Recent Canadian product liability case law highlights

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There have been several significant new developments in product liability cases across Canada in the past year. These decisions, arising from Ontario, Québec, Alberta, Saskatchewan, and British Columbia, provide important insights into how courts are deciding product liability matters.

Palmer v. Teva Canada Ltd. , 2024 ONCA 220

Plaintiffs must plead actual, demonstrable harm or loss for a liability claim in negligence to succeed.

In *Palmer v. Teva Canada Ltd.*, the Court of Appeal for Ontario reviewed the Superior Court of Justice's dismissal of a motion to certify a class proceeding. The plaintiffs alleged the presence of carcinogens in Valsartan, a blood-pressure medication produced by the defendant pharmaceutical company. The plaintiffs argued that Valsartan therefore caused genotoxic and psychological injuries.

The Court of Appeal upheld the Superior Court's decision to dismiss the plaintiffs' motion to certify the class proceeding. On genotoxic injuries, the court held that "physical change with no perceptible effect upon one's health is not compensable in negligence." On psychological injuries, the court held that, while speculative concern for an increased risk of future physical harm is compensable in negligence, an ordinary person of reasonable fortitude would not have sustained psychological injury in this case.

This decision confirms that plaintiffs must plead actual, demonstrable harm or loss for a liability claim in negligence to succeed.

Ding v. Canam Super Vacation Inc. , 2024 BCCA 102

The plaintiff must demonstrate a causal link between the failure to warn and the harm suffered.

In *Ding v. Canam Super Vacation Inc.*, the plaintiffs appealed from a dismissal of their claims against the manufacturer of a bus involved in a vehicle accident, as well as the dismissal of their claims against all the defendants for failing to warn of the dangers of riding in a bus without seatbelts.

The British Columbia Court of Appeal dismissed the appeal regarding the bus manufacturer's negligent design and failure to warn; however, the court upheld the trial judge's findings on industry and regulatory standards. It was not feasible to install seatbelts when the bus was manufactured in 1998. The court held that the trial judge erred in his causation analysis, but did not overrule his conclusion that the plaintiffs had not proved causation for failing to warn of the dangers of riding in a bus without seatbelts. The court allowed the plaintiffs costs appeal in part, upholding the trial judge's decision not to make a Sanderson or Bullock order, but holding that the trial judge erred in refusing any costs to the plaintiffs.

This decision reinforces the importance of evidence to demonstrate compliance with industry and regulatory standards when defending a claim for negligent design. Further, this decision reinforces that plaintiffs who are unable to establish a causal relationship between failing to warn and the injury suffered will not succeed in negligence claims.

Burr v. Tecumseh Products of Canada Limited, 2023 ONCA 135

Appellate courts owe deference to the trial judge's assessment of expert evidence

In this case, after a heat recovery ventilator overheated and exploded, causing damage to the plaintiffs' home, the plaintiffs sued the ventilator manufacturer (Venmar) and the manufacturer of the ventilator's motor (Fasco, formerly Tecumseh Products). The trial judge determined that Venmar was solely liable for negligently designing the ventilator, but that Venmar did not breach their duty to warn the public. The contract between Venmar and Fasco protected Fasco from any liability for claims relating to their motors. Venmar appealed the decision.

The Court of Appeal for Ontario dismissed the appeal. The court took issue with some of the trial judge's conclusions but affirmed that appellate courts must pay deference to assessments of expert evidence undertaken by trial judges. The court held that there was no basis to interfere with the trial judge's assessment of the evidence and that Venmar was bound under contract to indemnify Fasco.

This decision reinforces the principles underlining the duty of care owed by manufacturers in product liability cases. However, the court focusses largely on the specific facts of this case and the deference it owed to the trial judge's assessment of expert evidence. Therefore, this decision does not provide substantial guidance on the liability of manufacturers of sub-components (like ventilator motors) moving forward. Nevertheless, this decision reinforces the importance of choosing expert witnesses at

trial, given the deference that appellate courts must pay to a trial judge's assessment of such experts.

ATCO Energy Solutions Ltd. v. Energy Dynamics Ltd. , 2024 ABKB 162

Courts may permit similar fact evidence of other models or products of an impugned manufacturer; however, they are less likely to permit the opinion evidence of employees.

In *ATCO Energy Solutions Ltd. v. Energy Dynamics Ltd.*, the operator of a natural gas storage facility alleged that a defective piston in a natural gas compressor ultimately caused an engine failure causing damage. The plaintiff sued the manufacturer and supplier of this piston. The court considered the plaintiff's claim against the manufacturer for negligently designing, manufacturing, and assembling the piston in question, and for breaching their duty to warn the public. The plaintiff's claim against the supplier was settled prior to trial.

The Court of King's Bench of Alberta held that the plaintiff failed to prove on a balance of probabilities that the piston in question was defective. Further, the court held that, even if the piston in question was defective, the plaintiff failed to establish the causal connection between the piston and the engine failure. The court denied the plaintiff's use of evidence disclosed shortly before trial, holding that the plaintiff had failed to demonstrate sufficient reasons for not disclosing the evidence earlier nor that other interests of justice weighed in favour of not allowing the plaintiff to rely on the evidence. The court did permit similar fact evidence of the plug performance of other models produced by the manufacturer but noted that the similar fact evidenced adduced by the plaintiffs was insufficient to support an inference that the piston caused the damage in question. The court also denied the plaintiff's attempts to rely on the opinion evidence of an employee, holding that this evidence did not fall within the meaning of "witnesses with expertise".

This decision summarized the leading Canadian case law on product liability, as well as commentary on similar fact and opinion evidence. Ultimately, this decision reiterates the importance of building an appropriate expert evidentiary record to establish causation in design negligence claims.

Price v. Lundbeck A/S , 2022 ONSC 7160

(Appealed to Divisional Court – discussed under *Price v. Lundbeck*, 2024 ONSC 845)

Proposed common issues must be pleaded in a specific and focused manner.

In *Price v Lundbeck A/S*, 2022 ONSC 7160, the Ontario Superior Court of Justice re-heard and dismissed a certification motion for a class proceeding. The plaintiffs alleged that Celexa, an anti-depressant drug manufactured and distributed by the defendant pharmaceutical company, is a teratogen, which under reasonable circumstances of exposure can disturb the development of an embryo or fetus and thereby cause

congenital malformations. The plaintiffs pleaded that the common issue for the class was that the Defendants breached their duty of care by failing to warn about the risk that Celexa is or may be teratogenic.

In dismissing the certification motion, the court held that the plaintiffs led no evidence of a methodology to establish on a class-wide basis that Celexa may cause any particular congenital malformation. Further, the court held that there was no evidence that would enable the court to limit the plaintiffs' proposed class definition or causation issue. On the duty to warn, the court held that general causation could not be established without individual trials on the particular congenital malformation of each class member and that a warning would have to be for a specific risk, not for teratogenicity in general.

This decision reinforces that plaintiffs seeking to certify a class proceeding must plead specific and focused common issues. Otherwise, courts will likely dismiss certification on the grounds that the pleaded issues are too general and overbroad.

Price v. Lundbeck , 2024 ONSC 845

Proposed common issues must be pleaded in a specific and focused manner.

In *Price v. Lundbeck, 2024*, the representative plaintiffs appealed the Ontario Superior Court of Justice's dismissal of their motion to certify a class proceeding to the Divisional Court. The appellants alleged that the judge had made several errors, including by ruling that there was no common issue, as required by s. 5(1)(c) of the *Class Proceedings Act*.

The Divisional Court dismissed the appeal, holding that the judge had correctly applied the relevant legal principles and their expertise in denying certification. Further, the Divisional Court upheld the judge's finding that the appellants' proposed common issues were superficially common.

This decision reinforces that plaintiffs seeking to certify a class proceeding must plead specific and focused common issues. Otherwise, courts may dismiss certification on the grounds that the pleaded issues are too general and overbroad to be resolved in common amongst class members.

Oberski v. General Motors LLC , 2024 ONSC 345

The plaintiff bears the onus of proving their putative class settlement meets the certification test even on consent certification; courts may look to settlements in other jurisdictions to determine whether settlement is reasonable.

In *Oberski v. General Motors LLC*, the plaintiffs moved for the consent certification of a class action for settlement purposes and for leave to discontinue certain causes of action. The plaintiffs had proposed a class action against General Motors for economic loss claims in relation to defective ignition switches, ignition keys, and power steering units. Several proposed class actions were consolidated in Ontario regarding these alleged defects, and two parallel class proceedings were brought in Québec. The Québec proceedings were stayed pending the outcome of the Ontario proceedings and

ongoing proceedings in the United States for similar class claims. The multijurisdictional claims in the United States were resolved prior to this decision.

The Ontario Superior Court of Justice approved a $12 million settlement for the claims against General Motors. The approved settlement provided a resolution process for claims of personal injury, wrongful death, and other claims under the *Family Law Act*, RSO 1990, c F.3, with the opportunity for individual litigation if claims were not resolved through the settlement process. The court also included a settlement for the actions in Québec.

This case stands for the proposition that consent certification still requires the plaintiff to demonstrate their putative class proceeding meets each of the certification criteria of the *Class Proceedings Act*, but that court will apply a less rigorous standard and may look to a settlement in other jurisdictions as guidance of the reasonableness of that settlement.

Martin v. Wright Medical Technology Canada Ltd. , 2024 ONCA 1

There is a bright line between actions commenced under the "old" *Class Proceedings Act* , and those commenced under the amended Act.

In Martin v. Wright Medical Technology Canada Ltd., two representative plaintiffs (Martin and Rowland) commenced a claim against the defendant manufacturer of two prosthetic hip implants and sought to certify the claim as a class proceeding. While counsel for the Martin action avoided mandatory dismissal for delay under section 29.1 of Ontario's pre-2020 amendments *Class Proceedings Act*, 1992, SO 1992, c 6 (CPA), the judge in the Martin action allowed the pleadings to be amended to add the Rowland cause of action and ordered that the combined action continue under the amended *CPA*. Both the plaintiffs and the defendants appealed.

The Court of Appeal for Ontario held that the only legally available option to the motions judge was to continue the Marin action under the old CPA and that the Rowland action was to be re-constituted or re-filed and commenced under the amended CPA, with the two actions being tried separately or together thereafter. The court made this determination based on statutory interpretation, focusing on the wording section 39 of the CPA, which stipulated that the old CPA would continue to apply to class proceedings commenced before October 1, 2020. The court dismissed the defendants' submission that different certification tests for the two actions would be "unmanageable and unworkable", holding that a motions judge would be able to manage applying the different criteria in the actions because of similar causes of action and factually related evidence.

This decision affirms that the text, legislative history, and case law on section 39 of the CPA indicate that there is a bright line between actions commenced under the "old" CPA, and those commenced under the amended Act. For those actions commenced after October 1, 2020, the stricter certification test under section 5, and the mandatory dismissal for delay requirements under section 29.1, will apply.

OCHC v. Sloan Valve Company , 2024 ONSC 1493

Claims for pure economic loss are generally not actionable in tort law.

In *OCHC v. Sloan Valve Company*, Ottawa Community Housing Corporation (OCHC) commenced an action against Sloane Valve Company, the manufacturer of a toilet flushing system, and Wolseley Canada Inc., the supplier of this toilet flushing system. The OCHC claimed breach of warranty under the *Sale of Goods Act*, RSO 1990, c S. 1 (*SGA*), negligence, and negligent misrepresentation. The defendants filed a motion to strike the plaintiff's claim under rule 21 of the *Rules of Civil Procedure*, RRO 1990 Reg 194.

The Ontario Superior Court of Justice ordered that the OCHC's claims against both the manufacturer and supplier of the toilet flushing system be struck. In doing so, the court held under the doctrine of privity, that the warranties and conditions under the SGA do not apply to manufacturers who do not sell good(s) directly to purchasers. Further, the court disagreed with OCHC's submission that it suffered, not damages for pure economic loss, but rather damage to property. The court determined that the water which flowed through the toilet flushing system was supplied by the municipality to the OCHC as an end user; this water was not owned by OCHC.

This decision reaffirms the doctrine of privity's application to conditions and warranties enshrined in the SGA. This decision also reaffirms that a plaintiff who brings an action in negligence must prove that there was actual damage and loss to their property or person. Claims for pure economic loss are generally not actionable in tort law.

Underhill v. Medtronic Canada , 2023 ONSC 5919

Courts make use of the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice* .

In *Underhill v. Medtronic Canada*, the plaintiffs proposed a class action in Ontario against a manufacturer of surgical stapler products that were alleged to be defective. Prior to the certification motion, a concurrent action emerged in British Columbia. The plaintiffs brought a motion to discontinue their proposed class action in Ontario and sought for the claims to be advanced in a single proceeding.

The Ontario Superior Court of Justice ordered that the plaintiffs' motion be adjourned indefinitely. The defendant manufacturer had applied for a stay or dismissal in the British Columbia action. Therefore, the court held that if a discontinuation was allowed before the stay was granted, then the limitation period may continue to run as the stay order is granted, and this could bar class claims. Thus, the court held that there was a significant risk to absent class members who might be prejudiced from a discontinuance order before the defendant's stay application was decided. The court also found two reasons to make use of the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice*, which are rarely used outside of settlement approvals. First, the outcome of one motion will necessarily change the outcome of the other motion. These motions should be decided on their facts and the law, not timing. Second, given that there was discussion of British Columbia procedural law at the motion hearing, it would be preferable if those arguments were made in a "fully briefed application" context in the Ontario proceeding.

These decisions may indicate that the courts are becoming more open to using the *Canadian Judicial Protocol for Management of Multijurisdictional Class Actions and the Provision of Class Action Notice* beyond settlement approvals. This may impact the process of multijurisdictional class actions brought against product manufacturers in Canada.

Larsen v. ZF TRW Automotive Holdings Corp. , 2023 BCSC 1471

A recall program, or similar defect-remedying program, may be preferable to certification of a class proceeding.

In *Larsen v. ZF TRW Automotive Holdings Corp*., the representative plaintiff sought certification of a class proceeding under British Columbia's *Class Proceedings Act*, RSBC 1996, c 50. The representative plaintiff alleged that the airbag control units (ACUs) designed and manufactured by ZF TRW Automotive Holdings Corp., and installed in vehicles manufactured, distributed, and sold by several large automotive companies, were defective. Several vehicles were subject to voluntary recalls in the United States and Canada for airbag deployment malfunctions. The plaintiffs claimed pure economic loss resulting from negligent design and/or manufacturing. The plaintiffs did not claim that the class members suffered personal injuries or damages.

In dismissing the certification motion, the Supreme Court of British Columbia held that the repair available to consumers through voluntary recall provided access to justice. The court acknowledged that a recall is indicative of a manufacturer's acknowledgment of a defect; however, there was no basis in fact for the alleged defect, or that the defect was common to the proposed class vehicles. The court also took note of the United States National Highway Traffic Safety Administration Office of Defects' investigation into the (ACUs) manufactured by the defendant manufacturer and concluded that the open investigation was not sufficient to "form a basis in fact that the alleged ACU defect exists in the Unrecalled Vehicles". The court held that a class proceeding was not the appropriate procedure to address the defects in the remaining unrepaired recalled vehicles, or to compensate those who had had their vehicles repaired through the recall. The court cited the decision in *Coles v. FCA Canada Inc.* 2022 ONSC 4575.

This decision reinforces that a manufacturer's implementation of a recall program, or similar defect-remedying program, could potentially bar the certification of a class proceeding, particularly if a court finds that the program is effective at compensating the losses of the class members.

Dussiaume v Sandoz Canada Inc ., 2023 BCSC 795

The mere risk of harm is insufficient to ground a cause of action; proof of actual damages is required.

In *Dussiaume v Sandoz Canada Inc.*, a class action was brought on behalf of a class of those who purchased one or more of the drugs distributed by the defendants containing

ranitidine–a histamine H2-receptor antagonist. The plaintiffs claimed that the presence of this substance led them to face an increased risk of contracting cancer.

On the motion for certification, the court held that the plaintiff did not plead a claim for any injury that manifested in adverse effects or health conditions. The court stated that the plaintiff's allegations of the resulting cellular changes which can cause cancer was a potential future harm or increased risk of harm claim in "different clothes".

The court concluded it was "plain and obvious [this] claim for potential future harm is bound to fail." The court also addressed the psychological injury claims and affirmed that "claims for worries about increased risk of physical harm are also not compensable". The court held that the jurisprudence is rooted in the principle that damages for psychological injuries are unavailable in the context of an alleged increased risk of harm, or an unmaterialized harm. The court also found that the plaintiff's medical monitoring claim failed.

Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc., 2024 SCC 20

Supreme Court of Canada defines the use of exclusion clauses in sale contracts.

In *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, Pine Valley sued topsoil manufacturer Earthco after it received and used topsoil in a project that did not meet the compositional requirements required. In the contract Pine Valley had waived its right to test the soil before delivery, and the contract had an exclusionary clause that precluded Earthco's liability for the quality of the topsoil. At first instance, the trial judge dismissed the plaintiff's action. At the Ontario Court of Appeal (ONCA) the court reversed the lower court. Earthco appealed that decision to Canada's highest court.

The Supreme Court of Canada allowed Earthco's appeal, restoring the trial judge's decision. While the Supreme Court determined that the exclusion clause was an express agreement under section 53 of Ontario's *Sale of Goods Act*, RSO. 1990, c. S.1 (SGA), the court affirmed that courts should adopt a flexible approach when interpreting exclusion clauses under section 53 by focusing on the parties' objective intention. The SCC confirmed that express agreements under section 53 do not require particular "magic words" or explicit language to be effective.

While the decision arose under Ontario's SGA, it has broader implications given most provinces in the country use similar statutory language in their respective statutes. For companies seeking to use exclusionary clauses to limit or waive liability, the best practice is to use language that explicitly, clearly, and directly ousts the warranties and conditions embodied by the statute. However, even if the language does not meet this threshold, courts may still enforce the exclusionary clause. This may not be fatal to the party's contractual protection under the clause. Instead, the courts will apply principles of modern contractual interpretation to determine whether the parties objectively intended to contract out of the statutory protections.

Harris v. Bayerische Motoren Werke Aktiengesellschaft et al., 2024 ONSC 2341

For multinational corporations, Canadian courts can accommodate foreign laws so long as it maintains the integrity of the fact-finding process.

In *Harris v. Bayerische Motoren Werke Aktiengesellschaft et al.,* a class action was brought on behalf of Canadians who owned or leased certain Mini Cooper cars manufactured between 2002 to 2008 in Germany, and alleged that the class vehicles had a defective steering system that posed a risk to drivers. The class action was certified by the court on April 2, 2020.

The defendant argued that European privacy laws restricted its ability to disclose certain documents in the litigation in Canada. At first instance, the motion judge determined that BMW, in providing a new affidavit of documents, could redact personal data that was deemed irrelevant to the action and/or privileged.

On appeal, the court ruled that the motion judge did not exceed his jurisdiction, as rule 37.13(1) of the *Rules of Civil Procedure*, RRO 1990 Reg 194 in Ontario, read together with rule 1.04(1), gave him discretion to grant the relief on the motion. The court also upheld the motion judge's ruling on the redactions, deeming it consistent with established legal principles and noting the motion judge's consideration in the redaction order of relevancy and potential harm being needed to justify redaction. The court did allow the fourth ground of appeal, finding that the motion judge erred in finding there was a leave requirement under rule 30.05(5).

This decision has significant implications for multinational manufacturers operating in Canada, particularly regarding the disclosure of sensitive information subject to laws in their home jurisdiction. In their discussion of the redaction order, the court discussed the principle of comity, affirming that foreign laws cannot dictate Canadian judicial processes, provided that Canadian fact-finding can be adapted to comply with both domestic and foreign law requirements.

Bourassa c. Abbott Laboratories Ltd., 2024 QCCS 1245

The court will apply a liberal and generous approach to the authorization stage reinforcing the role of class actions as a tool for providing access to justice.

This decision in *Bourassa c. Abbott Laboratories Ltd.* involved a proposed class action in Québec against multiple pharmaceutical companies who manufactured, marketed, distributed and/or sold prescription opioid drugs. The action alleged that the companies engaged in aggressive and misleading marketing campaigns which promoted the safety of opioids and downplayed their addictive potential.

The court granted the plaintiff's application and appointed Mr. Bourassa's as class representative. The court found the plaintiff satisfied the criteria under Article 575 of the *Code of Civil Procedure,* CQLR c C-25.01 (CCP), that must be met in Québec for a class action to be authorized and for the representative plaintiff to be designated.

The court noted that, in analyzing the criteria under Article 575, the court must ensure the proposed class action is not frivolous, while also approaching the evidence liberally and generously with respect to the goals of class actions (namely, deterrence and compensation for victims, amongst others).

Tress v. FCA , 2023 SKKB 186

Product liability class actions require demonstrable proof of compensable loss, and an absence of such evidence can be fatal.

This decision in *Tress v. FCA* dealt with an application to certify a class action due to alleged misrepresentation, negligence, breach of contract, and a violation of regulatory standards. The plaintiff's claim alleged the defendants (FCA US LLC and FCA Canada Inc.) misrepresented the emissions performance of diesel vehicles, which they allege were equipped with auxiliary emissions control devices ("defeat devices") that caused them to produce exhaust emissions above the regulatory limits.

Before the class certification application, the defendants developed an update to address the emissions issues which was offered to all purchasers and lessees of the class vehicles, free of charge. The update occurred under the terms of a settlement that FCA reached with the US' EPA and CARB in 2019, which settled the regulatory proceedings.

The court, in reviewing the "themes of loss" claimed by the plaintiff, found that the minimum evidentiary basis for compensable harm was not established. The court cited other recent Ontario decisions in *Maginnis v FCA Canada Inc.*, 2021 ONSC 3897 and Maginnis and *Magnaye v FCA Canada*, 2020 ONSC 5462, in support of this finding. The court was clear that "the absence of evidence of a compensable loss cannot be simply overlooked when considering the pre-requisites to certification".

Tress v. FCA US LLC, 2024 SKCA 31

A lack of evidence of compensable loss can be fatal to certification of a defective device class action.

In *Tress v. FCA US LLC*, the plaintiff initiated a class action alleging that the defendants designed, manufacturer and distributed motor vehicles with "defeat devices" that caused excess emissions.

At the first instance the motions judge dismissed the plaintiff's application for certification. On appeal, the Saskatchewan Court of Appeal denied appeal, dismissing the plaintiff's application for class certification. The court held there was no basis in fact to support there was compensable harm, a class action was not the preferable procedure and there was an inadequate class representative. In addressing the appellant's 12 grounds of appeal, the court confirmed that Saskatchewan and, more broadly, Canadian jurisprudence mandates that class certification requires evidence of compensable harm or losses.

This case re-affirms the principle that certification of a class action requires demonstrable proof of compensable loss on the part of the class members. A lack of such evidence will likely be fatal.

Gebien v. Apotex Inc., 2023 ONSC 6792

If there is an issue with the pleadings the court may not outright dismiss certification product liability class actions.

In *Gebien v. Apotex Inc.,* a class action was commenced against seventeen pharmaceutical manufacturers and distributors, claiming over $1.2 billion in compensation. The claims include breaches of the *Competition Act*, RSC 1985, c C-34, negligent representation, fraudulent misrepresentation or deceit, and common law negligence. Further, the defendant was comprised of two groups, the manufacturers, and the producers.

The defendants brought a motion to strike the statement of claim for failing to disclose a cause of action, and in the alternative for violating the rules of pleadings. An additional motion was brought by another defendant challenging the jurisdiction of the proposed class action.

In response to the pleading issue, the court held that the statement of claim was overly rhetorical, argumentative, and violated the rules of pleading. The plaintiffs were granted 120 days to amend their claims. Further, the court struck the claims against the distributor defendants finding there were no material facts or evidence connecting them to the alleged misconduct. For the defendant that brought a motion on jurisdiction, the court held Ontario lacked jurisdiction and Québec was the more appropriate avenue.

This case demonstrates that if a plaintiff's pleading is non-compliant, such non-compliance may not be a total bar to certification. Further, there is a high bar connecting proposed defendants to alleged misconduct when there is a complex situation involving multiple parties.

D'Heane v. BMW Canada Inc ., 2022 ONSC 5973

Plaintiffs must adhere to the procedural timelines or risk having their actions dismissed.

In D'Heane v. BMW Canada Inc., a proposed class action was initiated against several automobile manufacturers. This was one of several national class actions brought against automobile manufacturers for allegedly defective airbags installed in vehicle models. A motion was brought by two defendants to dismiss the immediate action of a proposed class action for delay under section 29.1 of Ontario's *Class Proceedings Act*, 1992, S.O. 1992, c 6 (CPA). The plaintiff had failed to meet the deadline for advancing the claim by either filing a certification motion agreeing to a timetable.

The court dismissed the action as against the two moving automotive manufacturers. However, the court noted that the dismissal order was subject to being set aside if the representative plaintiffs filed a final and complete motion record in the motion for

certification within thirty days. The court noted it had the discretion to use its initiative to make such an order under section 12 of the CPA.

This decision suggests that courts may have flexibility in making similar orders under section 29.1, which may, in certain circumstances, still allow the proposed representative plaintiffs to have another kick at the can. However, the impact and acceptance of this decision remains to be seen. The court in *Tataryn v Diamond & Diamond*, 2023 ONSC 6165, considered the phoenix order in D'Haene and remarked that section 29.1 would not address the problem it was intended to resolve if such orders could be made.

D'Haene v. BMW Canada Inc., 2023 ONSC 6434

Developments in the law have meant that claims for pure economic loss must meet strict criteria to succeed in product liability cases.

In D'Haene v. BMW Canada Inc., the defendants brought a motion to discontinue a proposed class action which was commenced due to claims of defective airbags posing dangers during deployment. While the action was commenced in April 2015, the intervening years saw developments in case law that diminished the prospects for certification, and the viability of claims for pure economic loss. As such, the plaintiffs instructed counsel to discontinue the action, and the defendants consented to the motion and requested orders.

Recent cases out of the Supreme Court of Canada had changed the framework for claims of pure economic loss. Claims of pure economic loss, with few exceptions, tend to fall within the scope of contract law rather than tort law and claims of negligence. These developments in the law significantly impacted the continuance of this action considering the diminished prospect of recovery. The motion to discontinue was granted.

The decision in this case reiterates that claims of pure economic loss are unlikely to be certified as class proceedings.

DeBlock v. Monsanto Canada ULC , 2023 ONSC 6954

An ongoing individual civil actions against manufacturers or producers, that address the same issue as the proposed class action, will not necessarily weigh in favour of dismissing certification.

In *DeBlock v. Monsanto Canada ULC*, this decision addressed an application commenced by a proposed representative plaintiff for a class action against the defendants for their respective roles in producing, distributing, and selling herbicide products which contained glyphosate, a synthetic compound that is allegedly carcinogenic. The representative plaintiff was diagnosed with non-Hodgkin's Lymphoma at 17 and attributed his diagnosis to glyphosate. The defendants acknowledged that the pleadings disclosed a cause of action in negligence but challenged the claims for battery, unjust enrichment, and constructive trust.

The court certified the action as a class proceeding for claims of negligence and failure to warn, although the battery and unjust enrichment/constructive trust causes of action were dismissed. While noting that individual actions related to glyphosate were ongoing, the court determined that a class proceeding in this case would provide easier access to justice and be more economical than pursuing individual claims. The court cited the ongoing glyphosate litigation in the U.S. in support of this conclusion.

The decision seems to suggest that ongoing individual civil actions against manufacturers/producers, that address the same issue as the proposed class action, will not weigh in favour of dismissing certification. Courts may be inclined to find that class actions are preferable for enabling access to justice on a wider scale. This should be considered by manufacturer's facing class action certification motions who are also subject to ongoing individual civil claims.

Fernandes Leon v. Bayer Inc ., 2023 ONCA 629

Plaintiffs don ’t need to specifically identify defects in their statement of claim if sufficient material acts are provided to support the allegations.

The appeal in *Fernandes Leon v. Bayer Inc.* stems from an action brought by a claimant for alleged injuries suffered from an implanted female contraception device. While the action was brought against the doctor who implanted the device and Bayer Inc. (manufacturer), the action against the doctor was discontinued. Bayer brought a motion to dismiss under Ontario’s rule 21.01(b) of the *Rules of Civil Procedure*, RRO 1990 Reg 194 arguing that the statement of claim disclosed no cause of action. The Superior Court struck the statement of claim without leave to amend. The plaintiffs appealed this decision arguing they ought to have been granted leave to amend their claim.

The Ontario Court of Appeal allowed the appeal, finding that the proposed amended statement of claim satisfied the "low threshold" to plead a cause of action and provided the essential elements for claims of negligent design and manufacture. Notably, the court did not agree with Bayer's submission that statements of claim must be struck if they do not identify specific manufacturing or design defects in the given product. To do so, according to the court "would place too onerous a burden on a plaintiff at the stage of initiating a proceeding in a product liability action". According to the Court of Appeal, the details of an alleged defect are not always required elements to be pleaded before the claims disclose a cause of action.

The court deemed that in this case, the appellant's met the requirement to plead a cause of action in negligence, even if they could not identify a specific defect in the product’s manufacture or design.

Lam v. Flo Health Inc ., 2024 BCSC 391

Companies must be cautious with managing client information and must be clear regarding privacy policies and consent it obtains pursuant to those policies.

In *Lam v. Flo Health Inc.*, the plaintiff brought an application to certify a class action on behalf of Canadian users (except those in Québec) of the Flo Health & Period Tracker app during the proposed class period. The plaintiff submitted that Flo had intentionally violated the privacy of the app's users, having entered into contracts with third-party companies and granting them access to user information for purposes such as advertising and promotion. The proposed causes of action included breach of confidence, negligence, and breach of relevant consumer protection statutes, amongst others.

The court approved the application for the action to be certified as a class proceeding for some of the common issues, including intrusion upon seclusion (in most jurisdictions), breach of confidence, and breach of relevant privacy legislation (and resulting damages from that breach). The court found a basis for the claim that Flo inappropriately handled user information due to evidence tendered by the plaintiff, which include (a) a report from the Wall Street Journal and (b) an investigation by the U.S. Federal Trade Commission into Flo, which resulted in a decision and order by the FTC following the investigation. However, the court found several of the proposed causes of action (including unjust enrichment, breach of consumer protection legislation, and breach of the *Competition Act*, RSC 1985, c C-34) destined to fail, while granting the plaintiff leave to amend the pleadings for their breach of contract claim.

While the ultimate outcome of this action is still to be decided, this case may have significant impacts on manufacturers or producers who collect and manage data about their consumers, particularly those that develop and publish applications.

GlobeAir Holding GmbH c. Pratt & Whitney Canada Corp., 2024 QCCS 2451

Broad ICC arbitration clauses must be respected.

In *GlobeAir Holding GmbH c. Pratt & Whitney Canada Corp.*, Globe Air alleged that the P&Ws engine suffered from defects which caused frequent breakdowns and significant financial losses. Globe air further alleged that it is also locked into an exclusive 2017 agreement with P&W that prevents it from using alternative service providers. Globe air filed a claim in the Québec Superior Court, but P&W responded arguing that the dispute was covered by an arbitration clause in the 2017 agreement, broadly referring all disputes to the ICC arbitration in Toronto under Ontario law. The other issue presented was whether the Québec Superior Court would issue interim measures compelling P&W to provide temporary replacement engines while the arbitration proceeds.

The court held that arbitration agreements should be liberally construed. The judge found that there was nothing in Québec law preventing the resolution of the issues raised in arbitration, that the arbitration agreement was not null, and that while there was a dispute escalation process in the agreement, neither party had raised it in the hearing. He said that the agreement gave the broadest possible grant of jurisdiction to an arbitral tribunal, covering “any dispute, questions or controversies arising out of or in connection with the agreement”, as well as legal relationships associated with it.

Finally, the court held that they have the authority to grant relief when arbitration is pending, but in this instance, there was not sufficient evidence of urgency and irreparable harm. The plaintiffs had not ultimately demonstrated that their business operations would be irreparable harm without immediate intervention, and this required a haring on the merits. The court emphasized the fact that the agreement was concluded between sophisticated parties and, as such, it must be honored. This case affirms that agreements about arbitration clauses should be liberally construed.

Pelton v. Maytag, 2024 ONSC 3016

Defendants may not have a duty to warn when the risks are remote and reflective of a plaintiff 's unique circumstances.

In *Pelton v. Maytag*, the plaintiff sought damages after a valve in his ten-year-old dishwasher failed, causing extensive flooding and damage to his home. The plaintiff alleged that the valve had been negligently manufactured and failed under ordinary use, and that the defendants had failed to warn of the potential risk of failure due to freezing. The defendants (the manufacturers of the dishwasher and the valve, respectively) argued that the valve failure was unforeseeable as it arose due to an unforeseen freezing event.

The court confirmed that manufacturers have a duty to warn of probable and foreseeable risks; however, there is no duty to warn of remote or merely possible risks or dangers. Even where the alleged risks are generally known to the manufacturer, there is no duty to warn if the risks arise only from plaintiff-specific facts and circumstances unknown to the defendant.

The court held that if plaintiffs are alleging a manufacturing defect, they must prove its existence with reliable evidence. Testing to establish a defect may not be persuasive where it cannot be reliably connected to the affected product, for example, where there is a significant delay or intervening events between the incident and the testing, or where the products used in testing are much newer.

Kane v. FCA US LLC , 2024 SKCA 86

The court is unlikely to certify a class action where claims from defective products are for pure economic loss.

In *Kane v. FCA US LLC*, a proposed class action was commenced against several auto manufacturers after they issued various recall notices. The representative plaintiff claimed the vehicle design and manufacturing which resulted in the notices caused financial losses and other damages to class members and argued for damages pursuant to negligence, breach of warranty, unjust enrichment, and violation of consumer protection laws.

At first instance the certification judge dismissed the application for certification finding that the plaintiff's reliance only on the existence of the recall noticed failed to establish that there was some basis in fact that the proposed common issues existed or could be answered in common across the entire class.

The Saskatchewan Court of Appeal upheld the decision not to certify the proposed class, finding that there was no basis in fact that the defects posed a real, substantial, or imminent danger capable of causing damage. The court agreed that claims for pure economic loss are not typically recoverable under Canadian negligence law unless they are tied to an imminent, real, and substantial danger or harm.

Evans v. General Motors of Canada Company , 2024 SKCA 87

Claims for pure economic loss arising from defective products are not likely to be the preferable procedure for a class action.

In *Evans v. General Motors of Canada Company*, a class action was commenced against General Motors for vehicles alleged to have defective cooling systems. The plaintiffs alleged these defects led to economic losses by resulting in performance issues that diminished the value of their vehicles. The claims included negligence, unjust enrichment, and branches of statutory warranties.

The class action was certified by the certificate judge at first instance. The certification judge concluded that there was some basis in fact that the vehicles had manufacturing defects, but there was no evidence of any injuries or damages suffered, nor any evidence that they rendered the vehicles inoperable. The defendant, General Motors appealed the certification decision. On appeal, the Saskatchewan Court of Appeal allowed the appeal, reversing the lower court's decision. They held that Canadian law limits recovery for pure economic loss unless there is a real or substantial danger posed to person(s) or property. The Court of Appeal held that negligence claim absent evidence of compensable harm do not further judicial economic or access to justice and therefore it failed to satisfy the preferable procedure criterion. In this case, the diminished vehicle value and overpayment did not create a risk of danger.

Par

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