IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Crotty v. Aviva General Insurance Company*, 2024 NLSC 54
Date: April 2, 2024
Docket: 202201G1794

BETWEEN:
ADAM CROTTY
FIRST PLAINTIFF

AND:
SHAWN COLEMAN
SECOND PLAINTIFF

AND:
AVIVA GENERAL INSURANCE COMPANY
FIRST DEFENDANT

AND:
AVIVA CANADA INC.
SECOND DEFENDANT

Before: Justice Vikas Khaladkar

Place of Hearing: St. John's, Newfoundland and Labrador

Dates of Hearing: March 5-6, 2024

Summary:

The Representative Plaintiff's Application for Certification of a class action was dismissed.

Appearances:

Robert W. Buckingham, Eli W.P. Baker and Stephen E. Barnes	Appearing on behalf of the Plaintiffs
Paul J. Martin, Pavel Sergeyev and Denis J. Fleming	Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Ring v. Canada (Attorney General)*, 2010 NLCA 20; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68; *MacKay v. Rovers* (1987), 196 A.P.R. 237, 41 D.L.R. (4th) 193 (N.S. C.A); *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205; *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24; *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 130 O.A.C. 373, 184 D.L.R. (4th) 687; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18; *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30; *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139; *Price v. H. Lundbeck A/S*, 2018 ONSC 4333; *Bourbonnière v. Yahoo! Inc.*, 2019 QCCS 2624; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46; *Heller v. Uber Technologies Inc.*, 2022 ONSC 1997; *Logan v. Canada (Minister of Health)*, 2002 CarswellOnt 482, [2002] O.J. No. 522 (Sup. Ct.)

STATUTES CONSIDERED: *Class Actions Act*, S.N.L. 2001, c. C-18.1; *Automobile Insurance Act*, R.S.N.L. 1990, c. A-22; *Medical Care Insurance Insured Services Regulations*, C.N.L.R. 21/96; *Medical Care Insurance Act*, O.C. 96-132

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

TEXTS CONSIDERED: Paul Finn, "Contract and the Fiduciary Principle" (1989) 12 University of New South Wales Journal 76

REASONS FOR JUDGMENT

KHALADKAR J.:

INTRODUCTION

[1] Adam Crotty and Shawn Coleman have applied, as Representative Plaintiffs (the "Plaintiffs"), to certify a class action against the Defendants on behalf of a class of persons whose number is, at present, indeterminate. The Application for Certification (the "Application") is brought pursuant to the *Class Actions Act*, S.N.L. 2001, c. C-18.1 (as amended).

[2] The Plaintiffs claim damages for breach of contract, breach of regulatory authority, breach of fiduciary duty, breach of good faith, and unjust enrichment together with aggravated and punitive damages.

[3] The Plaintiffs' claim is against two Defendants: Aviva General Insurance Company and Aviva Canada Inc. The insurance policies were issued by Aviva General Insurance Company to the Plaintiffs.

FACTS

[4] Each of the Plaintiffs was involved in motor vehicle accidents and suffered personal injuries. Mr. Crotty was involved in two motor vehicle accidents – one on August 25, 2018 and the second on January 14, 2019. Mr. Coleman was involved in a motor vehicle accident that occurred on December 12, 2019. Both of them were the recipients of Section B Accident Benefits ("Section B").

[5] Aviva General Insurance Company operates a licensed insurance company in Newfoundland and Labrador and, as well, in the other jurisdictions in which the Plaintiffs wish to have this class action extended – namely, Nova Scotia, Prince

Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon (the "Regulated Jurisdictions").

[6] Aviva Canada Inc. is a property and casualty insurance company that provides automotive and other insurance products to Canadian consumers through a network of wholly owned subsidiary insurance companies – of which Aviva General Insurance Company is one.

[7] There is no contract of insurance in force between the Plaintiffs and Aviva Canada Inc. This fact was acknowledged by counsel for the Plaintiffs during the course of his submissions to the Court.

[8] Amanda Perry, Claims Leader for Aviva General Insurance Company, deposed in an affidavit dated May 18, 2023, as follows:

> Accident benefits coverage is a form of no-fault automotive insurance coverage that compensates an insured in relation to bodily injury or death by an accident arising out of the use or operation of an automobile. With one exception, accident benefits coverage is mandatory in each of the Regulated Jurisdictions and must be included in all automotive insurance policies issued to motor vehicle owners in these provinces and territories. The only exception is Newfoundland and Labrador, where such coverage is optional and can be purchased by insureds for an additional premium payment.

[9] Provincial and Territorial insurance regulators have mandated that accident benefits coverage conform to certain standards in relation to terms, conditions, exclusions and policy limits. In this Province they are stipulated in Section B of the Newfoundland and Labrador, S.P.F. No. 1 Standard Automobile Policy ("Standard Automobile Policy") pursuant to the *Automobile Insurance Act*, R.S.N.L. 1990, c. A-22.

[10] In each of the Regulated Jurisdictions the Standard Automobile Policy containing a no-fault Section B requires that insured persons be compensated, after

being injured in a motor vehicle accident, for "all reasonable expenses" incurred for necessary medical and rehabilitation services.

[11] Subsection 1 of Section B of the Standard Automobile Policy pursuant to the *Automobile Insurance Act* provides, in part, as follows:

> The Insurer agrees to pay to or with respect to each insured person as defined in this Section who sustains bodily injury or death by an accident arising out of the use or operation of an automobile:
>
> (1) All reasonable expenses incurred within 4 years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of insured services under *Medical Care and Hospital Insurance Act* and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of $25,000 per person, …

[12] The term "reasonable expenses" is not defined in the Standard Automobile Policy in each of the Regulated Jurisdictions. The meaning that is to be attributed to that term is one of the major issues that will be engaged in this decision.

[13] Aviva General Insurance Company compensated insured persons covered by automobile policies for no-fault Section B in relation to transportation or mileage costs to and from medical appointments at a rate of $0.25 per kilometer travelled.

[14] However, on or about March 1, 2018 Aviva General Insurance Company changed its policy for reimbursing traveling expenses by giving adjusters the discretion to decide whether or not mileage claims less than 25 kilometers (round trip) should be reimbursed.

[15] In Mr. Crotty's case no reimbursement for traveling expenses was offered to him. However, in Mr. Coleman's case, he was advised that he would be fully reimbursed but would have to submit a claim by means of providing a travel log. Mr. Coleman did not apply for reimbursement.

ISSUES

[16] The sole issue before the Court is whether the action should be certified as a class action pursuant to the provisions of the *Class Actions Act*.

ANALYSIS

[17] Pursuant to section 5 of the *Class Actions Act* the Legislature has mandated that courts must certify actions as class actions, if an application has been made under sections 3 or 4, and if certain conditions are met. These conditions are contained in subsections 5(1)(a) to 5(1)(e) of the *Class Actions Act*. In addition, courts may consider a number of factors relating to communal issues, whether a class action is the best vehicle for advancing the interests of the class, the relative efficiency of proceeding by means of a class action versus individual actions. These factors are set out in subsection 5(2).

[18] The onus is on the Plaintiffs to establish all of the criteria set out in section 5. The test applied in determining whether the pleadings disclose a cause of action is the "plain and obvious" test. See *Ring v. Canada (Attorney General)*, 2010 NLCA 20, at para. 11. The Plaintiffs are required to show that the criteria have some basis in fact. In this regard see the judgment of McLachlan C.J. in *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68, at para. 25.

[19] Whether the requirements of section 5(1)(a) of the *Class Actions Act* have been met will be assessed on the basis of the same test as a motion to dismiss, the

facts as pleaded are assumed true and the requirement is satisfied unless it is plain and obvious that the Plaintiffs' claim cannot succeed.

[20] I propose to conduct my analysis by dealing with each of the statutory factors in turn.

Section 5(1)(a) – Do the pleadings disclose a cause of action?

[21] The original Statement of Claim in this matter was amended. The amended Statement of Claim was filed with the Court on August 2, 2023. My analysis is based upon the contents of that amended Statement of Claim.

[22] The *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D (the "*Rules*"), provide as follows:

> **Facts, not evidence to be pleaded**
>
> **14.03.** Every pleading shall contain a statement in a summary form of the material facts on which the party pleading relies for a claim or defence, but not the evidence by which the facts are to be proved, and the statement shall be as brief as the nature of the case admits.
>
> …
>
> **Particulars of pleading**
>
> **14.11.** (1) Subject to rule 14.11(2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded, including
>
> > (a) particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; …

[23] Aviva Canada Inc. has been named as a Second Defendant in this action. Aviva Canada Inc. did not enter into a contract of insurance with the Plaintiffs. Its

only connection to this proceeding is because Aviva General Insurance Company is a wholly owned subsidiary of Aviva Canada Inc. Both are bodies corporate and, as such, are treated as distinct persons under the law. Any breaches of contract or tort by one do not, in law, implicate the other.

[24] Aviva Canada Inc. is not a proper party to this action and ought not to have been named as the Second Defendant. I will henceforward conduct my analysis as if Aviva General Insurance Company is the only Defendant in the proposed class action proceeding.

Paragraph 1

[25] In paragraph 1 it is alleged that the Defendant implemented, on or about March 1, 2018, in contravention of past and future insuring agreements a 25 kilometer "deductible" for no-fault Section B medical and rehabilitation transportation expenses.

[26] It is common ground that Aviva General Insurance Company introduced a change whereby reimbursement for the first 25 kilometers of travel became more restricted than it had been. It is not clear to me, from the pleadings, how this change was a contravention of future insuring agreements. The term "contravention" implies, to me, a breach of some sort. There are no particulars in the pleadings as to how the change breached either past or future insuring agreements.

[27] It is further alleged that the Defendant did so without notifying or receiving approval of provincial regulatory authorities. There are no particulars, in this paragraph, concerning the legal requirement by virtue of which the Defendant was to notify or receive the approval of provincial regulatory authorities for the change in coverage.

Paragraph 2

[28] Paragraph 2 sets out facts concerning the First Plaintiff, Mr. Crotty.

Paragraph 3

[29] Paragraph 3 alleged that the First Plaintiff's contract of insurance with Aviva General Insurance Company provided for Section B coverage. These facts are admitted by Aviva General Insurance Company.

[30] Paragraph 3 further stated that Section B coverage provided for reimbursement for transportation to and from necessary medical and rehabilitation services. Paragraph 11 of the Statement of Claim, sets out the insuring agreement between the parties and, in particular, subsection 1 of Section B, which stated what the insurer agreed to pay to insured persons who sustain bodily injury, namely:

> (1) All reasonable expenses incurred within 4 years from the date of the accident as a result of such injury for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service and for any other service within the meaning of insured services under the Medical Care Insurance Act, and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, the limit of $25,000 per person, ...
>
> [emphasis added]

[31] The amended Statement of Claim sets out, in paragraphs 12-16 the equivalent provisions in each of the Regulated Jurisdictions. Each of these provisions use the words "all reasonable expenses". In none of the provisions are transportation expenses set out as being a specifically covered item of reimbursement.

[32] In *MacKay v. Rovers* (1987), 196 A.P.R. 237, 41 D.L.R. (4th) 193 (N.S. C.A), the Nova Scotia Court of Appeal held, in part, that:

> … It is usually necessary to travel to the hospital or other place where medical and dental services can be obtained and the cost of such travel, particularly in this case where the respondent lived far from the place of treatment, would be an integral part of the medical expenses required to be paid by the insurer. …

[33] The dicta of the Court of Appeal seem to imply that travel expenses would be mandatory in cases where the injured person lived far from the place of treatment. The policy change carried out by the insurer in this case would seem to be consonant with the decision in *MacKay v. Rovers*. Travel expenses are paid if the injured party lives far from the place of treatment – over 25 kilometers on a round trip basis but are in the discretion of the adjuster if the travel is for less than 25 kilometers per round trip.

[34] *MacKay v. Rovers* is not authority for the proposition that every claim for transportation must be paid. Rather, it is authority for the proposition that significant travel expenses should be paid. The determination of what is significant, or reasonable, is on an objective standard in accordance with the terms of the policy.

[35] I believe travel costs fall within the term “all reasonable expenses”. I am further of the opinion that the decision as to whether the travel costs should, or should not, be reimbursed is discretionary and must, in the first instance, be defined by the insurer. If the injured party is dissatisfied with the decision of the insurer then they would have resort to the courts to determine whether claimed expenses were reasonable under the circumstances.

[36] I am fortified in this conclusion by looking at the practice in terms of the amount that is paid, on a per kilometer basis, for traveling expenses. Here, in Newfoundland and Labrador, the Defendant pays $0.25 per kilometer. That is a number arrived at by the Defendant – in the exercise of its discretion to pay for traveling expenses. There are no facts alleged in the amended Statement of Claim to support the proposition that the mileage rate is mandated by the regulatory authority.

[37] Paragraph 3 further alleged that Mr. Crotty submitted a reasonable travel expense claim which Aviva General Insurance Company refused to pay on account of the 25 kilometers per trip.

[38] Amanda Perry, Claims Leader for Healthcare Services for Aviva General Insurance Company, filed an affidavit with the Court dated May 18, 2023. In that affidavit she deposed that Mr. Crotty made a claim for 91 trips to and from visits to his physiotherapist and massage therapist. She indicated that Mr. Crotty was seeing his physiotherapist and massage therapist at the same place on a number of occasions and, therefore, that he was only entitled to claim for 48 of the 91 trips. Each of the return trips was less than 25 kilometers in length.

[39] Counsel for the Defendant indicated, during their submissions, that Mr. Crotty would not have been entitled to recover any sums from his insurer on account of these trips because his claim was fraudulent. Counsel submitted that he is not a fit person, for that reason, to act in a representative capacity if the class action is certified.

[40] However, that was not the reason given to Mr. Crotty for the insurer's decision to refrain from paying his travel costs. The reason advanced was that the insurer's policy forbade payment where the round-trip distance was less than 25 kilometers.

[41] It is not necessary for me to decide whether or not Mr. Crotty made a fraudulent claim in adjudicating the merits of the Application.

Paragraph 4

[42] Paragraph 4 sets out certain particulars regarding the Second Plaintiff, Mr. Coleman. In this paragraph it is alleged that he did not receive reimbursement for travel expenses due to the Defendant's improper 25-kilometer deductible.

[43] Mr. Coleman swore an affidavit on November 9, 2022 in which he deposed that the Defendant did not reimburse him for any travel costs for his treatment.

[44] In Amanda Perry's said affidavit she deposed that Mr. Coleman was notified on June 8, 2022, through his counsel, that the insurer would not be applying a deductible in respect of his Section B policy claim. However, Mr. Coleman did not take any steps to file a claim and, to the date of the hearing in this matter, had not done so.

[45] Amanda Perry was not cross-examined on her affidavit. No affidavits in rebuttal were filed on behalf of Mr. Crotty or Mr. Coleman. I cannot assume that Mr. Coleman was unjustifiably deprived of a contractual benefit to which he is entitled in light of the fact that he never applied for it. Despite this deficiency, I will continue with my analysis because the unsuitability of the proposed Plaintiffs does not, by itself, disentitle the Application – more appropriate Plaintiffs could be substituted if there are grounds to certify the class action.

Paragraph 5

[46] Paragraph 5 sets out particulars concerning Aviva General Insurance Company.

Paragraph 6

[47] Paragraph 6 sets out particulars concerning Aviva Canada Inc.

Paragraph 7

[48] Paragraph 7 sets out the definition of the class as follows:

> All persons in Canada who were an insured party to a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut, and Yukon.

[49] That definition of the class is overbroad. It was amended by counsel for the proposed Plaintiffs in their written submissions, as follows:

> Class A
>
> All persons in Canada who were an insured party to a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon on or after March 1st, 2018 who incurred travel expenses to attend necessary medical treatment but whom did not receive reimbursement for said travel expenses from the Defendant, and whose policy limit was never reached.
>
> Class B
>
> All persons in Canada who purchased a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon on or after March 1st, 2018, for which they overpaid due to Aviva not receiving permission from the proper regulatory authorities to implement a deductible on mileage.

[50] I am not satisfied by the pleadings that the Plaintiffs have appropriately alleged that it was necessary for the Defendant to obtain permission from the regulatory authorities for implementing a change in the practice of reimbursing travel costs.

Paragraph 8 – Section B – No-fault Accident Benefits

[51] Paragraph 8 alleged that all of the provinces and territories in respect of which certification is sought have a Section B no-fault accident benefits regime by virtue of which reasonable expenses incurred for medical, rehabilitative treatments and

funerals must be paid. It is alleged that these no-fault benefits are contractual in nature, and that they are contracted for by insured automobile owners and paid for them through their premiums.

[52] There is no issue with respect to paragraph 8.

Paragraphs 9, 10-16 – The Insuring Agreements

[53] Paragraph 9 indicated that the Defendant, in each of the provinces and territories listed, must agree by law to pay to each insured person who sustains bodily injury or death by means of a motor vehicle accident "all reasonable expenses" incurred for necessary medical, rehabilitation and funeral expenses. Paragraphs 10-16 reproduce the relevant sections of the insuring agreements in each of the listed provinces and territories.

[54] There is no issue with respect to paragraphs 9, 10-16.

Paragraph 17 – Expense claim rejected – a 25-kilometer deductible/trip "*adopted practice*" of Aviva

[55] Paragraph 17 sets out the particulars of the insurance policy obtained by Mr. Crotty. Its contents are not contentious.

Paragraph 18

[56] Paragraph 18 sets out further particulars with respect to Mr. Crotty's policy. It stated that his policy came into force on October 12, 2018 and had an expiry date of June 16, 2019. This pleaded fact is not in contention.

Paragraph 19

[57] Paragraph 19 alleged that Mr. Crotty sustained injuries in respect of an accident for which he was not at fault and that he incurred transportation expenses driving to and from medical and rehabilitative treatments. This pleaded fact is also not in contention.

Paragraph 20

[58] Paragraph 20 alleged that Mr. Crotty applied for reimbursement of transportation expenses for trips made between December 3, 2018 and March 19, 2019 for a total of 13 trips to his physiotherapist. The claim was rejected by the Defendant insurer.

[59] Ms. Perry's affidavit indicated that Mr. Crotty applied for 91 round trips in respect of his first and second policy claims. Of these only 48 of the claims would have been qualified for reimbursement since, on 43 occasions, Mr. Crotty visited a massage therapist in conjunction with his visit to the physiotherapist at the same location. The value of the transportation costs that could have been reimbursed was, according to Ms. Perry, $245.00.

[60] As noted earlier, I do not intend to consider these allegations of fraud in determining whether the class action should be certified. If Mr. Crotty is an unfit representative plaintiff, he can be substituted with another representative plaintiff.

Paragraph 21

[61] Paragraph 21 outlined the Defendant insurer's stated reason for denying the claim for transportation expenses.

[62] There is no issue with respect to this paragraph.

Paragraph 22

[63] At paragraph 22 it is alleged that the Defendant insurer, in response to a request for an explanation made by Mr. Crotty, indicated:

> This is not an item listed in the policy but has been an adopted practice.

[64] There is no issue with the contents of this paragraph.

Paragraph 23

[65] At paragraph 23 it is alleged that the transportation log required by the Defendant insurer stated:

> We will reimburse you for mileage costs to and from, medical appointments only, required as a direct result of this motor vehicle accident, at a rate of $0.25 per kilometer. <u>There is a 25 km deductible per trip.</u>
>
> [emphasis added]

[66] There is no dispute with respect to the contents of this paragraph.

Paragraph 24

[67] In paragraph 24 it is alleged that Mr. Coleman's transportation expenses were similarly subject to a 25-kilometer deductible per trip.

[68] There is no dispute with this paragraph. However, I note that Mr. Coleman was invited to apply for reimbursement, but no application was forthcoming from him. The insurer said that it was ready, willing and able to pay a claim for reimbursement without imposing a deductible. That being so, Mr. Coleman becomes a less likely candidate to be a representative plaintiff in a class action suit.

Paragraph 25

[69] Paragraph 25 – the first amended paragraph – stated that the Plaintiffs purchased insurance contracts that purported to pay for all reasonable expenses. They allege that at no time were they informed, at the time of purchasing their policies, that a deductible would be applied to transportation expenses.

[70] I do not believe that there is any disagreement with this pleading.

Paragraph 26

[71] Paragraph 26 was added during the amendment to the Statement of Claim. It is instructive to reproduce it in full because, in my opinion, it is problematic:

> Further to paragraph 25, in order to implement such a deductible, Aviva would have had to receive permission from each jurisdiction's governing regulatory board. The Applicants submit that such a deductible on travel less than 25 km to and from required treatment would have been rejected by the governing regulatory board, because the regulatory boards have no discretion to approve such a deductible. Furthermore, if the governing regulatory board did approve such a deductible, it would come with an adjustment on the rates the Defendant could charge to consumers – i.e. any consumer who purchased insurance from the Defendant ought to have paid less than they did, since their insurance policy contained a deductible on transportation costs.

[72] It will be remembered that I set out, earlier, Rule 14.03 of the *Rules*. It is a requirement of the *Rules* that parties set out the material facts upon which they rely to assert their claim.

[73] Paragraph 26 contains supposition without any substance:

a) There is no statement as to why it was necessary for Aviva General Insurance Company to obtain permission – this would be a matter of law – required by legislation or regulation – the particulars should have been pleaded.

b) Rule 14.04 specifically allows a party to plead a point of law. If Aviva General Insurance Company was in breach of a statutory duty to obtain permission from a regulatory authority in instituting a mileage deductible, I would have expected to see the specific reference to that statutory duty.

c) The Plaintiffs said that had such a request been made by the Defendant insurer, the regulatory authority would have rejected the request because the regulatory authority has no jurisdiction to entertain such a request. This is not a pleaded fact, it is conjecture.

d) The Plaintiffs further said that if the regulatory authority had accepted the request, then they would have only done so if there was a corresponding adjustment to the premiums paid by the policy holders. Again, this is not a fact – it is a hope and a wish.

Paragraph 27

[74] Paragraph 27 contains a summary of the allegations made in the first 26 paragraphs of the Statement of Claim.

Paragraph 28

[75] There is no paragraph 28 in the Statement of Claim.

Paragraph 29

[76] At paragraph 29 the Plaintiffs said that the Defendant's illegal actions have resulted in a significant windfall for it – in overpayment of insurance premiums and in substantial savings in terms of what they have had to pay out in insurance benefit claims to insured persons.

[77] There is no basis set out in the amended Statement of Claim upon which it can be claimed that the Defendant's actions were illegal. It is a statement with no underpinning.

[78] The allegation that the Defendant had become the recipient of windfalls by way of inflated insurance premiums and reduced costs has, similarly, no basis.

[79] The Defendant filed, on November 20, 2023, an affidavit of Yang Wang, Senior Vice-President of Personal Insurance Pricing at Aviva Canada Inc. Mr. Wang oversees the pricing of all personal insurance products offered in all the Regulated Jurisdictions in which Aviva Canada Inc. operates in Canada. He indicated that Aviva Canada Inc. submits new rates to each insurance regulatory authority on an annual basis.

[80] Taken into account in providing that pricing structure is any savings that might be realized, for example, by instituting the 25-kilometer deductible for medical transportation. He indicated that, to the extent that the cost reduction has any bearing on their rate filing, it would impact the resultant premium in a manner favourable to the policy holders. He indicated that this is so because their rate proposals are

regulated to ensure that their profits margins are controlled. As a result, if costs decrease, premiums also decrease.

[81] Mr. Wang was not cross-examined on his affidavit. There was no evidence submitted in rebuttal. I accept his evidence that the imposition of a deductible for transportation costs would likely have had no appreciable effect on the premiums paid but, if the savings were significant, they would be passed on to policy holders by way of decreased premiums.

Paragraph 30 - Breach of existing legislation in each jurisdiction

[82] Paragraph 30 alleged that the *Automobile Insurance Act* contains no permission to impose a deductible in respect of a Section B transportation expense. It indicated that the definition of "accident benefits" means Section B Accident Benefits as set out in the Standard Automobile Policy. The relevant section is set out, earlier, at paragraph [30] of my decision above.

[83] In a second affidavit filed by Amanda Perry and sworn on November 29, 2023, she indicated that the Defendant was not required to seek the approval of any regulatory authority for the implementation of the subject deductible. She explained that the Standard Automobile Policy in the Regulated Jurisdictions we are concerned with do not indicate coverage for travel expenses or mileage at all. She stated that regulators in these jurisdictions have obliged insurers to exercise discretion when implementing their own policies and procedures for the payment of reasonable expenses for necessary medical and rehabilitation treatment. This evidence was not refuted by cross-examination or the filing of supplemental affidavits on the part of the Plaintiffs. It is uncontradicted.

[84] It might have assisted the Plaintiffs' case if the *Automobile Insurance Act* contained an admonition against the imposition of a deductible for a Section B transportation expense. In such a case it could be argued that there was a breach of the statute. However, alleging a negative is not helpful. If the legislation is silent about a topic it cannot be inferred that the silence is a prohibition.

[85] I accept the explanation provided by Amanda Perry as noted in paragraph [83] above.

Paragraph 31

[86] At paragraph 31 the Plaintiffs alleged that the laws preventing the Defendant from imposing a deductible in respect of travel expenses for mileage are the same in all of the Regulated Jurisdictions. They plead that the imposition of a deductible is a breach of existing legislation in each jurisdiction. In an amendment to this paragraph, the Plaintiffs add that had such a deductible been permissible, it would have resulted in a rate adjustment to the premiums paid by class members and, as such, the Defendant overcharged for the policies and the policy holders overpaid.

[87] There is no mention, in the pleadings, as to what law, specifically, is being breached by the imposition of a deductible concerning traveling expenses in each of the Regulated Jurisdictions.

[88] I accept Mr. Wang's evidence that cost savings would automatically result in reduced premiums. I accept his evidence that the policy holders did not overpay their premiums.

Paragraph 32 – Breach of Regulatory Authority

[89] In paragraph 32 the Plaintiffs asserted a breach of regulatory authority. They said that in all of the Regulated Jurisdictions insurance rates require the approval of the regulators. In particular, the Plaintiffs alleged that in each jurisdiction the approval of the regulator is necessary before an insurance company can implement a transportation deductible. They imply that this is so because it would affect the insurers' rating program. The Plaintiffs reiterate that if such a deductible were permissible, it would result in a rate adjustment in favour of the class members. As such the Plaintiffs said that the Defendant overcharged them for their insurance policies.

[90] I have dealt with this allegation in my discussion with respect to the affidavits of Mr. Wang and Ms. Perry. I reiterate that the allegations are conjectural and refuted by the evidence that has been placed before me.

[91] In addition, the Supreme Court of Canada has clearly outlined that a tort of breach of statutory duty does not exist in Canada. In *R. v. Saskatchewan Wheat Pool*, [1983] 1 S.C.R. 205, at para. 37, the Court said as follows:

> … I would be adverse to the recognition in Canada of a nominate tort of statutory breach. Breach of statute, where it has an effect upon civil liability, should be considered in the context of the general law of negligence. Negligence and its common law duty of care have become pervasive enough to serve the purpose invoked for the existence of the action for statutory breach.

[92] There is no allegation in the amended Statement of Claim that Aviva General Insurance Company was negligent.

Paragraph 33 – Breach of Contract

[93] At paragraph 33 the Plaintiffs alleged that the Defendant breached the terms of its insuring agreement as noted in the Standard Automobile Policy of each Regulated Jurisdiction.

[94] As noted earlier, there is no privity of contract between the Plaintiffs and Aviva Canada Inc. A class action, let alone any action, is not sustainable against Aviva Canada Inc. It should not have been made a party to this proceeding and the Application against Aviva Canada Inc. is hereby denied.

[95] I agree with the submissions of counsel for the Defendant that none of the Standard Automobile Policies contain any provisions for any or all travel costs. Each and every one of them is completely silent on the topic of transportation costs. What

each of the policies do talk about is “all reasonable expenses” related to necessary medical and rehabilitation services.

[96] Who determines “reasonable expenses”? In my opinion, the Defendant has the discretion to decide what is reasonable. Reasonable expenses are not limited to costs of transportation. They could include specific equipment required by an injured insured that is required for medical or rehabilitative purposes or a myriad of things. It wouldn’t make sense to list each item of potential reimbursement, including transportation costs, separately. The term “all reasonable expenses” covers everything and, in the event of a dispute as to what is reasonably necessary, there are avenues for resolving the dispute – including court.

[97] The regulatory authority has input annually as to the base premiums to be charged for automobile insurance policies. The regulatory authority dictates the aggregate maximum limit that can be paid out as Section B – in some jurisdictions the maximum is $25,000, in others it is $50,000. However, I cannot imagine that the regulatory authorities engage in a line-item by line-item analysis of how the aggregate premium will be composed. As Mr. Wang testified, regulators are keen to ensure that insurers’ profit margins remain within acceptable bounds. How those profit margins are attained is within the operational purview of each insurer.

[98] If the insurer has the discretion to determine a reasonable expense, then it has the discretion to set, for example, the rate to be paid for travel expenses. In this jurisdiction Aviva General Insurance Company set the rate at $0.25 per kilometer. Should it have been $0.25 or $0.55? Who decides? It is clear to me that it is the insurer who decides what rate will be paid – at least in the first instance.

[99] The insurer must exercise its discretion reasonably. In the case before me the adjuster was willing to reimburse Mr. Coleman, but not Mr. Crotty. Based upon the facts that have been made known to me, I can understand why the decisions to pay, or not pay, might have been made as they were.

[100] A breach of discretion cannot give rise to a suit for damages, in a breach of contract context, unless the discretion is exercised in an arbitrary or capricious manner or is made in bad faith.

[101] In *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, the Supreme Court of Canada said, at paras. 83 and 88:

> The fact that a party's exercise of discretion causes its contracting partner to lose some or even all of its anticipated benefit under the contract should not be regarded as dispositive, in itself, as to whether the discretion was exercised in good faith (Burton, at pp. 384-385). As authors A. Swan, J. Adamski, and A.Y. Na explain, the mere fact that a party is deprived of substantially the whole benefit of a contract is not sufficient, absent proof of the discretion-exercising party's fault or default, to make out a claim for breach of contract... In other words, absent some infringement of the non-exercising party's rights, there is no actionable wrong for the law to correct.
>
> …
>
> In sum, then, the duty to exercise discretion in good faith will be breached where the exercise of discretion is unreasonable, in the sense that it is unconnected to the purposes for which the discretion was granted. This will notably be the case where the exercise of discretion is capricious or arbitrary in light of those purposes because that exercise has fallen outside the range of behaviour contemplated by the parties. The fact that the exercise substantially nullifies or eviscerates the fundamental contractual benefit may be relevant but is not a necessary pre-requisite to establishing a breach.

[102] It must be remembered, in this case, that there was no total loss of benefits. In the case of Mr. Crotty, he was paid $12,500.00 in Section B claims and denied $500.00 if all of his transportation claims were justifiable. And in the case of Mr. Coleman, he didn't apply for reimbursement – even though the Defendant was prepared to pay – so he lost nothing at all.

Paragraph 34 – Breach of Fiduciary Duty

[103] At paragraph 34 the Plaintiffs alleged that Aviva General Insurance Company had a fiduciary relationship with its clients. The Plaintiffs said that the Defendant agreed, in the insuring agreement, to act on behalf of, and in the best interests of, the insured. They alleged that the insurer breached its fiduciary obligations by imposing a deductible on traveling expenses and by overcharging class members for their policies of insurance.

[104] In Paul Finn, "Contract and the Fiduciary Principle" (1989) 12 University of New South Wales Journal 76, indicated at page 88, that the "end point" in each situation is to ascertain whether "the one has the right to expect that the other will act in the former's interests (or, in some instances, in their joint interest) to the exclusion of his own several interests".

[105] In *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, La Forest J. indicated at para. 33:

> Thus, outside the established categories (*trustee/beneficiary; principal/agent*), what is required is evidence of a mutual understanding that one party has relinquished its own self-interest and agreed to act solely on behalf of the other party. …
>
> (italicized portions added)

[106] In *Elder Advocates of Alberta Society v. Alberta*, 2011 SCC 24, paras. 29-31, the Supreme Court of Canada indicated that it must first be established that the alleged fiduciary gave an undertaking of responsibility to act in the best interests of the beneficiary.

[107] Since the Plaintiffs said that the Defendant agreed to act on behalf of, and in the best interests of them, in the insuring agreement, the Plaintiffs should have outlined, in the amended Statement of Claim, that portion of the insuring agreement that they are relying upon to make the assertion that a fiduciary relationship was

established. It is not enough, in my estimation, to make an assertion that a fiduciary relationship existed without outlining the facts upon which the claim is made.

Paragraph 35 – Breach of Good Faith

[108] At paragraph 35 the Plaintiffs plead a breach of a duty of good faith. This breach is characterized as a contractual one and, as well, an intentional and/or negligent breach of a duty of care that inflicted loss upon the insureds.

[109] In the context of contracts for insurance, insurers are expected to act promptly and fairly when investigating, assessing and attempting to resolve claims made by its insureds: *702535 Ontario Inc. v. Non-Marine Underwriters, Lloyd's London, England* (2000), 130 O.A.C. 373, 184 D.L.R. (4th) 687, at para. 27. This implied that the insurer has an obligation to act in good faith in the efficient exercise of their duties as insurers. There is, as well, a general duty to ensure that the insurer does not use the settlement power that it has, through the insurance contract, in a manner that is detrimental to the interests of the insured.

[110] It is alleged that the breach of the duty of good faith took place by the introduction by the insurer of the 25-kilometer deductible and the resultant failure to pay benefits. The Plaintiffs also alleged that the duty of good faith was breached because the Plaintiffs and proposed class members were overcharged for their premiums.

[111] Aviva General Insurance Company exercised the discretion granted to it by the terms of the policy to invoke a limit on the transportation claims that could be made. It is possible that it might be determined that the result was not correct. Even if that is so, it cannot amount to an act of bad faith. In Canadian law the insurer has a duty to settle claims with due dispatch, but not in such a way that the insurer becomes, inordinately, liable for excess payments that are above the limits of the policy. The duty of good faith has not been extended any further in Canadian jurisdictions.

Paragraph 36 – Unjust Enrichment

[112] In paragraph 36 the Plaintiffs said that the Defendant insurer was unjustly enriched as a result of instituting the 25-kilometer deductible and by overcharging policy holders for their premiums.

[113] In assessing this claim it is necessary to look, once again, at subsection 1, of Section B of the Standard Automobile Policy:

> (1) All reasonable expenses incurred … for necessary medical, surgical, dental, chiropractic, hospital, professional nursing and ambulance service… within the meaning of insured services under *Medical Care and Hospital Insurance Act*… and for such other services and supplies which are, in the opinion of the physician of the insured person's choice and that of the insurer's medical advisor, essential for the treatment, occupational retraining or rehabilitation of said person, to the limit of $25,000 per person, ...

[114] Section 3 of the *Medical Care Insurance Insured Services Regulations*, C.N.L.R. 21/96, under the *Medical Care Insurance Act*, O.C. 96-132, sets out the insured services for in-patient and out-patient services. Transportation costs are not specifically covered. Transportation falls into the category of "all reasonable expenses" – which are defined, or not, and awarded on a case-by-case basis.

[115] There is no evidence before me, and it was not alleged in the amended Statement of Claim, that the transportation costs suffered by Mr. Crotty and Mr. Coleman were to be reimbursed as a result of an agreement between the insureds' medical professionals and that of the insurer's medical advisor.

[116] There is evidence before me that if the limitation on transportation costs results in a reduction in the amount paid out, in the aggregate, by the insurer then there will be a lowering of the premiums charged to the insured. No unjust enrichment can, therefore, result.

Paragraph 37 – Aggravated Damages

[117] In paragraphs 37 and 38 the Plaintiffs request that the Court award them aggravated damages and punitive damages.

[118] The question is whether the Plaintiffs have suffered mental distress, as a result of a breach of the insurance contract, which justifies an award for compensation.

[119] In the case of Mr. Coleman there had been a failure to apply on his part, not a failure to pay on the insurer's part. He would not be entitled to any damages in the context of this action because there has been no breach of contract. If he has suffered mental distress, it is of his own making.

[120] In the case of Mr. Crotty there was evidence that he claimed more than he was entitled to receive. It is suggested to me by counsel for the insurer that Mr. Crotty be disqualified from making any claim on account of his misstatements.

[121] Leaving that issue aside for a moment, I believe that in order to obtain an award for aggravated damages there must, first, be a breach of contract. I have found, in this case, that there was no breach of contract because transportation expenses are not, under the terms of the Section B coverage, statute or regulation, 100 percent compensable.

[122] It was within the discretion of Aviva General Insurance Company to impose a policy shift that limited transportation claims. Whether or not it was reasonable is an issue to be decided on a case-by-case basis because there will be factors particular to each claimant that will have to be taken account in determining whether or not Aviva General Insurance Company's adjusters exercised their discretion reasonably.

[123] If there was no breach of contract, there can be no award for aggravated damages. Aggravated damages are compensatory in nature and rely, for their existence, upon a breach committed by the insurer.

Paragraph 38 – Punitive Damages

[124] Punitive damages are designed to address the purposes of retribution, deterrence and denunciation: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, at para. 43.

[125] In *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, the Supreme Court of Canada stated, at para. 62:

> By their nature, contract breaches will sometimes give rise to censure. But to attract punitive damages, the impugned conduct must depart markedly from ordinary standards of decency — the exceptional case that can be described as malicious, oppressive or high-handed and that offends the court's sense of decency: *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130 (S.C.C.), at para. 196; *Whiten*, at para. 36. The misconduct must be of a nature as to take it beyond the usual opprobrium that surrounds breaking a contract. As stated in *Whiten*, at para. 36, "punitive damages straddle the frontier between civil law (compensation) and criminal law (punishment)". Criminal law and quasi-criminal regulatory schemes are recognized as the primary vehicles for punishment. It is important that punitive damages be resorted to only in exceptional cases, and with restraint.

[126] As in the case of aggravated damages, if there is no breach of contract, there cannot be a claim for punitive damages. For the reasons cited earlier, there is no evidence to support the notion that the insurer breached its statutory or regulatory duty. Even if there were evidence substantiating an allegation that the insurer had breached its contract with Mr. Crotty and Mr. Coleman, there is nothing that I could characterize as malicious, oppressive, high-handed or indecent. Punitive damages would not be available in a case such as this one.

[127] In *Sherry v. CIBC Mortgage Inc.*, 2020 BCCA 139, at para. 23, the British Columbia Court of Appeal said:

> … for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: ... In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. … the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: ...

[128] It is plain and obvious to me that the action sought to be certified as a class action has no chance of success.

[129] The insurer is not obliged to bring to the insured's attention a restriction that has been placed, albeit unilaterally, on an item of reimbursement that the insurer has discretion whether or not to pay.

[130] I have outlined, in these reasons, that the Plaintiffs' amended Statement of Claim is conjectural. It is deficient with respect to material allegations of fact that could sustain the claim. It is vitally necessary that statements of claim outline the facts, not the evidence, on which the party intends to rely.

Section 5(1)(b): Class Definition

[131] The Plaintiffs have a duty to establish an identifiable class. In order to do so, the Plaintiffs must show that the proposed class definition identifies, in the pleadings, those persons who have issues in common that are best settled through the vehicle of a class action. The class must not be unnecessarily broad or over inclusive. See *Price v. H. Lundbeck A/S*, 2018 ONSC 4333, at para. 95.

[132] Initially the Plaintiffs sought to have the following class certified:

> All persons in Canada who were an insured party to a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon.

[133] The Plaintiffs acknowledged, in their Reply to the Defendant's Memorandum of Fact and Law, that the class definition required amendment. They proposed the following:

> Class A
>
> All persons in Canada who were an insured party to a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon on or after March 1st, 2018, who incurred travel expenses to attend necessary medical treatment but whom did not receive reimbursement for said travel expenses from the Defendant, and whose policy limit was never reached.
>
> Class B
>
> All persons in Canada who purchased a contract of insurance providing Section B Accident Benefits with the Defendants in Newfoundland and Labrador, Nova Scotia, Prince Edward Island, New Brunswick, Alberta, Northwest Territories, Nunavut and Yukon on or after March 1st, 2018, for which they overpaid due to Aviva not receiving permission from the proper regulatory authorities to implement a deductible on mileage.

[134] In the event that my analysis, and findings, in respect of section 5(1)(a) of the *Class Actions Act* are overturned, then it is my opinion that the definition for Class A requires further refinements, as follows:

a. Claimants who were notified of their ability to claim transportation expenses but did not file a claim should be excluded from Class A.

b. Claimants who received Section B coverage for the total amount of their policy limit should be excluded from Class A.

c. Claimants whose policy claim was properly denied for reasons unrelated to the 25-kilometer deductible should be excluded from Class A.

[135] I have found that, with respect to Class B, the Defendant had not alleged appropriate facts that would sustain a claim on account of overpayment of premiums. If my analysis, and findings, in relation to Class B are overturned then I would propose that Class B ought to be limited in time: by commencing on March 1st, 2018 and concluding on the date when regulatory permission for the restriction on reimbursement can be deemed to have been received. The class should have a clear beginning and end date. See *Bourbonnière v. Yahoo! Inc.*, 2019 QCCS 2624.

Section 5(1)(c): Common Issues

[136] Section 2(b) of the *Class Actions Act* defines "common issues" as:

> i) common but not necessarily identical issues of fact, or
>
> ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[137] As was explained by the Supreme Court of Canada in *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, at para. 39, class members' claims must share a substantial common ingredient to justify class action.

[138] In *Heller v. Uber Technologies Inc.*, 2022 ONSC 1997, at para. 17, the Ontario Superior Court held:

> From a factual perspective, the plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a

> rational connection between the Class Members and the proposed common issues. The plaintiff must establish some basis in fact for the existence of the common issues in the sense that there is some factual basis for the claims made to which the common issues are connected.
>
> (footnotes omitted)

[139] I have found that there are no facts alleged, or advanced, that would sustain the existence of a common issue. However, had the Plaintiffs been able to allege the appropriate facts and shown some evidentiary basis for establishing the existence of a common issue, it could be argued that persons who were subjected to a deductible of 25 kilometers per round trip for seeking medical attention under Section B comprised a group of persons who had an issue in common.

[140] Similarly, had there been facts alleged, or advanced, that would at least point to an argument that persons had been subjected to an overpayment of premiums on account of an unjustifiable, and corresponding, decrease in benefits payable under their policy then it could be argued that those persons had an issue in common.

[141] The Plaintiffs acknowledge that there will need to be individual assessments for each class member's damages. However, the Plaintiffs assert that aggregate awards would be appropriate in relation to the heads of damage they have alleged: breaches of fiduciary duty and good faith, unjust enrichment, aggravated and punitive damages.

[142] I reiterate that there is no such factual underpinning for either of those common issues in the pleadings or otherwise. If the Application fails under section 5(1)(a), I am unable to certify the common issues for the various causes of action that are set out in the amended Statement of Claim.

Section 5(1)(d): Preferable Procedure

[143] I am required to consider three overarching issues in determining whether a class action is the appropriate vehicle for advancing the claims of the proposed classes of plaintiffs:

a. Improving access to justice:

b. Enhancing judicial economy; and

c. Encouraging behaviour modification.

[144] Section 5(2) of the *Class Actions Act* states:

> (2) In determining whether a class action would be the preferable procedure for the fair and efficient resolution of the common issues, the court may consider all relevant matters including whether
>
> (a) questions of fact or law common to the members of the class predominate over questions affecting only individual members;
>
> (b) a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) the class action would involve claims that are or have been the subject of another action;
>
> (d) other means of resolving the claims are less practical or less efficient; and
>
> (e) the administration of the class action would create greater difficulties than those likely to be experienced if relief were sought by other means.

Questions of Fact or Law Common to Class Members

[145] In each individual case it would have to be determined whether the class member had a contract of insurance providing for Section B accident benefits. It would be necessary to determine whether the person made a claim for transportation expenses in relation to medical expenses on or after March 18, 2018 and whether or not the person was denied coverage on account of the 25 kilometer deductible policy. In addition, it would have to be determined whether or not the person had exhausted the limits of Section B coverage.

[146] All the foregoing inquiries are peculiar to each potential class member. However, I do not agree with the Defendant's position that this would cause the class action to break down into individual proceedings. While it is true that the facts in each individual case might be slightly different, many class actions are constituted in that fashion.

Do a Significant Number of Plaintiffs Have a Valid Interest in Controlling the Prosecution of Separate Actions?

[147] There is no evidence that any members of the proposed classes have commenced their own actions in regard to the alleged breaches. This is not an appropriate basis for denying certification.

The Class Action Would Involve Claims That Are or Have Been The Subject of Another Claim

[148] Both Mr. Crotty and Mr. Coleman brought actions against the other drivers involved in their respective motor vehicle accidents, together with Aviva General Insurance Company and Aviva Canada Inc. In those claims they sought all sums that they are legally entitled to recover from the owner or driver of an uninsured automobile. Those claims overlap with the claim seeking certification for a class

action insofar as they are seeking special damages relating to their travel expense claims in their individual actions as well as the representative action.

[149] This gives rise to a potential conflict of interest. As stated by the Ontario Superior Court in *Logan v. Canada (Minister of Health)*, 2002 CarswellOnt 482, [2002] O.J. No. 522 (Sup. Ct.), at para. 6 – it is contrary to the goal of judicial efficiency, and avoiding duplicative litigation, to allow a plaintiff to sue as a representative in a class action while, at the same time, maintaining an individual action.

[150] Mr. Coleman settled his action against the other driver. There was some question as to whether or not he had done so completely. If he had settled fully then he would have no interest in the class action. If he had not, then he is in a potential conflict of interest. He may not be the best representative plaintiff.

[151] Mr. Crotty is also a "double plaintiff". He has another problem – the Defendant said that he had made a claim for transportation expenses to which he was not entitled and, therefore, has committed fraud and is not entitled to any recovery. He, like Mr. Coleman, might also not be the best representative plaintiff.

[152] The issue is, as far as I am concerned, moot because I have concluded that the representative class action ought not to proceed on other grounds.

Are Other Means of Resolving The Actions Less Practical or Less Efficient?

[153] There are, potentially, thousands of potential claimants – if a cause of action exists. My sense is that the claims of individual plaintiffs would not be substantial in dollar terms. Mr. Crotty's claim, for example, was about $500. A plaintiff could litigate in Small Claims Court. However, a class action would, from the individual's perspective, be the most efficient means of seeking redress. I would not be inclined to refuse certification on this basis.

Would the Administration of the Class Action Create Greater Difficulties Than Those Likely To Be Experienced If Relief Were Sought By Other Means?

[154] Thousands of potential actions, if each class member were to pursue one, would of necessity be more cumbersome and harder to manage than one action. However, there are other alternatives. The insurance industry is highly regulated. There are offices, established by all provincial and territorial governments, of the Superintendent of Insurance – which give broad powers to regulate the industry within each jurisdiction.

[155] The Plaintiffs have, throughout the amended Statement of Claim, made allusion to the ability of the Superintendent of Insurance to exercise oversight powers in relation to the insurance industry. It is an avenue for redress that they may wish to pursue instead of bringing a class action.

CONCLUSION

[156] In *Sherry v. CIBC Mortgage Inc.*, the British Columbia Court of Appeal said at para. 23:

> … for a claim to be certified the prospect of success must be reasonable, not speculative, taking into account the salient law and the litigation context: … In addition, and importantly, the material facts upon which the claimant relies in making the claim must be clearly pleaded. … the pleaded facts form the basis upon which the prospect of success of the claim will be assessed: …

[157] It is plain and obvious to me that the action sought to be certified as a class action has no chance of success.

[158] The insurer is not obliged to bring to the insured's attention a restriction that has been placed, albeit unilaterally, on an item of reimbursement that the insurer has discretion whether or not to pay.

[159] I have outlined, in these reasons, that the Plaintiffs' amended Statement of Claim is conjectural. It is deficient with respect to material allegations of fact that could sustain the claim. It is vitally necessary that statements of claim outline the facts, not the evidence, on which the party intends to rely.

[160] In the result, the Application is dismissed. There is no order as to costs.

VIKAS KHALADKAR

Justice