle on the RHVP after November 1, 2007, and who were involved in a motor vehicle collision."

Family Class "All *FLA* Section 61 family members of Class Members."[14]

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[11] *Kuiper* Appeal, *supra* at para. 21.
[12] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913, at para. 10.
[13] *Western Canadian Shopping Centres Inc.,* at para. 38; *Hollick*, at paras. 19-21.
[14] Referring to the *Family Law Act*, R.S.O. 1990, c. F.3 ("*FLA*"), s. 61(1) reads: "If a person is injured or killed by the fault or neglect of another under circumstances where the person is entitled to recover damages, or would have

[45] The defendant conceded at the motion hearing that it is not contesting this criterion. Indeed, in its submissions, the defendant appears to have identified the members of the class itself by reviewing accident statistics on the RHVP in the class period.

[46] This criterion allows potential class members to determine whether they are members of the class and meet the other purposes. I find that s. 5(1)(b) is therefore satisfied by the applicants.

3. Common Issues s. 5(1)(c)

[47] Common issues are the issues that are to be determined at trial, should a class action be certified. An analysis under s. 5(1)(c) is intended to identify common elements of the class members' claims.[15] In *Western Canadian Shopping Centres Inc.*, McLachlin C.J. confirmed that the "underlying question" in this subsection is "whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis."[16] Rothstein J. summarized the criteria in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, as follows:

1) The commonality question should be approached purposively.
2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
3) It is not essential that the class members be identically situated vis-à-vis the opposing party.
4) It is not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.[17]

[48] *Cloud v. Canada (Attorney General)* is the leading case on the relationship between common issues and the issues raised by the claim as a whole. In *Cloud*, Gouge J.A. determined that the common issues could constitute a substantial ingredient in the claims, even if many issues remain to be decided after its resolution.[18] In *Vivendi Canada Inc. v. Dell'Aniello*, the Supreme Court of Canada held that commonality requires a common question to exist "even if the answer given might vary from one member of the class to another."[19] In other words, "for a question to be common, success for one member of the class does not necessarily have to lead to success for all members." However, the answers must not raise conflict among class members such that "success

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been entitled if not killed, the spouse, as defined in Part III (Support Obligations), children, grandchildren, parents, grandparents, brothers and sisters of the person are entitled to recover their pecuniary loss resulting from the injury or death from the person from whom the person injured or killed is entitled to recover or would have been entitled if not killed, and to maintain an action for the purpose in a court of competent jurisdiction."

[15] See Janet Walker et al., *Class Actions in Canada*, 2nd ed. (Toronto: Emond, 2018), at p. 65.

[16] *Western Canadian Shopping Centres Inc.*, at para. 39.

[17] 2013 SCC 57, [2013] 3 S.C.R. 477 at para. 108.

[18] (2004) 73 O.R. (3d) 401 (C.A.) at para. 53.

[19] 2014 SCC 1, [2014] 1 S.C.R. 3 at para. 45.

for one member ... result[s] in failure for another".[20]

[49] The plaintiffs propose the following common issues, based on the torts of negligent failure to warn and negligence. They allege specifically that the proposed common issues focus on the City's conduct and are a substantial ingredient of each of the plaintiffs' and class members' claim.

[50] The proposed common issues are the following:

Negligent Failure to Warn

(a) did the City become aware that remedial work was required on the RHVP and that the roadway was not safe for vehicular travel?

(b) if so, when did that occur?

(c) upon becoming aware that remedial work was required on the RHVP, did the City have a duty to warn the public of the unsafe road conditions on the RHVP?

(d) if so, what measures did the City take to warn the public of the unsafe road

conditions on the RHVP?

(e) did the measures taken by the City meet the City's duty to warn?

(f) if not, did the City's failure to warn cause or contribute to injury to the Plaintiffs and Class Members in some substantial or material way?

(g) or, if not, is it impossible for the Plaintiffs and Class Members to prove causation on the 'but for' test?

(h) if so, did the City breach its duty of care in a way that exposed the Plaintiffs and Class Members to an unreasonable risk of injury?

(i) if so, is the City liable to the Plaintiffs and proposed Class Members for damages as a result of its failure to warn?

Negligence

(j) did the City owe the proposed Class Members a duty of care to design, engineer, use appropriate products, construct, and maintain the RHVP, so as to be safe for vehicular traffic?

(k) if so, did the City meet its duty of care in that regard?

(l) upon becoming aware that remedial work was required on the RHVP, did the City have a duty to undertake such work to remedy the unsafe road conditions on the RHVP?

(m) if so, did the City fail to meet the standard of care in breach of its obligations under the *Municipal Act, 2001* ("*MA*")[21]?

(n) if so, did the City's breach cause injury to the Plaintiffs and Class Members in some substantial or material way?

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[20] *Vivendi*, at para. 45.
[21] S.O. 2001, c. 25.

(o) or, if not, is it impossible for the Plaintiffs and Class Members to prove causation on the 'but for' test?

(p) if so, did the City breach its duty of care in a way that exposed the Plaintiffs and Class Members to an unreasonable risk of injury?

(q) if so, is the City liable to the proposed Class Members for damages as a result of its breaches of duties of care owed, failure to meet standards of care or negligence/breach of the *MA*?

Plaintiffs' Position

[51] The plaintiffs submit that these common issues need to be resolved in the case of each class member. Each member of the class will benefit from the successful prosecution of these issues, although not necessarily to the same extent. It is the plaintiffs' position that even a significant level of individuality does not preclude a finding of commonality. There are 22 related pending actions against the City, and their statements of claim represent the commonality between potential class members. Further, the City has acknowledged it has 31,000 documents that are relevant to the pending individual litigations. It would go against the principal of judicial economy to review these documents for the purposes of the proposed common issues in each individual case. The plaintiffs argue that the City has refused to admit any commonality at all, but then it contradicts its own position when it touts the potential benefits of the Judicial Inquiry.

[52] The plaintiffs submit that the City's position disregards the "clear commonality of the design, construction, testing and maintenance of the RHVP." They submit that, should they be litigated in individual trials, these commonalities would duplicate the test from *Fordham v. Dutton-Dunwich (Municipality)* for municipal liability as the result of highway non-repair.[22]

Defendant's Position

[53] The City submits that the "vast majority" of the common issues cannot be resolved on a common basis, and the few that can be resolved on a common basis, are insufficient for certification at the preferability stage of certification.

(a) **<u>Duty of care issues: proposed issues (c), (j), and (l)</u>**

[54] The defendant submits that there is no real issue as to whether a *prima facie* duty of care exists in regard to the duty to maintain the roadway in a reasonable state of repair, as this duty is legislated in the *MA*.[23] The defendant further reminds that, with respect to design, in order to determine whether the duty of care is owed to the motorist, one must first identify whether the design element at issue was a policy decision, or an operations decision.

[55] The *prima facie* duty of care under s. 44(1) of the *MA* is subject to s. 450 which provides municipalities with immunity from claims in negligence in connection with the exercise or non-exercise of a discretionary power or the performance or non-performance of a discretionary function, if the action or inaction results from a policy decision made in a good faith. Given that I have determined that design and engineering issues do not constitute a cause of action, I believe this point is now moot. However, in principle, I see no reason why the question of whether

[22] 2014 ONCA 891.
[23] *MA*, s.44(1).

something was a policy, or an operational decision would not be embedded in the duty of care issue with respect to a municipality. In theory, this would be a key common issue, given that a finding that the design was a policy decision would have ended that negligent design analysis across the class.

[56] Notwithstanding that these common issues are likely easily disposed at trial; I find that they are common to the proposed class. I note that questions (c) and (l) require factual findings under questions (a) and (b). Question (j) is a common issue, except for the portions that refer to negligent design and engineering—as I found above that those were not properly constituted causes of action under s.5(1)(a).

(b) **Standard of Care issues: proposed issues (a), (b), (d), (e), (h), (k), (m), and (p)**

[57] Questions (a) and (b) are somewhat vague but seem to refer to an overall condition of the RHVP, rather than specific locations on the RHVP at specific times that might require regular maintenance. Setting aside for a moment the issues of the individuality of different locations on the road where accidents occurred, if I am to accept the premise that the entire length of the RHVP may have needed specific maintenance for a portion of, or the entire class period, then this question would be necessary to resolve for each class member. These are therefore proper common issues only insofar as they refer to the entire RHVP. Contrast that question to a factual determination of the condition of RHVP at specific points on the road, at specific points in time, which would not be a common question to all class members.

[58] Questions (d), (e), and (m) are properly constituted common issues, as they relate to the entire RHVP. Questions (d) and (e) specifically relate to the actions taken to City in relation to the alleged duty to warn and would be common to all class members.

[59] Questions (h), (k), and (p) are properly constituted common issues. I note that Questions (h) and (p) begin with "if so" which appear to refer to a finding of causation on the above issues. Whether the standard of Care has been breached is not dependent upon a finding of causation. These questions are common issues on their own, notwithstanding the "if so" that appears to connect them to the issues of causation.

(c) **Causation issues: proposed issues (f),(g),(n) and (o)**

[60] The plaintiffs submit that the issue of causality is common to the proposed class members. They also submit that if the class members are unable to prove causation using the "but for" test, then the material/substantial contribution to risk test could be used to determine causality on a class-wide basis.

[61] The defendant submits that these issues cannot be common because their resolution depends on individual findings of fact. Causation is typically an individual issue in negligence claims due to the nature of the "but for" test— as in, the plaintiff would not have suffered the injury "but for" the defendant's negligence. It submits that the material contribution to risk approach only applies where "but for" cannot be proven. The City asserts that it is the plaintiff's responsibility to demonstrate that there is a workable methodology for determining causation on a class-wide basis, and it is the City's position that the plaintiffs have failed to provide such methodology in this case.

[62] At first glance, applying *Vivendi*, it may seem that the question of causation is common to

all proposed class members. After all, causation will need to be established in each case. The distinction lies in the fact that the proposed common issues are essentially asking "did the City's (alleged) breach of their duty of care cause each of the MVAs?" *Vivendi* does not require that the common issue have a common answer for each class member, however, there needs to be some class-wide way of determining causation. That simply cannot be in the case for MVAs occurring on the RHVP at different times, in different weather, and at different locations with different drivers. The question of causation is necessarily "did the City's (alleged) breach of their duty of care cause *this particular* MVA?"

[63] The plaintiffs' alternate position is that if it is not possible to determine class-wide causation on the 'but for" test, then it should be possible to use the material/substantial contribution to risk test to determine causation on a class-wide basis.

[64] The plaintiffs rely on *Kamin v. Kawartha Dairy Ltd.*[24] for their application of the "but for" test. In *Kamin*, the plaintiff slipped and fell in the defendant's parking lot. The issue on appeal was causation and whether the plaintiff failed to prove causation because she was not able to indicate the precise location of her fall in a parking lot that was in ill-repair. Borins J.A., writing for the court, held that the trial judge erred in her causation analysis by setting the onus too high for the plaintiff to meet, and that "there was ample evidence on which to find that the appellant's injuries were caused, or materially contributed to, by the respondent's negligence."[25] In other words, the fact that she was able to prove the parking lot was in ill-repair was enough to establish causation, even though she could not prove the specific area of ill-repair that caused her fall.

[65] *Kamin* is not a useful precedent in that it relies on the state of the law when the leading test for causation was *Snell v. Farrell*.[26] The Supreme Court of Canada has since refined the law of causation. In *Clements v. Clements*[27], McLachlin C.J. stated the following about causation (emphasis added):

> [13] To recap, the basic rule of recovery for negligence is that the plaintiff must establish on a balance of probabilities that the defendant caused the plaintiff's injury on the "but for" test. This is a factual determination. Exceptionally, however, courts have accepted that a plaintiff may be able to recover on the basis of "material contribution to risk of injury", without showing factual "but for" causation. As will be discussed in more detail below, this can occur in cases **where it is impossible to determine which of a number of negligent acts by multiple actors in fact caused the injury, but it is established that one or more of them did in fact cause it.** In these cases, the goals of tort law and the underlying theory of corrective justice require that the defendant not be permitted to escape liability by pointing the finger at another wrongdoer. Courts have therefore held the defendant liable on the basis that he materially contributed to the risk of the injury.
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> …
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> [28] To recap, the Canadian Supreme Court jurisprudence on a material contribution approach to date may be summarized as follows. First, while accepting that it might be appropriate in "special circumstances", the Court has never in fact applied a material contribution to risk test. *Cook* was analyzed on a reverse onus basis. *Snell*, *Athey*, *Walker*

[24] (2006) 79 O.R. (3d) 284 (C.A.).
[25] *Kamin*, at para. 8.
[26] [1990] 2 S.C.R. 311.
[27] 2012 SCC 32, [2012] 2 S.C.R. 181.

Estate and *Resurfice* were all resolved on a robust and common sense application of the "but for" test of causation. Nevertheless, the Court has acknowledged the difficulties of proof that multi-tortfeasor cases may pose — difficulties which in some cases may justify relaxing the requirement of "but for" causation and finding liability on a material contribution to risk approach.

…

3. When Is a Material Contribution to Risk Approach Available?

[33] We have seen that the jurisprudence establishes that while tort liability must generally be founded on proof that "but for" the defendant's negligence the injury would not have occurred, exceptionally proof of factual causation can be replaced by proof of a material contribution to the risk that gave rise to the injury.

[34] In *Resurfice*, this Court summarized the cases as holding that **a material contribution approach may be appropriate where it is "impossible" for the plaintiff to prove causation on the "but for" test and where it is clear that the defendant breached its duty of care (acted negligently) in a way that exposed the plaintiff to an unreasonable risk of injury.** As a summary of the jurisprudence, this is accurate. However, as a test it is incomplete. A clear picture of when "but for" causation can be replaced by material contribution to risk requires further exploration of what is meant by "impossible to prove" (*Resurfice*, at para. 28) and what substratum of negligence must be shown. I will discuss each of these related concepts in turn.

…

(a) *"Impossibility"*

…

[39] What then are the cases referring to when they say that it must be "impossible" to prove "but for" causation as a precondition to a material contribution to risk approach? The answer emerges from the facts of the cases that have adopted such an approach. **Typically, there are a number of tortfeasors. All are at fault, and one or more has in fact caused the plaintiff's injury. The plaintiff would not have been injured "but for" their negligence, viewed globally.** However, because each can point the finger at the other, it is impossible for the plaintiff to show on a balance of probabilities that any one of them in fact caused her injury. This is the impossibility of which *Cook* and the multiple-employer mesothelioma cases speak.

(b) *Substratum of Negligence Involving Multiple Possible Tortfeasors*

[40] The cases that have dispensed with the usual requirement of "but for" causation in favour of a less onerous material contribution to risk approach are generally cases where, "but for" the negligent act of one or more of the defendants, the plaintiff would not have been injured. This excludes recovery where the injury "may very well be due to factors unconnected to the defendant and not the fault of anyone": *Snell*, per Sopinka J., at p. 327. The plaintiff effectively has established that the "but for" test, viewed globally, has been met. It is only when it is applied separately to each defendant that the "but for" test breaks down because it cannot be shown which of several negligent defendants actually launched the event that led to the injury. The plaintiff thus has shown negligence and a relationship

> of duty owed by each defendant, but faces failure on the "but for" test because it is "impossible", in the sense just discussed, to show which act or acts were injurious. In such cases, each defendant who has contributed to the risk of the injury that occurred can be faulted.
>
> [41] In these circumstances, permitting the plaintiff to succeed on a material contribution to risk basis meets the underlying goals of the law of negligence. Compensation for injury is achieved. Fairness is satisfied; the plaintiff has suffered a loss due to negligence, so it is fair that she turns to tort law for compensation. Further, each defendant failed to act with the care necessary to avoid potentially causing the plaintiff's loss, and each may well have in fact caused the plaintiff's loss. Deterrence is also furthered; potential tortfeasors will know that they cannot escape liability by pointing the finger at others. And these goals are furthered in a manner consistent with corrective justice; the deficit in the relationship between the plaintiff and the defendants viewed as a group that would exist if the plaintiff were denied recovery is corrected. The plaintiff has shown that she is in a correlative relationship of doer and sufferer of the same harm with the group of defendants as a whole, if not necessarily with each individual defendant.
>
> …
>
> [43] It is important to reaffirm that in the usual case of multiple agents or actors, the traditional "but for" test still applies. The question, as discussed earlier, is whether the plaintiff has shown that the negligence of one or more of the defendants was a necessary cause of the injury. Degrees of fault are reflected in calculations made under contributory negligence legislation. By contrast, the **material contribution to risk approach applies where "but for" causation cannot be proven against any of multiple defendants, all negligent in a manner that might have in fact caused the plaintiff's injury, because each can use a "point the finger" strategy to preclude a finding of causation on a balance of probabilities.**

[66] The plaintiffs' argument that the material contribution to risk is applicable in this case, on a class-wide basis, is a mischaracterization of the test. First, the impossibility of proving a common causation on a "but for" test arises in this case because there are too many individual facts in many MVAs to determine causation on a class-wide basis. This does not mean that the "but for" test is impossible to prove for each individual accident. Second, the plaintiffs argue that there are multiple tortfeasors in this case such as are contemplated in the *Clements* test. They argue that both the City and the drivers are potential tortfeasors. That is a mischaracterization of the test in *Clements* which applies to multiple defendants. Third, it is impossible to determine, on aggregate, whether individual drivers at various times during different weather conditions, driving at different speeds and in different locations on the RHVP may have breached their duty of care and contributed to their risk or not. This is inherently an individual issue.

[67] Further the plaintiffs argue that "the consequences of any impossibility should rest at the feet of the City," specifically that it is impossible for the plaintiffs or class members to prove causation because it is too late to assess how the non-repair contributed to any MVA. This again is a mischaracterization of impossibility, as defined in *Clements*.

[68] The "underlying foundation of a common issue is whether its resolution will avoid

duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice."[28] In the case before me there would be no duplication — causation will need to be determined for each MVA. It will depend upon findings of fact tied to when the accident occurred (and that would include the time of day, the actual date, the weather, speed and the driver's condition), where the accident occurred and the condition of the RHVP at that location. An issue is not a common issue if its resolution is dependent upon individual findings of fact for each class member.[29]

[69] Assuming, for a moment, that the City was found to have breached their duty of care at the common issues trial, this does not lead to an assumption that their negligence caused or contributed to each MVA. To make such an assumption would be an error of law. Common issues cannot be based on assumptions that circumvent the necessity for individual resolution of issues.[30]

[70] Questions (g) and (o) require individual analysis of each MVA to determine whether causation can be determined using the "but for" test. They cannot be certified as common issues.

[71] Questions (f) and (n) require individual analysis under questions (g) and (o), and then further individual analysis of whether the drivers were negligent and whether the material contribution to risk is applicable in the case of each MVA. These questions also cannot be certified as common issues.

(d) **Liability and damages: proposed issues (i) and (q)**

[72] The plaintiffs did not address these specific questions at any length in either oral or written arguments, save to note that as per s.6 of the *CPA* the court shall not refuse to certify solely on the grounds that there would need to be an individual determination of damages. While this is true, it has little to do with whether these questions are proper common issues and is more properly addressed at the preferability stage.

[73] The defendant argues that as per the Court of Appeal for Ontario in *Anderson v. Wilson*, if causation cannot be handled as a common issue, it flows that liability also cannot be a common issue.[31] The City further submits that the plaintiff must demonstrate that there is a workable methodology for determining damages on a class-wide basis.

[74] The answer to these questions as common issues requires that all of the elements of negligence or negligent failure to warn are found to be common issues. Thus, if causation fails then liability must also fail. For that reason alone, liability fails as a common issue in this instance.

[75] Even if all the elements of the proposed torts were to be certified as common issues, I agree with the defendant that there is no proposed workable methodology for establishing class-wide damages.

[76] In *Sauer v. Canada (Minister of Agriculture)*, Lax J. explained that in most class actions, a determination of whether each class member has suffered damages and the quantum of damages will not be made at a trial of common issues.[32] Aggregate damages are possible in some cases, and

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[28] *R.G.* at para. 197; see also *Western Canadian Shopping Centres Inc.*, at paras. 39 and 40.
[29] *R.G.* at para. 198; *Fehringer v. Sun Media Corp*., 2003 CanLII 22598 (Ont. Div. Ct.) at paras. 3, 6.
[30] *R.G.* at para. 198; *Nadolny v. Peel (Region),* 2009 CanLII 51194 (Ont. S.C.) at paras. 50; *Collette v. Great Pacific Management Co.*, 2003 BCSC 332 at para. 51, varied on other grounds, 2004 BCCA 110, 42 B.L.R. (3d) 161.
[31] (1999) O.R. (3d) 673 (C.A.).
[32] 2008 CanLII 43774 (Ont. S.C.), at para. 44.

there is a provision allowing aggregate damages at s. 24 of the *CPA*. For example, in *Ramdath v. George Brown College of Applied Arts and Technology*, the Court of Appeal for Ontario allowed an aggregate damages award after the defendant college falsely represented that students would obtain industry designation on completion of a specific program.[33] The defendant was found to have engaged in unfair practice contrary to *Consumer Protection Act* ("*Consumer Protection*).[34] In that case, the parties agreed to a specific formula to determine the damages owed to class members.[35]

[77] As a practical issue in this case, it is difficult to even conceive of a class-wide methodology for determining damages, and I believe that is why the plaintiffs have not attempted to do so. Their Plan of Proceeding does not discuss a class-wide methodology for damages, and instead suggests summary individual assessment of damages, or the use of extra-judicial resources to achieve the most "cost-effective, just and expeditious determination of any individual issues that remain." This suggests that the plaintiffs have all but abandoned their position that damages can be determined as common issues.

[78] Liability and damages cannot be determined on a class-wide basis in this case. These common issues will not be certified.

4. Preferable Procedure s. 5(1)(d)

[79] In *Hollick*, the Supreme Court of Canada held that the preferability criteria captures two ideas of "preferability". First, the court should consider whether the class proceeding would be a "fair, efficient and manageable method of advancing the claim." Second, the court should consider whether a class proceeding would be preferable to other procedures (such as joinder, test cases, consolidation, etc.).[36] The preferability inquiry should also be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification.[37]

[80] The plaintiffs have the onus of showing that there is some basis in fact that a class proceeding would be preferable. However, if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative. Once there is some evidence about the alternative, the burden of satisfying the preferability requirement remains on the plaintiff.[38]

[81] When considering alternatives to the class action, Cromwell J. in *Fischer* considered five factors with regards to access to justice: (1) the barriers of access to justice; (2) the potential of the class action to address those barriers (3); the alternative to the class proceeding; (4) to what extent the alternatives address the relevant barriers; and (5) how the class action and the alternative(s) compare.[39]

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[33] 2015 ONCA 921, leave to appeal refused, [2016] S.C.C.A. No. 79.
[34] *2002*, S.O. 2002, c. 30, Sched. A.
[35] *Ramdath* at para. 27.
[36] *Hollick*, at para. 28.
[37] *Hollick*, at paras. 27-28.
[38] *AIC Limited v Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at paras. 48-49.
[39] *Fischer*, at paras. 24-38.

(a) **Positions of the Parties**

[82] The plaintiffs argue that this is a case where the resolution of the common issues is substantially determinative of the liability of the class and would achieve the objectives of a class proceeding. They say they have developed a fair and manageable procedure that is preferable to any alternative method for resolving the claims. They argue that the Judicial Inquiry cannot establish civil liability and that there are no legal consequences.

[83] The defendant submits that a class proceeding is not the preferable procedure for resolution of the common issues. They claim that the common issues are overwhelmed by the individual issues, and that resolution of the common issues will not significantly advance the proceeding. As per Winkler J. (as he then was) in *Mouhteros v. DeVry Canada Inc. et al.*, even where there are some common issues, certification must still be denied when the common issues are "completely subsumed by the plethora of individual issues, which would necessitate individual trials for virtually each class member."[40]

(b) **Judicial Economy**

[84] The plaintiffs point to the duplication in the Statements of Claim in 22 related actions. They also argue that the city's production of tens of thousands of documents in these cases mean that a common issues trial is in the interests of judicial economy.

[85] The common issues that I have found to be properly constituted have to do with duty of care and standard of care. The duty of care for a municipality to keep roads in repair is statutorily required. Therefore, this will not be a live issue at individual trials or take substantial judicial resources. The issues that will require the most evidence, argument and findings of fact have to do with (i) the repair of the RHVP at the time and location of each accident, and whether there are any defences available under s. 44(3) of the *MA*; and (ii) what the City knew about the safety of the road, and when they knew it.

[86] With respect to the repair of the RHVP, I find that judicial economy would not be aided by a common issues resolution as to the state of repair of the RHVP from 2007 to the end of the class period. In order to be useful to the plaintiffs' class action, the common issues trial would need to establish the state of repair for every section of the RHVP where an accident occurred, at the point in time when each accident occurred. General findings about the overall state of the RHVP would do little to aid in establishing whether the standard of care was met in the case of each MVA. The resources and evidence that would go into creating such a point-in-time, section-specific analysis would be enormous, and each specific finding would only be useful to the class member who had an accident at that particular location, at that particular time, and in those particular circumstances. Judicial economy is better aided by point-in-time, location-specific evidence being resolved at individual trials.

[87] Likewise, whether there are any *MA* s. 44(3) defences available depends on the findings about the state of the specific section of the RHVP at the specific time of the MVA and the actions and knowledge of the City with respect to that specific maintenance issue (if one is found). Again, judicial economy is not aided by one trial in which there is a determination of the City's knowledge and actions for every single maintenance issue at the location of each accident prior to that accident on the RHVP from 2007.

[88] With respect to the issues regarding when the City may have known that there was a problem

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[40] (1998) 41 O.R. (3d) 63 (Gen. Div.).

with friction on the RHVP, I agree that there may be some economy to having this resolved as a common issue. However, the individual litigations will likely be aided by the findings of the Judicial Inquiry. Further, I find that this single instance of judicial economy is substantially overwhelmed by the individual issues.

[89] In *Hollick*, the Supreme Court of Canada considered a proposed class action in relation to pollution alleged to have been emitted by a landfill. McLachlin C.J. concluded that judicial economy was not aided by a class proceeding:

> Turning first to the issue of judicial economy, I note that any common issue here is negligible in relation to the individual issues. While each of the class members must, in order to recover, establish that the Keele Valley landfill emitted physical or noise pollution, there is no reason to think that any pollution was distributed evenly across the geographical area or time period specified in the class definition. On the contrary, it is likely that some areas were affected more seriously than others, and that some areas were affected at one time while other areas were affected at other times. As the Divisional Court noted, "[e]ven if one considers only the 150 persons who made complaints – those complaints relate to different dates and different locations spread out over seven years and 16 square miles" (p. 480). Some class members are close to the site, some are further away. Some class members are close to other possible sources of pollution. Once the common issue is seen in the context of the entire claim, it becomes difficult to say that the resolution of the common issue will significantly advance the action.[41]

[90] Judicial economy is not aided in this instance because of the number of individual issues that would need to be resolved in each case, notwithstanding certification. Further, findings of the Judicial Inquiry may be admissible in future proceedings to assist litigants, such as in *R.G.* when Perell J. admitted an Independent Review of the Motherisk Drug Testing Laboratory, at issue in the proposed class action.

(c) **Access to Justice**

[91] I will consider the issues of access to justice through the lens of the test established in *Fischer*.

i. Barriers to Access to Justice

[92] Access to justice is not a significant concern in this case as in many other class actions. This is not a situation with minimal damages resulting in low incentives to participate in litigation. There are also no common features of the class members that might make them less likely to participate in litigation, such as it was in *Cloud*, and similar cases. The plaintiffs' affidavits state that class member's claims may be so small that it would not be worthwhile to pursue them individually. This does not strike me as a realistic concern in MVA cases. My view is supported by the fact that there are 22 pending related actions.

[93] The most that can be said in relation to access to justice is that an individual litigant may feel overwhelmed and intimidated by going against a large institutional defendant such as the City, or may feel that the costs of commencing an individual litigation are not worth their while.

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[41] *Hollick*, at para. 32

ii. Potential for the Class Proceeding to Address the Barriers

[94] As discussed above, the class action format may assist individual litigants that are intimidated by going against the City in litigation. In this particular situation, I do not see there being many significant barriers to access to justice.

iii. Alternatives to Class Proceedings

[95] The defendant points to the Statutory Accident Benefits ("SABs") program as a potential alternative for class members' smaller claims. In Ontario, persons injured in an automobile accident can receive "no fault" first-party benefits through SABs. SABs are required by statute to be included in all automobile insurance policies. They provide a person injured in an accident, whether or not they are at fault, access to medical, rehabilitation, and other benefits to assist with their recovery.[42] The defendant therefore argue that SABs is a mechanism for redress that operates more quickly than the judicial system.

[96] For class members with larger claims, the defendant submits that there is not a substantial access to justice concern because the actions become more worthwhile at a larger scale, and many plaintiff-side personal injury firms will represent litigants on a contingency fee basis.

[97] I accept the defendant's position on this issue.

iv. Extent Alternatives Address Barriers

[98] As I have noted above, SABs is designed to be efficient and address access to justice for smaller claims related to MVAs. The process is, without question, more navigable than litigation.

[99] While relying on contingency fee agreements is not a perfect system for addressing access to justice, it does assist litigants with larger claims to pursue litigation. The downside being that counsel may only offer these arrangements in cases in which counsel believe the litigation is worth their time.

v. Comparison of Class Proceeding with Alternatives

[100] In this case, the access to justice concern, which would favour certification, is negligible. Further, because of the multitude of individual issues that would still need to be resolved for each class member after a common issue trial, class members would likely still need individual counsel to assist their cases. This is not a situation where class members could simply wait for the common issues to be resolved and then collect their damages, or have a very simple process by which their damages would be assessed. Class members would need to take active steps in litigation to prove causation and damages. The amount of effort required would be similar to that of commencing an individual action.

(d) **Behaviour Modification**

[101] If the allegations against the City are proven to be true, this is indeed a matter for significant public concern. However, the need for behaviour modification does not, in itself, warrant certification—and, indeed, a class action is not the only available mechanism for behaviour modification.

[102] In this instance, I do not believe that behavioural modification is a concern that only a class

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[42] *El-Khodr v. Northbridge Commercial Insurance Company*, 2021 ONCA 440, at para. 1.

action can address. The Judicial Inquiry will no doubt bring as much—if not more—public scrutiny that could also flow from a class proceeding. The individual litigations will serve as financial incentive if there is indeed malfeasance or misfeasance on the part of the defendant. The plaintiffs themselves acknowledge that a "tarnished reputation" is a potential outcome of the Judicial Inquiry for the City, and that more individual actions could flow out of the Judicial Inquiry findings.

5. Representative plaintiffs s. 5(1)(e)

[103] The representative plaintiffs must have a claim that is a genuine representation of the claims of the members of the class to be represented or must be capable of asserting a claim on behalf of all class members against the defendant.[43] Provided that the representative plaintiffs have their cause of action, they may assert a claim against the defendant on behalf of other class members that they do not personally assert, provided that the causes of action all share a common issue of law or fact.

[104] The proposed representative plaintiffs in this case are Corinne Klassen and *FLA* plaintiff Brian Klassen; and the Estate of Michael Sholer, and *FLA* plaintiffs Edwin Sholer, Melissa Sholer, Natasha Sholer and Matthew Sholer. To avoid confusion, I will refer to them by their first names. I mean no disrespect by doing so.

[105] The seven proposed plaintiffs' claims arise out of two separate MVAs (the "Klassen MVA" and "Sholer MVA"). Corinne was the driver in the Klassen MVA which occurred on October 21, 2018. She says she was travelling on the RHVP between the Greenhill Avenue and Kind Street ramps when her vehicle began to slip on the payment without warning or reason. Her vehicle spun three times, hitting the guardrail each time. She alleges she suffered "considerable musculoskeletal injuries, a concussion, psychological impairments and remains disabled from the crash. She also was fined and suffered pecuniary losses." Brian, her husband, alleges he has incurred expenses and loss of consortium, care, guidance, and companionship of Corinne.

[106] Michael was the driver in Sholer MVA of January 25, 2017. His vehicle is said to have started slipping without warning or "logical reason", causing him to lose control. Michael's vehicle crossed the median and he crashed into a transport truck. This resulted in his death. His family has suffered a loss of care, guidance and companionship, as well as alleged pecuniary losses and dependency. Edwin is Michael's father, and Melissa, Natasha, and Matthew are his siblings.

[107] Corinne, Brian, and Edwin submitted affidavits in support of the motion. The other Sholer family members did not.

(a) fairly and adequately represent the interests of the class,

[108] The plaintiff submit that they are prepared to serve as representative plaintiffs in this matter, given that they have "retained counsel, assisted in the preparation of the Statement of Claim, assisted in the preparation of the affidavit in support of this motion, have been cross-examined and have been actively engaged in communications with counsel."

[109] The defendant submits that Melissa, Natasha, and Matthew did not discharge their burden of establishing they would be suitable representative plaintiffs as they did not put forward affidavit

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[43] *Attis v. Canada (Minister of Health)*, 2003 CanLII 46230 (Ont. S.C.) at para. 40.

evidence in support of the motion.

[110] The Supreme Court of Canada held in *Western Canadian Shopping Centres Inc.* that a representative plaintiff need not be typical of the class, nor even the best possible representative. The courts should, however, be satisfied that the proposed representatives will "vigorously and capably prosecute the interests of the class".[44] In *Heron v. Guidant Corp.,* Cullity J., of this court noted that it was consistent with the objectives of the *CPA* that the interests of the class "should not be vulnerable to the deficiencies in the ability of the named plaintiff to represent them."[45]

[111] Although the bar is not a high one for establishing that a representative plaintiff is suitable, I find that it is concerning that these plaintiffs have not adduced evidence as to their suitability as representative plaintiffs in this case. I have no evidence to determine whether Melissa, Natasha, or Matthew are able to fairly or adequately represent the interests of their class. I also do not know whether they have any conflicts with the class. Further, without the affidavit and ability to cross-examine, the defence has little information to test this issue.

[112] In *Tiboni v. Merck Frosst Canada Ltd*., Cullity J. held that a proposed representative plaintiff was unsuitable because he did not swear an affidavit, even though he had been cross-examined on his medical records.[46] In *Hollick*, *supra*, McLachlin C.J. said the following with respect to evidence adduced by proposed representative plaintiffs:

> I agree that the representative of the asserted class must show some basis in fact to support the certification order. As the court in *Taub* held, that is not to say that there must be affidavits from members of the class or that there should be any assessment of the merits of the claims of other class members. However, the Report of the Attorney General's Advisory Committee on Class Action Reform clearly contemplates that the class representative will have to establish an evidentiary basis for certification: see Report, at p. 31 ("evidence on the motion for certification should be confined to the [certification] criteria"). The Act, too, obviously contemplates the same thing: see s. 5(4) ("[t]he court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence"). In my view, the class representative must show some basis in fact for each of the certification requirements set out in s. 5 of the *Act*, other than the requirement that the pleadings disclose a cause of action….[47]

[113] Beyond this, the failure of the proposed plaintiffs to meet this procedural step raises concerns regarding their motivation and ability to carry this action. In *Sondhi v. Deloitte*, Belobaba J. noted that "proposed class members are entitled at the very least to a representative plaintiff who can be counted on to take her job seriously, review key documents and demonstrate an appropriate level of interest in a class action that is being brought in her name..."[48]

[114] I am sure that Melissa, Natasha and Matthew are all devastated over the loss of Michael, and I do not mean to diminish their loss. However, in the specific instance of this litigation, they have not demonstrated the diligence and advocacy required of a representative in a class action. Should this action have been certified, the demands on them would only increase. Unfortunately,

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[44] *Western Canadian Shopping Centres Inc.*, at para. 41.
[45] [2007] O.J. No 3823 (S.C.), at para. 10.
[46] 2008 CanLII 37911 (Ont. S.C.), at para. 115.
[47] *Hollick*, at para. 25.
[48] 2017 ONSC 2122, at para. 42.

I do not have a factual basis to determine whether they would fairly and adequately represent the interests of the class.

[115] The defendant did not raise issue with the remaining proposed representative plaintiffs, and I find them to meet the criteria.

[116] Had the plaintiffs been successful on the other certification criteria the action could have continued with Corinne, Brian, Edwin, and Michael's estate (of which Edwin is the executor). These representatives are sufficient to represent both the general and *FLA* class members.

(b) **Litigation Plan**

[117] The plaintiffs submit that their Plan of Proceeding is sufficient to demonstrate the representative plaintiffs' and class counsel's understanding of the issues in the case and how they will be addressed. They submit that a litigation plan is a work-in-progress but should provide enough detail to allow the Court to assess whether the class action is preferable and workable, as per *Griffin v. Dell Canada Inc*.[49]

[118] The defendant submits that the plaintiff's litigation plan simply sets out the usual steps that occur in litigation. It submits that the litigation plan is not workable because it fails to address how the individual issues that remain will be addressed after the determination of the common issues.

[119] Given what would no doubt be an extremely complicated common issues trial, I did find the litigation plan to be simplistic. It is not likely a bar to certification but does ignore many individual issues at play in the various MVAs. The plaintiffs fail to specify what kind of experts will be needed, and the methodology of how they would resolve many of the proposed common issues. They propose that the court establish a litigation schedule without suggesting any reasonable timelines. Given the experience of counsel, I would have expected a more detailed and specific litigation plan for a complicated case, involving novel highway technology. As Winkler J. noted in *Carom v. Bre-X Minerals Ltd.*:

> A practice has developed in class proceedings of accepting litigation plans in support of certification motions that are sparse and lacking in detail. While this may be appropriate in more straightforward cases, in complex litigation such as the instant case, a detailed plan which meets the requirements of the Act is of critical importance.
>
> The interrelation between the different elements of the certification test under s. 5(1) has been noted previously in these reasons. The requirements set out for the representative plaintiff accordingly do not stand in isolation. The production of a workable litigation plan serves a twofold purpose: it assists the court in determining whether the class proceeding is indeed the preferable procedure; and, it allows the court to determine whether the litigation itself is manageable in its constituted form. The manageability must be assessed in the context of the entirety of the litigation, not just a common issue trial.
>
> A workable plan must be comprehensive and provide sufficient detail which

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[49] 2009 CanLII 3557 (Ont. S.C.), at para. 100.

corresponds to the complexity of the litigation proposed for certification.[50]

[120] Had the other certification criteria been met, on its own, the litigation plan would not have barred the plaintiffs from certification. Instead, I would likely have followed Lax J. in *Griffin* and granted a certification conditional to the plaintiffs producing a workable litigation plan.[51]

(c) **Conflict of interest**

[121] There do not appear to be any conflicts of interest issues in the case of the remaining four proposed representative plaintiffs.

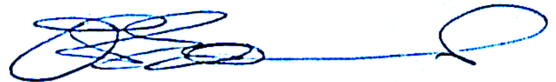
F. CONCLUSION

[122] Although the first two elements of s.5(1) of the *CPA* are met, and there are some limited common issues amongst the proposed class, the inherent individual nature of the causation in MVAs results in certification failing at the preferability stage under s. 5(1)(d) of the *CPA*.

[123] For the above reasons, I dismiss the plaintiffs' certification motion.

G. Costs

[124] If the parties cannot agree about the matter of costs, they may make submissions in writing. The defendant's submissions shall be served and filed within 20 days. The plaintiffs' submissions shall be served and filed within 15 days of receipt of the defendant's submissions. A reply, if any, shall be served and filed within five days of receipt of the plaintiff's submissions. Submissions shall be limited to three pages excluding the Bill of Costs.



D.L. Edwards, J.

Dated: June 20, 2022

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[50] 44 O.R. (3d) 173 (Div. Ct.), at p. 203.
[51] *Griffin*, at para. 102.

CITATION: Klassen v. City of Hamilton, 2022 ONSC 3660
COURT FILE NO.: CV-19-69208
DATE: 20/06/2022

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

CORINNE KLASSEN, BRIAN KLASSEN, ESTATE OF MICHAEL SHOLER by his Estate Administrator, Edwin Sholer, EDWIN SHOLER, MELISSA SHOLER, NATASHA SHOLER and MATTHEW SHOLER

Plaintiffs

- and –

CITY OF HAMILTON

Defendant

REASONS FOR DECISION

Released: June 20, 2022