October 4, 2023

Wither the Pure Economic Loss Class Action?

by Michael Robson and John Mather

Among other seismic changes in 2020, two developments shook the product liability class action landscape in Ontario.

First, the province introduced major amendments to its class actions legislation, giving defendants more tools to prevent certification, including introducing a requirement that the class action not only be a "preferable" procedure but also the "superior" procedure.

Second, the Supreme Court of Canada released its decision in *88782 Ontario Inc v Maple Leaf Foods Inc.*, 2020 SCC 35. The decision confirmed that claims for pure economic loss – damages for anything other than damage to person or property, such as the cost of repair or claims diminished value – are only available in limited circumstances and, when dealing with products claims, only where the alleged defect presents an imminent threat of real and substantial danger.

Following from these developments, products class actions began migrating to BC, where the legislation and courts are perceived as more plaintiff friendly. A recent case, however, shows that shoddy goods claims for pure economic loss still face substantial hurdles in BC, especially where the manufacturer has recalled or offered to fix or replace the product at no charge.

In *Larsen v. ZF TRW Automotive Holdings Corp.,* 2023 BCSC 1471, the Superior Court of British Columbia struck the proposed representative plaintiff's claim at certification as (i) she failed to establish that the alleged defect had some basis in fact and (ii) the claim was one for pure economic loss which was completely rectified by an open manufacturer recall.

The case is also a reminder that, even though certification is a low bar, the mere existence of an expert report does not show some basis in fact that a product is defective. The expert report and its author must be reliable, and ideally not self-contradictory.

Background

The plaintiff sought to certify a class action against six automotive manufacturers consisting of a proposed class of 1.6 million vehicles. The plaintiff alleged that the vehicles contained a defective Airbag Control Unit ("ACU") that was susceptible to electrical overstress which could prevent the deployment of airbags and seatbelt pretensioners.[1]

The manufacturers had voluntarily recalled a subset of the proposed class vehicles in the United States and Canada (the "**Recalled Vehicles**") after performing their own risk analysis into reports of airbag deployment malfunctions that were suspected to be caused by electrical overstress in the ACU. The Recalled Vehicles were repaired at no charge to the owners. The remaining proposed class vehicles were not subject to any recalls (the "**Unrecalled Vehicles**").[2]

The plaintiff claimed that the same electrical overstress defect identified in the Recalled Vehicles was common in the Unrecalled Vehicles, and the recall did not provide a complete repair. The action advanced claims based on negligent design and/or manufacture, breaches of the *Competition Act,* and various provincial consumer protection legislation.

No Basis in Fact for Existence of the Alleged Defect

Justice Magawa found that the plaintiff had not established some basis in fact that the alleged defect was common to all of the proposed class vehicles.

While the plaintiff bears a relatively low evidentiary burden at certification, the court must be satisfied that the evidence tendered by the plaintiff is admissible and sufficiently reliable. The court is obliged to consider all of the plaintiff's evidence. It cannot pick and choose one item that favours the plaintiff's submission and ignore evidence that undermines it.[3]

In this case, Justice Magawa found that the plaintiff's expert evidence was unreliable. The plaintiff had tendered three expert reports which were contradictory and circular. The first and second reports opined that the ACUs were not manufactured with sufficient protective components to protect against electrical overstress. The reports suggested that the addition of specific diodes

---

[1] *Larsen v. ZF TRW Automotive Holdings Corp.,* 2023 BCSC 1471 [***Larsen***], at paras. 9 and 12.
[2] *Larsen,* 2023 BCSC 1471, at para. 13.
[3] *Larsen,* 2023 BCSC 1471, at para. 72, citing *Frayce v. BMO Investor Line Inc. et al,* 2023 ONSC 16, at para. 22.

that provide surge protection would provide a complete fix.[4] In light of evidence that the protective diodes had been used in the manufacture and design of the ACUs, the third report instead referred to the use of such components as a "band-aid" solution.[5]

With respect to the Recalled Vehicles, the court found that, while the existence of a recall is some acknowledgement of a defective design or manufacturing, the plaintiff must still provide some basis in fact that the alleged defect still exists in the Recalled Vehicles that underwent the prescribed repair.[6]

The plaintiff had failed to do so, as she primarily sought to rely on inadmissible unproven allegations in a parallel U.S. class proceeding and untested consumer complaints.[7] The plaintiff's expert suggested in his third report that he had observed that the defect was still present in a Recalled Vehicle after the fix. However, on cross-examination, he admitted that the vehicle had not yet undergone the prescribed repair at the time of inspection.[8]

Given the above, Justice Magawa rejected the plaintiff's evidence that the alleged defect was common to all vehicles and held that the recall provided a complete fix.[9] In the absence of evidence that the alleged defect is common to all vehicles or still exists in Recalled Vehicles, the only remaining claim is one for pure economic loss.

There is No Compensable Loss as the Manufacturer Provided a Complete and Free Repair

The court held that, while the recall creates some basis in fact that a defect exists in the Recalled Vehicles, the fact that the defect can be completely fixed, free of charge, effectively eliminated any recoverable loss.

Compensable harm is a fundamental prerequisite of an actionable wrong and class certification. Where the plaintiff does not plead injury to person or property, the claim is one for pure economic loss. Justice Magawa, following the Supreme Court of Canada's decision in *Maple Leaf Foods Inc.,*[10] held that the scope of recovery in pure economic loss claims is limited to mitigating the

---

[4] *Larsen,* 2023 BCSC 1471, at para. 46.
[5] *Larsen,* 2023 BCSC 1471, at para. 57.
[6] *Larsen,* 2023 BCSC 1471, at para. 70.
[7] *Larsen,* 2023 BCSC 1471, at paras. 73-80.
[8] *Larsen,* 2023 BCSC 1471, at paras. 54-56.
[9] *Larsen,* 2023 BCSC 1471, at para 83.
[10] 2020 SCC 35, at para. 48.

imminent real and substantial danger posed by the defective product by repairing the defect and putting the product back into a non-defective state.

While there was an admitted defect in the ACUs of the Recalled Vehicles which would likely expose the potential class members to imminent real and substantial danger, all of the Recalled Vehicles could be repaired at no charge to their owners. Any pure economic loss claim that the potential class members have was completely rectified by the recall procedure.

Conclusion

While we have seen a trend of products class actions moving to BC, we have also seen a more general trend in the decline of class actions for pure economic loss. This case reflects why this happening, and why manufacturers are placing more focus on robust recall procedures, which benefit both the consumer and the manufacturer.