CITATION: Kalra v. Mercedes Benz, 2017 ONSC 3795
COURT FILE NO.: CV-16-550271-CP
DATE: 20170629

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: **YOGESH KALRA,** Plaintiff / Moving Party

AND:

MERCEDES BENZ CANADA INC., DAIMLER AG, MERCEDES BENZ USA LLC and MERCEDES BENZ FINANCIAL SERVICES CANADA CORPORATION, Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward P. Belobaba

COUNSEL: *Peter Griffin, Kirk Baert, James Sayce and Andrew Skodyn* for the Plaintiff

Steven Rosenhek, Robin Roddey, Caroline Youdan and Allison Worone for the Defendants

HEARD: June 13, 2017

CERTIFICATION DECISION

[1] The emission control systems in diesel automobiles manufactured in Europe and imported into the U.S. and Canada continue to generate class action litigation. In the wake of the Volkswagen "dieselgate" scandal and the multi-billion dollar settlements that followed,[1] governmental authorities in the U.S. and Europe began scrutinizing the emission control systems of other diesel vehicle manufacturers. The news that a

[1] In the U.S. Volkswagen paid $4.2 billion in fines and entered into a settlement worth just over $10 billion: *In re Volkswagen "Clean Diesel" Marketing Sales Practices and Products Liability Litigation,* MDL, No. 2672 (CRB)(JSC) (U.S. District Court, Northern District of California, October 25, 2016). In Canada, VW paid a $15 million fine and entered into a $2.1 billion settlement: *Quenneville v. Volkswagen,* 2016 ONSC 7959 (December 20, 2016).

particular manufacturer was being investigated was often enough for the commencement of a class action. As happened here.

Background

[2] The focus of this proposed class action is the Mercedes-Benz line of BlueTEC diesel automobiles[2]. Just under 80,000 were sold in Canada from 2006 to 2016. The plaintiff says that all of these BlueTEC vehicles contain a defect or a "defeat device" that turns off the emission control system when the ambient air temperature drops below 10 degrees Celsius (50 degrees Fahrenheit). If this is true, this means that the defendants' BlueTEC vehicles are emitting high (and illegal) levels of nitrogen oxide pollution for most of the time that they are being driven on Canadian roads.

[3] The plaintiff, Yogesh Kalra, resides in Toronto. In November 2012 he purchased a used 2009 Mercedes-Benz BlueTEC R320 for $33,029 exclusive of tax, from JP Motors in Burlington, Ontario. He brings this proposed class action on behalf of all persons and corporations in Canada (except for "excluded persons"[3]) who own, owned, lease or leased a BlueTEC vehicle (as defined in the statement of claim) over the eleven-year time period, from 2006 to 2016.

[4] There are four defendants. Daimler AG, the parent company is based in Stuttgart, Germany and designs and manufactures Mercedes-Benz brand vehicles, including the BlueTEC vehicles; Mercedes-Benz Canada Inc., is the sole importer, distributor and warrantor of Mercedes-Benz vehicles in Canada; Mercedes-Benz USA LLC is the sole importer and distributor of Mercedes-Benz vehicles in the United States; and Mercedes-Benz Financial Services Canada Corporation is an indirect finance company that competes with other financial institutions to purchase lease agreements and sales finance contracts from automotive dealers in Canada.

[5] Mercedes-Benz notes that to date there have been no product recall orders or court decisions relating to the impugned BlueTEC emission control system. However, it acknowledges that investigations into its diesel emission control system are proceeding in both the US and Europe.

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[2] The BlueTEC vehicle models at issue in this case are the following: the ML320, ML350, GL320, E320, E250, E250, S350, R320, R350, E Class, GL Class, ML Class, R Class, S Class, GLK Class, GLE Class and Sprinter - all years.

[3] Excluded persons are defined as: (i) the defendants and their officers and directors; (ii) the authorized motor vehicle dealers of the defendants and the officers and directors of those dealers; and, (iii) the heirs, successors and assigns of the persons described in subparagraphs (i) and (ii).

The alleged misrepresentations

[6] This is primarily an action for negligent misrepresentation. The core representation, says the plaintiff, is that BlueTEC vehicles provide a "clean and green" diesel option that has low fuel consumption and low emissions. The actual representations (referred to hereafter and in the proposed common issues as the Representations) fall into three categories:

- *Advertising to the public*: A repeated refrain in the advertising of the BlueTEC vehicles is: "Clean. Efficient. Powerful. Diesel?" Other substantively similar representations include: "BlueTEC for a greener world"; "BlueTEC, the Cleanest Diesel Engine in the World"; "Here's why we call our green diesel technology 'Blue'"; and, "Finally, a luxury SUV that's fuel and cost efficient".

- *Warranty representation*: The warranty document provided to every class member, as required by Environment Canada, contains the same representation: that the BlueTEC vehicle conforms to Environment Canada's emission standards. The warranty document goes on to provide a time and distance warranty on material and workmanship relating to the emission control system.

- *Chrome lettering on BlueTEC vehicles*: The name "BlueTEC" is affixed in readable chrome lettering on the rear of every BlueTEC vehicle. By printing the word BlueTEC on the vehicle, says the plaintiff, Mercedes represented that there was a working BlueTEC system in that vehicle and that it would function properly and achieve its intended purpose - to clean the emissions of the vehicle under ordinary, on-road usage, regardless of the outside temperature.

[7] The plaintiff notes that at no time did the defendants tell prospective purchasers that the benefits and functionality associated with the BlueTEC system would be reduced or rendered inoperative when the air temperature dropped below 10 degrees Celsius.

Primarily a claim for economic loss

[8] As one can see from the 17 proposed common issues attached in the Appendix, the plaintiff is pursuing a wide range of statutory and common law claims. But the core claim is a claim for economic loss. There are no health or safety claims. There are no claims that noxious diesel emissions impacted on the plaintiff's or any class member's overall health or caused any physical harm or property damage. The core common law claim is for the damages sustained by the class members because of an alleged overpayment for a diesel automobile that failed to deliver on its emission control promise.

[9] I will return to this point shortly when I consider the causes of action and the proposed common issues.

Analysis

[10] The five requirements for the certification of a class action under s. 5(1) of the *Class Proceedings Act,*[4] ("CPA") are well known to counsel: a cause of action, an identifiable class, one or more common issues that will advance the litigation, a showing that a class action is the preferable procedure, and a suitable representative plaintiff with a workable litigation plan. The last four requirements only need a small amount of evidence – just "some basis in fact" – in order to be satisfied.

[11] The Supreme Court's decision in *Pro-Sys Consultants*[5] figures prominently in the analysis that follows, not because it also dealt with a product overcharge situation, but because of what the Court said about the following: (i) that the "some basis in fact" test under s. 5(1)(c) is really a one-step test that focuses only on the commonality of the proposed common issues; (ii) before a loss-related common issue can be certified the plaintiff must provide some plausible evidence of a workable methodology to measure actual class-wide loss and (iii) that aggregate damages are about the quantum of loss and not the fact of loss and cannot be used to establish liability. I will say more about these points in due course.

[12] I now turn to the five requirements.

(1) Cause of action – section 5(1)(a)

[13] The test under s. 5(1)(a) of the CPA is the same as the test on a motion to strike for no reasonable cause of action: assuming the facts pleaded to be true, is it plain and obvious that the claim has no reasonable prospect of success.[6]

[14] The plaintiff has pleaded eight causes of action. Three are statutory claims - under the *Canadian Environmental Protection Act* ("CEPA"), the federal *Competition Act,* and applicable provincial consumer protection legislation (the Ontario *Consumer Protection Act, 2002* and six other equivalent provincial statutes). Five are common law causes of action: negligent misrepresentation, negligence, unjust enrichment, breach of express and implied warranties and waiver of tort. The core claim, as I have already noted, is negligent

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[4] *Class Proceedings Act, 1992,* S.O. 1992, c. 6.

[5] *Pro-Sys Consulting Ltd. v. Microsoft Corp.*, 2013 SCC 57.

[6] *Ibid.*, at para. 63; *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 17.

misrepresentation but it is typical for class counsel to add as many other claims as the kitchen sink can hold.

[15] The defendants appear to take issue with five of the causes of action – the CEPA claim, the consumer protection claim, negligence, unjust enrichment and the breach of warranties claim.

[16] In my view, on the facts as pleaded, seven of the eight causes of action are supported by a generous reading of the pleadings and can remain in place. I hasten to add that some of them will be *de facto* altered or eliminated when I consider the proposed common issues under s. 5(1)(c). But at the s. 5(1)(a) stage, the only cause of action that plainly and obviously has no chance of success and must be struck is the breach of express and implied warranties claim. I cannot find that any of the seven other causes of action being advanced - viewed strictly as a cause of action on the facts as pleaded - has no chance of success and is certain to fail. I will first consider the five common law causes of action and then the three statutory claims.

[17] ***Negligent misrepresentation.*** As already noted, the plaintiff's principal claim is that the defendants misrepresented the emission control attributes of the BlueTEC vehicles causing the class members to purchase the vehicles at an inflated price. I am satisfied that the elements of negligent misrepresentation have been properly pleaded. It is not plain and obvious that this cause of action has no reasonable prospect of success.

[18] ***Negligence.*** It is certainly arguable that the negligence cause of action, as pleaded, has no chance of success and must be struck. There is no claim that the alleged defect (that is, the purported "shut off" of the emission control system at 10 degrees Celsius) has a propensity to cause personal injury or death to the putative class members. There is no health and safety claim. There is only the claim for out-of-pocket economic loss – that the vehicles are worth less than they otherwise would be. I am therefore very sympathetic to the defendants' submission that on the facts as pleaded this is not a "dangerous product" case but a "safe but shoddy goods" case. And if only the latter, then generally speaking, no duty of care arises on the part of the supplier.[7]

[19] Nonetheless, I am reluctant to strike the negligence claim. The pleadings do make reference (albeit in passing) to the dangers and health-related hazards of nitrogen oxide emissions and as the Court of Appeal noted in *Arora,*[8] the Supreme Court in *Winnipeg*

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[7] See the discussion in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85, *Martel Building Ltd. v. R.*, 2000 SCC 60 and *Arora v. Whirlpool Canada LP*, 2013 ONCA 657.

[8] *Arora, supra,* note 7.

Condominium[9] "carefully left the issue of whether there should be no recovery for pure economic loss where goods are shoddy, but not dangerous, for another day."[10] In other words, although Canadian courts have almost uniformly limited tort recovery for economic loss absent physical harm or damage to property, the recovery in negligence for pure economic loss involving a non-dangerous but shoddy product has not been determined definitively. The cause of action still has a slight pulse. It cannot be struck under s. 5(1)(a).

[20] This being said, when I consider the "negligence" common issue below under s. 5(1)(c), I conclude that the negligence/duty of care common issue will not advance the litigation and should not be certified.

[21] ***Unjust enrichment.*** The defendants say it is plain and obvious that the unjust enrichment claim is doomed to fail because: (1) unjust enrichment is not available in cases where the alleged transfer of value from plaintiff to defendant is indirect (i.e. from plaintiff to seller to defendant manufacturer); and (2) there is a valid juristic reason for any enrichment, namely the contract of sale between the buyers and sellers.

[22] In *Pro-Sys,*[11] however, the Supreme Court commented on both of these points. First, the Court concluded that it was not plain and obvious that a claim in unjust enrichment can only be made out where the relationship between the plaintiff and the defendant is direct.[12] Second, it held that if the contracts at issue are illegal and void because they violate the CEPA or Part VI of the *Competition Act,* (as alleged here) then they may not amount to a juristic reason for the enrichment. The Court also noted that "[t]he question whether the contracts are illegal and void should not be resolved at [the certification] stage of the proceedings."[13]

[23] I therefore cannot conclude that it is plain and obvious that the unjust enrichment claim has no reasonable prospect of success.

[24] ***Breach of express and implied warranties.*** The defendants are able to critique the breach of express and implied warranties claim because the relevant warranty documents are referenced in the statement of claim. It is well established that documents referenced in

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[9] *Winnipeg Condominium*, supra, note 7.

[10] *Arora, supra,* note 7, at para. 83.

[11] *Pro-Sys, supra,* note 5.

[12] *Ibid.,* at para. 87.

[13] *Ibid.,* at para. 88.

a pleading form part of the pleading, and may be considered and interpreted to determine whether the plaintiff has pleaded a viable cause of action.[14]

[25] As already noted, Mercedes-Benz expressly warranted to all BlueTEC purchasers and lessees that the vehicle complied with Environment Canada's emission standards. The warranty goes on to explicitly exclude all other express and implied warranties and provide limited remedies if the emission control system fails in any way – namely, repair or replace at Mercedes' expense. The warranty makes clear that claims for diminution in value are prohibited by the warranty.

[26] The plaintiff alleges that Mercedes-Benz breached the express warranty. However, he has not pleaded any facts that constitute a breach of the obligations assumed under this warranty document. Nor has the plaintiff pleaded facts establishing the breach of the implied warranty claim. In any event, implied warranties are not only expressly excluded by the language of the warranty here in question. The case law is clear that a term will not be implied if it is inconsistent or otherwise conflicts with an express provision in the agreement.[15]

[27] In short, even on a generous reading of the statement of claim, the breach of an express and implied warranty cause of action has no reasonable prospect of success. To the extent that a sub-class of buyers or lessees, namely consumers, can argue otherwise, that argument is best made under the rubric of the consumer protection cause of action that will be discussed shortly.

[28] ***Waiver of tort.*** In the alternative to damages in tort, the plaintiff has pleaded that the class members are entitled to claim "waiver of tort" and an accounting, or some other restitutionary remedy, for the disgorgement by the defendants of the revenues generated as a result of the class members' sale or lease of the BlueTEC vehicles. I am satisfied that the waiver of tort claim is properly pleaded and is not doomed to fail.

[29] ***Canadian Environmental Protection Act.*** Pursuant to section 40 of the CEPA, the plaintiff pleads that the class members have suffered loss and damage as a result of the defendants' contravention of this federal environmental protection statute, for which the

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[14] *Graham v. Imperial Parking Canada Corp.*, 2010 ONSC 4982 at paras. 97-98; *Durling v. Sunrise Propane Energy Group Inc.*, 2012 ONSC 4196 at para. 55; and *Hickey-Button v. Loyalist College of Applied Arts & Technology*, [2006] O.J. No. 2393 (C.A.) at para. 26.

[15] *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642, at para. 182 referring to the decisions in *G. Ford Homes Ltd.* v. *Draft Masonry (York) Co.* (1983), 43 O.R. (2d) 401 (C.A.); *Fort Frances (Town)* v. *Boise Cascade Can. Ltd.*; *Boise Cascade Can. Ltd.* v. *Ontario*, [1983] 1 S.C.R. 171; *Catre Industries Ltd.* v. *Alberta* (1989), 63 D.L.R. (4th) 74 (Alta. C.A.), leave to appeal to the S.C.C. refused, [1989] S.C.C.A. No. 447, 65 D.L.R. (4th) vii; and *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619.

defendants are liable. Contrary to the defendants' submission, damage to property is not necessary for a sustainable claim under the private right of action set out in s. 40 of the CEPA. This cause of action is properly pleaded and is not doomed to fail.

[30] ***Part VI of the Competition Act.*** The focus here is on the private cause of action for breach of section 52 of the *Competition Act* which, in essence, prohibits false and misleading representations to the public in the supply or sale of products. This cause of action is also properly pleaded and is not doomed to fail.

[31] ***Provincial consumer protection legislation.*** The rights and remedies available to consumer purchasers or lessees (as opposed to business purchasers) under provincial consumer protection legislation are significant. For example, in Ontario, any agreement entered into by a consumer after "a person" has engaged in an unfair practice can be rescinded or result in a damages claim.[16] Note that the word "person" is used rather than "contracting party." In several western provinces, consumer remedies are available even in the absence of privity of contract.[17] And in all provinces, as a minimum, a consumer cannot contract out of the implied warranties of fitness for purpose and merchantability.[18]

[32] The proposed class definition encompasses a range of transactional permutations involving: (i) consumers or corporations (ii) buying or leasing (iii) new or used BlueTEC vehicles (iv) in "privity" and "non-privity" provinces (iv) from at least four different types of vendors: company-owned Mercedes-Benz dealerships, independently-owned Mercedes-Benz dealerships, non-Mercedes-Benz dealerships and private sales.

[33] The availability of remedies under the pleaded consumer protection statutes will obviously depend on who bought or leased what from whom in which particular province. Sub-classes will no doubt be needed as this litigation proceeds. But at this stage, I cannot conclude that the consumer protection cause of action for eligible class members has no reasonable prospect of success.

(2) Identifiable class – section 5(1)(b)

[34] The next hurdle, section 5(1)(b) of the CPA, requires an identifiable class of two or more persons. Here the proposed class is defined as "all persons and corporations in Canada (except for Excluded Persons) who own, owned, lease or leased one of the BlueTEC

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[16] *Consumer Protection Act, 2002,* S.O. 2002, c. 30, Sch. A, ss. 18(1) and (2).

[17] British Columbia, Saskatchewan and Manitoba.

[18] See, for example, the Ontario Act, *supra,* note 16, ss. 9(2) and (3).

vehicles (as defined in the statement of claim)." The class period stretches over 11 years from 2006 to 2016.

[35] The class appears to be objectively defined, reasonably identifiable and rationally connected to the proposed common issues. However, as I have just noted, the scope and content of available remedies - particularly for consumer purchasers or lessees - will depend on who purchased the BlueTEC vehicle for what reason (consumer or business) from what vendor in what province. At some point soon, if this action is certified, sub-classes will be needed.

[36] The class is not overly broad. The fact that not every class member will be successful does not matter. It is enough that every class member shares a common interest in having the common issues determined.[19]

[37] In sum, there is some basis in fact for the "identifiable class" requirement.

(3) Common issues – section 5(1)(c)

[38] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. For an issue to be a common issue, it need only be a substantial ingredient of every class member's claim and its resolution must be a necessary component to the resolution of every class member's claim. A common issue does not mean that an identical answer is necessary for all of the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the class members.

[39] Mr. Kalra and the other putative class members may not all have the exact same claims and remedies available to them, but this is not a bar to certification. Even a significant level of difference among the class members does not preclude a finding of commonality. If material differences do emerge, the court can deal with them at that time.[20]

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[19] *Ontario v. Mayotte*, [2010] O.J. No. 2831 (S.C.J.), at para. 66, leave to appeal ref'd [2010] O.J. No. 4299 (Div. Ct.); and see *Crisante v. DePuy Orthopaedics Inc.*, 2013 ONSC 5186, at para. 37: "[t]he requirement that the class be objectively defined may sometimes result in a class that includes individuals who may ultimately not have a claim against the defendants. This is not fatal to certification ...." Also see *Frohlinger v. Nortel Networks Corp.*, [2007] O.J. No. 148 (S.C.J.), para. 28, where Justice Winkler (as he was then) said this: "[i]t must be remembered that the CPA is a procedural statute meant to provide a mechanism for the resolution of mass claims. As such, certification is a procedural step in the litigation and not a substantive determination. The statute must be interpreted liberally and a rigid approach to class definition based on concerns about over-inclusiveness may well defeat its purposes."

[20] The well-developed law on common issues is summarized in Winkler, Perell et al, *The Law of Class Actions in Canada*, (2014) at 107 *et seq.*

The underlying commonality question is whether allowing a proceeding to continue as a class proceeding will avoid duplication of fact-finding or legal analysis.[21]

The impact of *Pro-Sys*

[40] Three important observations were made by the Supreme Court in *Pro-Sys*[22] that are directly relevant to the analysis of the proposed common issues. The first deals with the some basis in fact test, the second with proof of loss on a class-wide basis, and the third with aggregate damages.

[41] ***The "some basis in fact" test.*** I have long believed that the "some basis in fact" test was a two-step test: that the plaintiff must show some evidence of the existence of the proposed common issue *and* some evidence that the proposed common issue has class-wide commonality.[23]

[42] Here, for example, the first proposed common issue (as set out in the Appendix) is whether some or all of the BlueTEC vehicles contain a defeat device. Under the two-step approach, the plaintiff would be required to provide some evidence (probably by way of a personal affidavit) that the alleged defect or defeat device actually exists. The second step, some evidence of class-wide commonality, would typically be satisfied by expert evidence that the alleged defect or defeat device can be found class-wide in every BlueTEC vehicle.

[43] But how does the plaintiff here provide some evidence that the defeat device actually exists? Unless he is an experienced automotive engineer with access to his own personal automobile hoist and emission testing technology, the existence of an alleged defeat device buried as it is in the complexities of a modern automobile engine is probably not something about which the plaintiff could ever provide meaningful evidence. The most the plaintiff can say, as he does here, is "the vehicle failed the emissions test" (not really evidence about a defeat device that stops working below 10 degrees Celsius) and "[i]f I had been aware of the defeat device, I would not have purchased the vehicle" (again not really evidence that such a defeat device actually exists).

[44] My concern in trying to preserve the two-step approach in the context of the common issues was rooted in the need to screen out the busy-body plaintiff who was not directly affected by the class action and to make sure that every proposed class action was grounded in reality. I now realize that a class actions judge can screen out the busy-body

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[21] *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, at para. 39; *Pro-Sys, supra,* note 5, at para. 108.

[22] *Pro-Sys, supra,* note 5.

[23] See the discussion in *Dine v. Biomet,* 2015 ONSC 7050, at paras. 15-19 and at note 9.

in at least two ways: one, by using s. 5(1)(e) and making sure that the proposed representative plaintiff can "fairly and adequately represent the interests of the class" (i.e. has some measure of direct involvement); or two, by applying the well-developed law of private interest standing that requires the plaintiff to show that she is indeed "directly affected" by the action that she has commenced.[24]

[45] In other words, I have come to understand that the Supreme Court's reminder, set out below, that the "some basis in fact" test in the context of the common issues is only a one-step process is a reminder that should be taken literally:

> In order to establish commonality, evidence that the acts alleged actually occurred is not required. Rather, the factual evidence required at this stage goes only to establishing whether [the common issues] are common to all the class members.[25]

[46] I am persuaded that it is time to retire the two-step approach and focus only on class-wide commonality. The plaintiff only has to show some evidence of commonality – that is some evidence that the proposed common issue applies class-wide. The plaintiff's personal evidence about the existence of the alleged defect is not needed. Busy-body plaintiffs who are not directly affected by their proposed class action can be weeded out under s. 5(1)(e) or via a firm-handed application of the law of private interest standing.

[47] I note that the Court of Appeal in a recent decision, *Hodge v. Neinstein,*[26] had no difficulty with the one-step approach, making clear that "[a]t the certification stage, the factual evidence goes only to establishing whether the questions are common to all the class members."[27] I will return to this point shortly.

[48] ***Proof of loss on a class-wide basis.*** If the plaintiff wants the court to certify a common issue that is loss-related or has a loss-related component (rather than just leaving the proof of loss to individual determination), the plaintiff must provide a plausible expert methodology that is capable of measuring the actual loss sustained by the class members on a class-wide basis. It is not necessary that the methodology establish the actual loss sustained, just that a sufficiently credible or plausible methodology is capable of doing

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[24] As discussed most recently in *Campisi v. Ontario,* 2017 ONSC 2884 at paras. 7-11.

[25] *Pro-Sys, supra,* note 5, at para. 110.

[26] *Hodge v Neinstein,* 2017 ONCA 494.

[27] *Ibid.,* at para. 113, citing *Pro-Sys, supra,* note 5 at para. 110.

so.[28] The expert methodology must offer a realistic prospect of establishing loss on a class-wide basis.[29]

[49] The plaintiff's obligation to provide a plausible methodology will often prompt a rebuttal from the defendant's expert. However, as the Supreme Court noted in *Pro-Sys,* "resolving conflicts between the experts is an issue for the trial judge and not one that should be engaged in at certification."[30]

[50] ***Aggregate damages.*** *Pro-Sys* has also made clear that the aggregate damages provision in s. 24(1) of the CPA focuses on "the assessment of damages and not proof of loss."[31] That is, the focus is on the quantum and not the fact of damage.[32] Aggregate damages cannot be used to establish proof of loss where proof of loss is an essential element of proving liability.[33] That is, aggregate damages cannot be used to establish liability.[34] And if liability has not been established, aggregate damages cannot be certified as a common issue.

[51] Each of the three observations as discussed above are directly relevant to my analysis of the proposed common issues ("PCIs"). I note again that the PCIs are set out in the Appendix.

Eleven of the PCI's are certified exactly as proposed

[52] Eleven of the seventeen PCIs are certified exactly as proposed: PCI (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv).

[53] PCI (i) asks whether some or all of the BlueTEC vehicles contain a defeat device (as defined in the statement of claim). I am satisfied that there is some basis in fact for the

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[28] *Pro-Sys, supra*, note 5 at para. 115.

[29] *Ibid.*, at para. 118.

[30] *Ibid.*, at para. 126.

[31] *Ibid.*, at para. 128.

[32] *Ibid.*, at para. 132.

[33] *Ibid.*, at paras. 128 and 135.

[34] *Ibid.*, at para. 131-32: "[A]n antecedent finding of liability is required before resorting to the aggregate damages provision of the CPA. This includes where required by the cause of action ... a finding of proof of loss."

allegation that all BlueTEC vehicles contain the same defeat device and that PCI (i) can be answered on a class-wide basis. I refer to the following:

- Daimler's statement in its Interim Report (1Q17) that in numerous jurisdictions worldwide, including the United States (where BlueTEC vehicles are certified for sale into Canada), governments are investigating BlueTEC vehicles for defeat devices:

  > Several federal and state authorities, including in Europe and the United States, have inquired about and are investigating test results, the emissions control systems used in Mercedes-Benz diesel vehicles and Daimler's interaction with the relevant federal and state authorities…In light of the notices of violation that were issued by US environmental authorities to another vehicle manufacturer in January of 2017, identifying functionalities, apparently including functionalities that are common in diesel vehicles, as undisclosed Auxiliary Emission Control Devices (AECDs) and potentially impermissible…it cannot be ruled out that the authorities might reach the conclusion that Mercedes-Benz diesel vehicles have similar functionalities.

- The evidence of Mr. Sherrard, the defendants' fact witness, that at one point the defendants stopped selling the BlueTEC model year 2017 in the U.S and Canada.

- The evidence of Dr. Jacobs, the defendants' expert that "very low ambient air temperature is one of the conditions under which a vehicle may need to reduce the operation of the emission system to protect it from damage".

[54] I therefore conclude that there is some basis in fact that PCI (i) can be answered on a class-wide basis.

[55] I reach the same conclusion with PCIs (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv). In each case – whether the question relates to the making of the Representations, what was said by the defendants to the Canadian government about the emission standards, the contravention of the CEPA and the federal *Competition Act,* the level of knowledge or recklessness on the part of the defendants, the applicability of the provincial consumer protection statutes and the remedies available thereunder, or the remedies available to class members who financed or leased their vehicles – it is evident from the form of the question or the fact that the PCI focuses on the conduct of the defendants that the question can indeed be answered in common on a class-wide basis.

[56] As already noted, sub-classes will be needed to differentiate amongst the various transactional permutations – who bought or leased what from whom in which province – but the class-wide commonality of these eleven PCIs cannot be disputed. Each of them is certified as a common issue.

Three of the PCIs need to be revised

[57] PCIs (viii), (xiv) and (xvii) will be certified if they are revised as follows.

[58] PCI (viii) begins by asking whether the Representations were negligently made and then goes on to ask "more specifically" about duty, breach and inferred reliance. I assume that class counsel wants the focus of this common issue to be the duty, breach and inferred reliance sub-parts and not the over-arching negligent misrepresentation question. The over-arching negligent misrepresentation question would require proof of loss and as a common issue, proof of loss on a class-wide basis. However, as already noted, this would require the plaintiff to present the *Pro-Sys* type of "actual loss" methodology discussed above. No such methodology has been presented. PCI (viii) must therefore be revised as shown in the Appendix to make clear that the question is limited only to the three sub-questions, duty, breach and inferred reliance.

[59] The duty and breach sub-questions can obviously be answered on a class-wide basis. So can the inferred reliance sub-question. It cannot be disputed that every BlueTEC purchaser reasonably expected, at a minimum, that the vehicle complied with federal emission standards and could lawfully be driven on Canadian roads regardless of the air temperature. There is therefore some basis in fact for inferring reliance on a class-wide basis even without having evidence that the very same representation in the Express Warranty was seen and read by every class member.

[60] PCI (viii) if revised as suggested above can be certified as a common issue.

[61] PCI (xiv) begins by asking about unjust enrichment but then goes on to ask whether the defendants are constructive trustees and about the amount that is being held by the defendants in the constructive trust. The first part of PCI (xiv) asking about unjust enrichment focuses on the defendants conduct and can be answered on a class-wide basis. The second part of this PCI that asks about the constructive trust must be deleted as shown in the Appendix. As the Supreme Court noted in *Pro-Sys,* where the plaintiff makes a purely monetary claim (as here) and cannot show any "link or causal connection between his contribution and the acquisition of specific property" then the constructive trust claim must be struck.[35]

[62] PCI (xvii) asks about waiver of tort. Here again, the first part of the question can be answered on a class-wide basis. However, the balance of the question asking about the "amount" of the loss and the imposition of a constructive trust must be deleted as shown in the Appendix. The plaintiff has not presented a *Pro-Sys* methodology to support the

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[35] *Pro-Sys*, *supra,* note 5, at paras. 91-92.

class-wide "amount of loss" question and there is no basis for the "constructive trust" question for the reasons just stated.

Three of the PCIs are not certified

[63] PCIs (ix), (x) and (xvi) are not certified.

[64] PCI (ix) is the negligence question that also asks "more specifically" about duty and standard of care. The negligence question suffers from the same deficiency as the negligent misrepresentation question in PCI (viii). Proof of loss is an essential element of the negligence claim. And the plaintiff has presented no methodology for measuring actual loss on a class-wide basis.[36]

[65] But there is a more pressing problem. When I dealt with the negligence claim as a cause of action under s. 5(1)(a), I found that it still had a (slight) pulse and should not be struck. But here, where the negligence claim is presented as a proposed common issue, I must pay greater heed to the fact that the plaintiff is claiming for economic loss only and not for any health-related injury and to the fact that today the overwhelming body of law would not impose a tort duty of care on the defendants for manufacturing and marketing a vehicle that on the facts as pleaded is a safe but shoddy product.[37] In my view, it is beyond dispute - given that the claim herein is for economic loss only - that under the applicable law the answer to the duty of care question must be "no". Because this answer is self-evident and will not advance the litigation, PCI (ix) should not be certified.

[66] PCI (x) asks about express or implied conditions or warranties. Recall that under the s. 5(1)(a) analysis I found that this cause of action had no reasonable prospect of success and was doomed to fail. Absent a viable cause of action, it must follow that the proposed common issue be struck as well. However, the plaintiff should find comfort in the fact that this warranty claim only has viability in the consumer context and the PCIs dealing with the availability of consumer protection remedies, namely PCIs (xi), (xii) and (xiii), have all been certified.

[67] PCI (xvi) asks about aggregate damages. An aggregate damages common issue can be certified under s. 24(1) of the CPA only if liability has been established and there is some evidence that all or part of the defendant's monetary liability can reasonably be determined without proof by individual class members. Recall again the admonition of the

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[36] The aggregate damages methodologies presented by the plaintiff and discussed below use an "average loss" approach and do not address "actual loss". In any event, aggregated damages cannot be used to establish the fact of loss, only the quantum of loss: see the discussion below.

[37] Recall the discussion above at paras. 18 to 20.

Supreme Court in *Pro-Sys* that liability, including proof of loss if that is an essential element of proving liability, must first be established before aggregate damages can be considered. If liability has not been established, then the aggregate damages common issue cannot be certified.

[68] The plaintiff presents an expert methodology to show how aggregate damages can reasonably be determined by using comparator vehicles to measure average loss and average resale value on a class-wide basis.

[69] The difficulty is this. The primary claim, as I have already noted, is for negligent misrepresentation. Proof of loss is an element of this tort and is needed to establish liability. The negligent misrepresentation issue, PCI (viii), asks only about duty of care, breach and inferred reliance. Proof of loss has been left, perhaps wisely, to individual determinations. Thus, PCI (viii), even when answered in its entirety, will still not establish liability. This being so, as both s. 24(1) of the CPA and *Pro-Sys* make clear, aggregate damages cannot be certified – at least not with regard to the negligent misrepresentation claim.

[70] There is no indication by the plaintiff that his aggregate damages methodology is intended to apply to the other PCIs, some of which also require proof of loss to establish liability such as the CEPA issue and the *Competition Act* issue.[38]

[71] Because aggregate damages cannot be certified for the negligent misrepresentation, CEPA and *Competition Act* issues, and the plaintiff has not explained how aggregate damages can apply to the consumer protection or unjust enrichment issues, I believe it makes sense to leave the aggregate damages issue to the trial or summary judgment motion judge. At the hearing on the merits, the presiding judge can easily add the aggregate damages if this is deemed appropriate. As the Supreme Court noted in *Pro-Sys*, "[t]he failure to propose or certify aggregate damages ... as a common issue does not preclude a trial judge from invoking the provision if considered appropriate once liability is found."[39]

[72] Given my decision not to certify the aggregate damages issue, I do not need to address the extensive dispute between the parties about whether the plaintiff's expert's "average loss" or "resale value" approach to aggregate damages is workable in a product purchase context where the individual's loss will depend on the interplay of a wide range of idiosyncratic factors.

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[38] *Pro-Sys*, *supra*, note 5, at para. 131.

[39] *Ibid.*, at para. 134.

[73] This concludes my analysis of the PCIs. As the Court of Appeal noted in *Cloud,*[40] I am obliged to consider the importance of the common issues in relation to the claim as a whole. The critical question is whether, viewing the common issues in the context of the entire claim, their resolution will significantly advance the action.[41]

[74] I am satisfied that the fourteen common issues as affirmed or revised will significantly advance the litigation. At the completion of the common issues trial or summary judgment motion, the parties will have answers to questions relating to statutory breaches, the availability of consumer protection remedies, and several key elements of the common law claims for negligent misrepresentation, unjust enrichment and waiver of tort. If the answers favour the plaintiff, the efficient class-wide determination of the common issues will certainly assist in the adjudication of the individualized damage assessments.

(4) Preferable procedure – section 5(1)(d)

[75] Section 5(1)(d) of the CPA requires the plaintiff to provide some basis in fact that a class proceeding is the "preferable procedure for the resolution of the common issues". The plaintiff must provide some evidence that: (1) a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members' claims. The preferability analysis must be conducted through the lens of the three principal goals of class actions, namely judicial economy, behavior modification, and access to justice.[42]

[76] I agree with the plaintiff that there is no other preferable manner in which the claims of the class members can be resolved. The only alternative to a class action would be tens of thousands of duplicative individual actions. Litigating the common issues relating to the duties owed, the scientific evidence about the impugned vehicles, and the defendant's knowledge and conduct would be prohibitively expensive for the vast majority of the putative class members.

[77] I also agree with the plaintiff that the certification of a class proceeding in this case would further the goals of access to justice, judicial economy and behaviour modification. The preferability requirement is satisfied.

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[40] *Cloud v. Canada (Attorney General)* [2004] O.J. No. 4924 (C.A.).

[41] *Ibid.*, at para. 74.

[42] *Hodge, supra,* note 26, at para. 148; *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 27.

(5) Suitable representative plaintiff – section 5(1)(e)

[78] The final requirement for certification is a representative plaintiff who would adequately and fairly represent the interests of the class, and who does not have a conflict of interest with respect to the common issues.

[79] Yogesh Kalra, the proposed representative plaintiff, owned one of the BlueTEC vehicles and has sworn to vigorously prosecute the action in favour of the class. He has no conflicts of interest with any of the other class members and has produced a litigation plan that sets out a workable method of advancing the proceeding on behalf of the class. Some changes will have to be made as sub-classes are added but at this stage the litigation plan is adequate.

[80] The defendants' suggestion that Mr. Kalra is in a conflict of interest because he does not share the exact same claims and potential for recovery as many of the other class members ignores the case law on point. Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert causes of action against a defendant on behalf of other class members that are not being asserted by him personally, provided that the causes of action all share a common issue of law or of fact. A proposed representative plaintiff need not be "typical" of the class, but must be "adequate" in the sense that he or she shares a common interest with the other class members and would "vigorously prosecute" the claim.[43]

[81] In sum, the s. 5(1)(e) requirement is satisfied.

The defendants' motion to strike

[82] The defendants brought a preliminary motion to strike four categories of material filed by the plaintiff: (1) the portion of Mr. Stockton's expert report proposing new aggregate damages methodologies; (2) the two expert reports filed by Dr. Checkel; (3) various newspaper articles and European studies appended to Mr. Rosenfeld's affidavit; and (4) two exhibits entered at the cross-examination of Dr. Jacobs consisting of two additional European studies conducted in 2016.

[83] Given my approach and analysis herein, I did not have to consider any of this material. The motion to strike is moot and need not be decided.

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[43] *Campbell v. Flexwatt Corp.*, [1997] B.C.J. No. 2477 (B.C.C.A.) at paras. 75-76. And see generally Winkler, Perell et al, *supra*, note 20, at 107-14.

Disposition

[84] The motion for certification is granted. Fourteen of the seventeen proposed common issues, as affirmed or revised, can be certified. Three of the proposed common issues, PCIs (ix), (x) and (xvi) cannot be certified.

[85] Counsel shall prepare a draft Order in the form contemplated by s. 8 of the CPA.

[86] If the parties are unable to agree on the costs, I would be pleased to receive brief written submissions from the plaintiff within 14 days and from the defendants within 14 days thereafter. I caution both sides that this may well be a case for no costs given the extent to which success (as measured by overall results and related work effort) was divided.

[87] My thanks to counsel for their assistance.

Justice Edward P. Belobaba

Date: June 29, 2017

Appendix attached.

APPENDIX: PROPOSED COMMON ISSUES

[As explained in the Reasons above, eleven of the seventeen PCI's are certified exactly as proposed: PCIs (i), (ii), (iii), (iv), (v), (vi), (vii), (xi), (xii), (xiii) and (xv). Three of the PCIs require some revision: PCIs (viii), (xiv) and (xvii) [the deleted portion is in *italics*; the revised portion is underlined]. Three of the PCIs are not certified: PCIs (ix), (x) and (xvi).]

(i) Do some or all of the Vehicles (as defined in the Statement of Claim) contain a Defeat Device (as defined in the Statement of Claim)?

(ii) Did the Defendants make some or all of the Representations (as defined in the Statement of Claim)? If so, which Representations, when and how?

(iii) Did the Defendants misrepresent to the Canadian government that the Vehicles met Emissions Standards (as defined in the Statement of Claim)?

(iv) Was the importation of the Vehicles into Canada unlawful and in contravention of the Canadian Environmental Protection Act, 1999, S.C. 1999, c 33?

(v) Did the Defendants contravene Part VI of the Competition Act, R.S.C. 1985, c. C-34?

(vi) Did the Defendants know that the Representations were false when they were made to the Plaintiff and other Class Members?

(vii) Were the Defendants reckless as to whether the Representations were false when they were made to the Plaintiff and other Class members?

(viii) *Were the Representations negligently made by the Defendants to the Plaintiff and other Class Members*? When making the Representations to the Plaintiff and other Class Members *More specifically:*

(1) Did the Defendants owe a duty of care to the Plaintiff and other Class Members?

(2) If so, did the Defendants breach their duty? How?

(3) In the circumstances of this case, can the reliance of the Plaintiff and other Class Members on the Representations be inferred?

(ix) *Were the Defendants negligent in the engineering, design, development, testing and manufacture of the diesel engines and emissions systems in the Vehicles? More specifically:*

(1) Did the Defendants owe a duty of care to the Plaintiff and other Class Members?

(2) What is the standard of care applicable to the Defendants?

(3) Did the Defendants breach the applicable standard of care? How?

(x) *Did the defendants breach any express or implied conditions or warranties of fitness, merchantability and quality of the Vehicles?*

(xi) Does the Consumer Protection Act 2002, S.O. 2002, c. 30 or the Equivalent Consumer Protection Statutes (as defined in the Statement of Claim) (collectively the "CP Legislation") apply to the Defendants? If so, which Defendants?

(xii) Does the CP Legislation apply to the claims of the Plaintiff and all other Class members?

(xiii) Did the Defendants, or any of them, make any false, misleading or deceptive representations within the meaning of the CP Legislation? If so:

(1) Were any such representations unfair practices?

(2) Are the Class Members, or any of them, entitled to damages?

(xiv) If one or more of the above common issues are answered affirmatively, has the conduct of the Defendants resulted in an unjust enrichment to the Defendants? *If so, are the Defendants constructive trustees holding ill-gotten gains for the benefit of the Plaintiff and Class Members? What amount is held by the Defendants in the constructive trust?*

(xv) If one or more of the common issues are answered affirmatively, can and/or should a remedy be granted with respect to the financing, lease or other agreements related to the Vehicles?

(xvi) *If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendants be determined on an aggregate basis? If so, in what amount and who should pay such damages to the Class?*

(xvii) By virtue of waiver of tort, are the Defendants:

(1) Liable to account to any of the Plaintiff and Class Members on a restitutionary basis, for any part of the proceeds of the sale of the Vehicles? *If so, in what amount and for whose benefit is such an accounting to be made?*

(2) Alternatively, should a constructive trust be imposed on any part of the proceeds of the sale of the Vehicles for the benefit of the Plaintiff and Class members, and, if so, in what amount, and for whom are such proceeds held?

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