Court of Appeal for Saskatchewan
Docket: CACV3998

Citation: *Kane v FCA US LLC*, 2024 SKCA 86
Date: 2024-09-12

Between:

Corrine Kane

Appellant
(Plaintiff)

And

FCA US LLC and FCA Canada Inc.

Respondents
(Defendants)

Before:	Jackson, Schwann and Tholl JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Tholl
In concurrence:	The Honourable Madam Justice Jackson The Honourable Madam Justice Schwann
On appeal from:	2022 SKQB 69, Regina
Appeal heard:	March 12, 2024
Counsel:	Iqbal Brar and Jaclyn Watters for the Appellant Jason Mohrbutter, K.C., Glenn Zakaib, Bevan Brooksbank and Sunny Kim for the Respondents

Tholl J.A.

I. INTRODUCTION

[1] Over the course of numerous years, FCA Canada Inc. issued recall notices covering defects in many different models of vehicles that were sold in Canada. Corrine Kane had purchased one of those vehicles, was dissatisfied with the repairs, and claims to have suffered various losses as a result. She initiated an action and sought to have it certified as a class action covering the owners and lessees of approximately 900,000 vehicles affected by 24 different recall notices. Certification was not granted. Ms. Kane appeals from that decision.

[2] For the reasons that follow, the appeal should be dismissed.

II. BACKGROUND

[3] FCA Canada manufactures and distributes vehicles in Canada. Its brands include Jeep, Dodge, and Chrysler. FCA Canada is a subsidiary of FCA Ontario Holdings Limited, which is a subsidiary of the other respondent, FCA US LLC. I will refer collectively to the two respondents as FCA.

[4] When FCA Canada recalls vehicles for repairs arising from design or manufacturing issues, it uses, inter alia, safety recalls and customer satisfaction notices. Safety recalls are obligatory under s. 10 of the *Motor Vehicle Safety Act*, SC 1993, c 16. Customer satisfaction notices are done voluntarily. Both types of recalls involve efforts by FCA and its dealers to notify the owners of the subject vehicles about the issue involved and to provide remediation of the known defect at no charge. Relevant to this appeal, FCA Canada issued 23 safety recalls and one customer satisfaction notice (described in detail at paragraphs 13 to 39 and 76 to 87 of *Kane v FCA US LLC*, 2022 SKQB 69, [2022] 9 WWR 680 [*Chambers Decision*]). Ms. Kane's evidence indicated that there were over 900,000 affected vehicles in Canada. In addition to Ms. Kane, four other potential class members provided affidavits regarding their experiences with some of the vehicles.

[5] Ms. Kane had purchased a used 2007 Jeep Liberty. It was the subject of a customer satisfaction notice that involved a possible fuel tank leak that could result from a rear-end collision. FCA's evidence indicated that there had never been a fuel leak or fire in Canada in a Jeep Liberty resulting from such an event. However, as a precautionary remedy, FCA installed a non-functional trailer hitch on the vehicle, at no charge to Ms. Kane, which would provide additional protection in the event of a rear-end collision. After the installation, she kept the vehicle for a subsequent year and then traded it in for a 2011 Jeep Liberty. Ms. Kane alleges that she suffered a financial loss in doing so.

[6] Laura Medeiros had purchased a new 2003 Jeep Liberty. It was subject to the same customer satisfaction notice, and, in 2016, a similar non-functional trailer hitch was installed on her vehicle. Ms. Medeiros opines in her affidavit that this was a poor solution with which she is not happy. She does not describe any financial loss. As of the date of her affidavit, December 9, 2016, Ms. Medeiros still owned the vehicle.

[7] Travis Brassington owns a 2008 Jeep Grand Cherokee. It was subject to a safety recall regarding the ignition switch, with which Mr. Brassington had experienced no problems. The defective part was replaced at FCA Canada's expense, and he continued to own the vehicle. In his affidavit, Mr. Brassington described being inconvenienced by the recall and expressed concern that his vehicle would experience a loss in resale value due to the negative stigma attached to recalls.

[8] Bradley Winder and Wade Ramsum both owned Dodge Ram 3500 trucks, which were subject to a safety recall over a concern that a tie rod ball stud could fracture. Neither of these individuals experienced this specific problem prior to having the recommended repair completed, but both of them allege that their trucks experienced front-end wobbles or shakes that were not remedied by the repair. Each averred that they had incurred further personal expense to rectify the wobbles or shakes but offered no evidence that linked the tie rod ball stud issue to the wobbles or shakes.

[9] Ms. Kane also provided evidence from Michael Peerless and Stephen Kertzman. Mr. Peerless is a partner in an Ontario law firm that had carriage of a similar proposed class action in Ontario. His affidavit identified the relevant recalls and described a National Highway Traffic Safety Administration proceeding from the United States in which FCA US LLC had entered into a consent order in 2015. Mr. Kertzman is a chartered business valuator. In his affidavits, he described possible methodologies for determining whether the class members suffered financial loss. His opinion did not extend to damages for personal injuries, but he did examine methods that could be utilized to calculate the loss in the resale value for vehicles owned by the putative class members.

[10] FCA provided affidavits from Stuart Shaw and H. Christopher Nobes. Mr. Shaw is the Manager of Vehicle Safety and Regulatory Compliance for FCA Canada. He described the corporate structure, the recall process in Canada, the recalls at issue in this matter, and the specific circumstances of the five vehicles set out above. Mr. Shaw summarized the recalls by stating that the action, if certified, would include a combination of 130 models and model years of vehicles. He also provided his opinion regarding the data used by Mr. Kertzman. Mr. Nobes is a chartered professional account and chartered business valuator. He critiqued Mr. Kertzman's evidence regarding valuation of the alleged losses and opined that the proposed methods were unreliable and unworkable.

[11] Ms. Kane applied to have her action certified as a class action, pursuant to *The Class Actions Act*, SS 2001, c C-12.01 [*CAA*]. The proposed class consisted of the following: "All persons in Canada, including their estates, who at any time before the date of the certification order, owned or who were a leasee of any of the following Class Vehicles". Paragraph 7 of the statement of claim provides a list of the vehicle models and types that fall into the category of Class Vehicles. FCA opposed this application and filed its own application for summary judgment, seeking the dismissal of the action. Both applications were heard at the same time.

III. CERTIFICATION DECISION

[12] The Chambers judge began his decision by describing in detail the regulatory framework in Canada for motor vehicle recalls and the specific recalls in question in this matter. He then set out the remedies sought by the proposed class members and listed the 17 proposed common issues. This was followed by a summary of the evidence filed by the parties. After setting the stage in this manner, the Chambers judge reproduced s. 6(1) of the *CAA*, which contains the requirements in Saskatchewan for the certification of a class action:

> **Class certification**
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> **6**(1) Subject to subsections (2) and (3), the court shall certify an action as a class action on an application pursuant to section 4 or 5 if the court is satisfied that:
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> (a) the pleadings disclose a cause of action;
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> (b) there is an identifiable class;
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> (c) the claims of the class members raise common issues, whether or not the common issues predominate over other issues affecting individual members;
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> (d) a class action would be the preferable procedure for the resolution of the common issues; and
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> (e) there is a person willing to be appointed as a representative plaintiff who:
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> (i) would fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the class action that sets out a workable method of advancing the action on behalf of the class and of notifying class members of the action; and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.

[13] An examination of the general principles related to certification was conducted by the Chambers judge with reference to *Hollick v Toronto (City)*, 2001 SCC 68, [2001] 3 SCR 158, *Pro-Sys Consultants Ltd. v Microsoft Corporation*, 2013 SCC 57, [2013] 3 SCR 477 [*Pro-Sys*], *Pederson v Saskatchewan (Social Services)*, 2016 SKCA 142, 408 DLR (4th) 661, leave to appeal to SCC refused, 2017 CanLII 18655 [*CA-Pederson*], *G.C. v Merck Canada Inc.*, 2019 SKQB 42, *MacInnis v Bayer Inc.*, 2020 SKQB 307, rev'd on other grounds, *MacInnis v Bayer Inc.*, 2023 SKCA 37 [*CA-MacInnis*], and *Kish v Facebook Canada Ltd.*, 2021 SKQB 198. He assessed the two most significant aspects of the certification application as being the causes of action and the common issue requirements.

[14] Turning first to the cause of action criterion under s. 6(1)(a) of the *CAA*, the Chambers judge described the applicable filter as being the plain and obvious test that would apply in an application to strike a pleading. He referenced the relevant principles as set out in *Venture Construction Inc. v Saskatchewan (Highways and Infrastructure)*, 2015 SKQB 70, [2015] 10 WWR 467, and *Reisinger v J.C. Akin Architect Ltd.*, 2017 SKCA 11, 411 DLR (4th) 687, along with several other cases. He then evaluated each of the proposed causes of action: negligence, breach of express and implied warranty, violations of the *Competition Act*, RSC 1985, c C-34, violations of consumer protection legislation, and unjust enrichment. The details of that analysis will be described as necessary in a later section of this judgment. In summary, he determined that the statement of claim disclosed a cause of action in negligence only (but only to the extent that the act giving rise to the negligence allegedly caused personal injury) and under *The Consumer Protection and Business Practices Act*, SS 2013, c C-30.2 (with leave given to amend the claim to address consumer protection legislation from other provinces).

[15] The Chambers judge next addressed the requirement that the claim raised common issues. He described this requirement as being "at the heart of the class action" (*Chambers Decision* at para 146) or the *central notion*, as voiced in *Pro-Sys* (at para 106). He referred to the general propositions regarding common issues as summarized by Strathy J. (as he then was) in *Singer v Schering-Plough Canada Inc.*, 2010 ONSC 42 at para 140, 87 CPC (6th) 276 [*Singer*], and then described the two-part test which he would apply (*Chambers Decision*):

> [148] To establish the common issues criterion, the plaintiff must meet a two-part evidentiary test. The test requires some basis in fact to show: (1) that the proposed common issues actually exist; and (2) that they can be answered across the entire class. It is only in this way that the Court can assess whether the resolution of the issue will advance the litigation as a class action. See *Kuiper v Cook (Canada) Inc.*, 2018 ONSC 6487 at paras 98–99.
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> [149] Typically, the two-part evidentiary test will be met where the representative plaintiff shows some basis in fact for the existence of a "credible or plausible methodology" by which a proposed common issue can be tried. … As I read the authorities, such a methodology is expected to show two things. First, it should involve evidence of "a plausible claim that is capable of being pursued"; see *Miller v Merck Frosst Canada Ltd*., 2013 BCSC 544 at para 166 … . Secondly, the methodology should offer a realistic prospect of establishing the basis for loss or damage on a class-wide basis. See *Pro-Sys* at para 118 (in SCC). While not mandatory, it is common for a case management judge to receive expert opinion to assist in assessing the value of any such methodology.

[16] The Chambers judge referred to numerous cases that involved alleged defects in motor vehicles, analyzed the remaining 12 common issues, and concluded they were too broadly framed. He found that the only common thread was that the class vehicles were subject to the listed recalls. The Chambers judge noted the disparate nature and circumstances associated with the defects and stated that "it cannot be said that this common thread demonstrates any common issues that will help to resolve the claim" (at para 157).

[17] The remaining criteria from s. 6(1) of the *CAA* were addressed in a summary fashion. The Chambers judge opined that, had a properly limited common issue been put forward – with the examples given of a single defect or a single defective model for illustration purposes – an identifiable class could have been found with respect to the two remaining causes of action. He also stated that, based on these premises, there would also be support for a class action being the preferable procedure. The Chambers judge further noted that Ms. Kane would not be a member of any identifiable class and "would have no meaningful common interest with any other members of the class" (*Chambers Decision* at para 166). Therefore, in his determination, she would not be able to continue as the representative plaintiff.

[18] After dismissing the certification application, the Chambers judge examined the summary judgment application but decided that the application should be adjourned *sine die*. A further description of his analysis of that issue is not required for the purposes of resolving this appeal.

[19] Lastly, the Chambers judge noted that his decision did not foreclose the possibility that certification could be renewed through a substantially amended claim that addressed the concerns and issues identified in his judgment.

IV. ISSUES

[20] Leave to appeal was granted on the following grounds of appeal:

(a) Did the Chambers judge err by imposing tests that were too stringent in relation to the evidence itself and to the conclusions to be drawn from the evidence, and by finding that the recall notices on their own, or in conjunction with the affidavit evidence filed on behalf of Ms. Kane, did not provide some basis in fact for the evidence-based certification requirements?

(b) Did the Chambers judge err by determining that claims for repair costs and diminution in value were uncertifiable?

(c) Did the Chambers judge err by requiring the plaintiff to allege a real and substantial danger and imminent threat in circumstances in her pleadings where, for a given plaintiff, including the proposed representative plaintiff, the real and substantial danger and imminent threat may not yet have materialized?

(d) Did the Chambers judge err by finding that, other than a manufacturer's warranty, the existence of an express or implied warranty can only exist by statute or contract?

(e) Did the Chambers judge err by concluding that unjust enrichment and disgorgement were not available to the class?

(f) Did the Chambers judge err by finding that the common issues lacked commonality or that certification could only be granted if the claim related to a single defect?

(g) Did the Chambers judge err by refusing to propose a common issue for certification in relation to certifiable causes of action or, alternatively, in having found causes of action, by not affording the parties an opportunity to make further submissions with respect to the formulation of those common issues?

(h) Did the Chambers judge err by implicitly requiring that the representative plaintiff have an interest in the determination of each of the common issues?

[21] My assessment of Ms. Kane's grounds of appeal will be reordered in this judgment, beginning with an examination of the causes of action in order to avoid embedding hypothetical analysis into the discussion of the other issues.

[22] FCA also made several arguments regarding s. 6(1)(d) of the *CAA*, which is the preferability requirement. Given that FCA has been successful on the other issues, it is not necessary to address those submissions.

V. ANALYSIS

A. Standard of review

[23] The applicable standard of review is described in *CA-MacInnis*:

> [38] A decision by a certification judge as to whether these two criteria [s. 6(1)(c) and s. 6(1)(d)] are satisfied involves the exercise of discretion. Although it is often said that discretionary decisions are entitled to deference, the fact is that an alleged error by a court in arriving at a discretionary decision is subject to appellate review in accordance with the appellate standards of review specified in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235. As is always the case, the standard of review depends on the nature of the error alleged, not the type of decision that was made. The standard of review in relation to alleged errors of law is correctness, where no deference is called for. An appellate court may intervene in a discretionary decision if there has been an error of law, including an error in the identification or application of the legal criteria that govern the exercise of the discretion: "Such errors may include a failure to give any or sufficient weight to a relevant consideration" (*Kot v Kot*, 2021 SKCA 4 at para 20, 63 ETR (4th) 161).
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> [39] An appellate court may also intervene if there has been a palpable and overriding error of fact or of mixed fact and law: [references omitted]. However, an appellate court is not entitled to substitute its own decision for that of the judge merely because it would have exercised the discretion differently: [reference omitted].

[24] A certification judge's determination of whether the statement of claim discloses a reasonable cause of action, including the decision as to whether a defendant owed a duty of care, "is a question of law, for which the standard of review is correctness" (*Nissan v Mueller*, 2022 BCCA 338 at para 33, leave to appeal to SCC refused, 2023 CanLII 36966 [*Nissan*]): similarly, see *1688782 Ontario Inc. v Maple Leaf Foods Inc.*, 2020 SCC 35 at para 24, [2020] 3 SCR 504 [*Maple Leaf*].

B. Pure economic loss

[25] Among other things, the proposed class action claims economic damages (argued to be loss in value of the vehicles and repair costs) and endangerment (argued to be an increased risk of future harm) due to the alleged defects. Grounds of appeal (b) and (c) cover these issues. Relying on the legal principle relating to claims in negligence for pure economic loss, the Chambers judge found that there was no viable cause of action that covered Ms. Kane's heads of damage. Ms. Kane challenges this finding, asserting that the tort of negligence encompasses damages of this nature. FCA argues that the Chambers judge correctly determined that the alleged losses were not recoverable at law as they were claims for pure economic loss. It further points out that the

statement of claim does not allege that any of the repairs undertaken under the recalls were inadequate. These arguments raise questions of law, subject to review for correctness.

[26] The Chambers judge evaluated Ms. Kane's negligence claim. While he found that the statement of claim had pleaded a duty of care and a failure to meet the standard of care, he summarized the problematic issue facing Ms. Kane as follows (*Chambers Decision*):

> [103] The elements relating to compensable damages present a more significant problem. This is because the claim in negligence, whether pleaded as negligent design, failure to warn or failure to consider safer design alternatives, asserts entitlement to "economic damages" and damages for personal injury. While damages for negligently caused personal injury and property loss are clearly compensable, the claim for "economic damages" is more problematic. As pleaded, the economic damages are said to take the form of repair/replacement costs and diminished resale value of some Class Vehicles. In the legal vernacular, these are claims for "pure economic loss", which conceptually differ from claims in negligence premised on actual personal injury and/or damage to property.

[27] After defining the issue in this manner, the Chambers judge reviewed the following jurisprudence related to pure economic loss: *Maple Leaf, Deloitte & Touche v Livent Inc. (Receiver of)*, 2017 SCC 63, [2017] 2 SCR 855, *Martel Building Ltd. v Canada*., 2000 SCC 60, [2000] 2 SCR 860, *Winnipeg Condominium Corporation No. 36 v Bird Construction Co.*, [1995] 1 SCR 85 [*Winnipeg Condominium*], and *Rivtow Marine Ltd. v Washington Iron Works*, [1974] SCR 1189. Taking these cases into account – looking at the matter from the perspective of foreseeability of injury to persons or property in relation to the duty of care – he determined that there must be a real and substantial character to the threat of harm and the threat must be imminent. The Chambers judge noted that the application of these principles to product liability claims was obvious. He further found the reasoning from *Carter v Ford Motor Company of Canada*, 2021 ONSC 4138, 76 CCLT (4th) 206 [*Carter*] – which I will discuss below – to be a persuasive example of the application of these principles (*Chambers Decision*):

> [113] I am persuaded that the analysis in *Carter* applies here. In her assertion that Class Members were endangered, the plaintiff has simply pleaded the existence of danger, without any averment as to the nature or quality of the danger. Importantly, she does not plead any material facts to support a "real and substantial" danger. More importantly, she pleads nothing to suggest the "imminent threat" of danger. While pleading the existence of the Recalls is barely sufficient to disclose a plea of substandard care, it is not sufficient, by itself, to support a plea of "imminent real and substantial danger". Put another way, pleading the Recalls simply to support the existence of potentially dangerous defects, says nothing about the nature, quality or imminence of the danger.

> [114] Accordingly, while I find that the claim barely discloses a cause of action for negligence, it can only be certified to the extent the negligence can be said to have caused proposed Class Members to suffer a personal injury. Unlike the situation in *Carter*, this claim does not allege, or even hint, that any Class Members experienced property damage arising from an identified defect.
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> [115] Accordingly, I find that the claim discloses a cause of action in negligence, but only to the extent that such negligence caused personal injury.

[28] As a preliminary point, I agree with FCA that Ms. Kane did not plead that she suffered any property damage or that the remediation efforts undertaken under the safety recalls or customer satisfaction notices did not fully and adequately remediate the problems associated therewith. There is no claim in that regard. The analysis devolves to this question: Was there a reasonable cause of action for potential class members that would ground an award of damages for (a) an alleged diminution of value of the class vehicles or (b) an alleged increased risk of harm or injury arising out of the defects that were the subject of the recalls? In my view, the Chambers judge was correct in determining that there was not.

[29] A discussion of the principles underlying pure economic loss begins with *Maple Leaf*. In that case, a proposed class action was brought on behalf of the franchisees of Mr. Submarine Limited [Mr. Sub] over a listeria outbreak and a subsequent recall of meat products produced at a Maple Leaf Foods facility. The franchise agreement between Mr. Sub and its franchisees stipulated that the latter must purchase meats produced by Maple Leaf Foods exclusively. However, there were no contracts between the franchisees and Maple Leaf Foods. The franchisees claimed that they had been affected by the Maple Leaf Foods recalls, in that they experienced a shortage of product for several weeks that caused them economic loss and reputational injury (lost past and future sales, lost past and future profits, decrease in capital value, and loss of goodwill). The question considered by the Supreme Court was whether Maple Leaf Foods, not being directly contractually linked to the franchisees, owed the franchisees a duty of care under negligence law for these types of losses. Justices Brown and Martin, writing for the majority, concluded that no such duty existed.

[30] Justices Brown and Martin affirmed the lower courts' recognition that the franchisees' claims were for pure economic loss:

> [17] As the lower courts recognized, the claims of the appellant and other Mr. Sub franchisees are for pure economic loss, in the form of lost profits, sales, capital value and goodwill. Pure economic loss is economic loss that is unconnected to a physical or mental

> injury to the plaintiff's person, or to physical damage to property ([references omitted]). It is distinct, therefore, from *consequential* economic loss, being economic loss that results from damage to the plaintiff's rights, such as wage losses or costs of care incurred by someone physically or mentally injured, or the value of lost production caused by damage to machinery, or lost sales caused by damage to delivery vehicles.
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> (Emphasis in original)

[31] Although pure economic loss may be recoverable in some circumstances, the majority in *Maple Leaf* confirmed that "there is no general right, in tort, protecting against the negligent or intentional infliction of pure economic loss" (at para 19). Justices Brown and Martin clarified that Canadian negligence law currently recognizes three categories of pure economic loss incurred between private parties:

(a) "negligent misrepresentation or performance of a service";

(b) "negligent supply of shoddy goods or structures"; and

(c) "relational economic loss" (at para 21).

[32] These categories are helpful in that they describe how a loss factually occurred; but, as the Supreme Court went on to discuss, they do not drive the negligence analysis. The majority in *Maple Leaf* stated that imposing a duty of care turns on the proximity of the relationship at issue, not the kind of pure economic loss claimed:

> [22] Properly understood, then, these categories are simply "analytical tools" that "provide greater structure to a diverse range of factual situations … that raise similar … concerns" (*Martel*, at para. 45; *Design Services*, [2008 SCC 22] at para. 31). Organizing cases in this way was and is therefore done for ease of analysis in ensuring that courts treat like cases alike. The fact that a claim arises from a particular kind of pure economic loss does not necessarily signify that such loss is recoverable. Where the loss *is* recoverable, however, this Court has clarified that the decided cases within these categories should be regarded as reflecting particular kinds of proximate relationships ([references omitted]). But to be clear, the invocation of a category, *by itself*, offers no substitute for the necessary examination that must take place "of the particular relationship at issue in each case" between the plaintiff and the defendant (*Livent*, at para. 28; see also *Dorset Yacht Co. v. Home Office*, [1970] A.C. 1004 (H.L.), at p. 1038). In other words, what matters is whether the requirements for imposing a duty of care are satisfied — and, in particular, whether the parties were at the time of the loss in a sufficiently proximate relationship. Where they are, it may be because the relationship falls within a previously established category of relationship in which the requisite qualities of closeness and directness were found, or is analogous thereto ([references omitted]). Or, a plaintiff may seek to establish a "novel" duty of care after undertaking a full *Anns/Cooper* analysis.
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> (Emphasis in original, footnotes omitted)

[33] In examining the pathway to a duty of care for shoddy goods or structures (being the second category), Brown and Martin JJ. considered the duty of care analysis from the Supreme Court's decision in *Winnipeg Condominium*. The liability rule in *Winnipeg Condominium* allows for recovery in tort for pure economic loss arising from the negligent supply of shoddy goods or structures, but only where the defective product poses a real and substantial danger to the plaintiff's person or property: see *Maple Leaf* at paras 42–43 and *Winnipeg Condominium* at paras 12, 21, 36, 38, and 49. The majority in *Maple Leaf* clarified that this test also includes the concept of imminent risk:

> [45] … Where a design or construction defect poses a real and substantial danger — that is, what Fraser C.J.A. and Côté J.A. described in *Blacklaws v. 470433 Alberta Ltd.*, 2000 ABCA 175, 261 A.R. 28, at para. 62, as "imminent risk" of "physical harm to the plaintiffs or their chattels" or property — *and* the danger "would unquestionably have caused serious injury or damage" if realized, given the "reasonable likelihood that a defect … will cause injury to its inhabitants", it makes little difference whether the plaintiff recovers for an injury actually suffered or for expenditures incurred in preventing the injury from occurring (*Winnipeg Condominium*, at paras. 36 and 38; see also [references omitted]). Thus, the economic loss incurred to avert the danger "is analogized to physical injury to the plaintiff's person or property" (P. Benson, "The Basis for Excluding Liability for Economic Loss in Tort Law", in D. G. Owen, ed., *Philosophical Foundations of Tort Law* (1995), 427, at p. 429). The point is that the law views the plaintiff as having sustained actual injury to its right in person or property because of the necessity of taking measures to put itself or its other property "outside the ambit of perceived danger" (*ibid.*, at p. 440; see also *Aktieselskabet Cuzco v. The Sucarseco*, 294 U.S. 394 (1935), at p. 404).
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> …
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> [46] … In our view, this normative basis for the duty's recognition — that it protects a right to be free from injury to one's person or property — also delimits its scope. This is because this basis vanishes where the defect presents no imminent threat.
>
> (Emphasis in original)

[34] The majority in *Maple Leaf* concluded that no duty of care arose in the context of that case for two reasons. First, any real and substantial danger posed by the meats "could be a danger only to *the ultimate consumer*" (emphasis in original, at para 57) – not to the franchisees – and the franchisees' alleged loss of sales, profits, capital value, and goodwill posed no interference with the consumers' rights. Secondly, any real and substantial danger posed by the meats "evaporated when they were recalled and destroyed" (at para 58).

[35] Justices Brown and Martin affirmed that *Winnipeg Condominium* remained a binding authority *governing* the duty of care for claims involving the supply of shoddy goods or structures but refined the framework for *imposing* that duty as follows, having regard to the proximity analysis (*Maple Leaf*):

> [67] In a case of negligent supply of shoddy goods or structures, the claim may arise in circumstances in which the parties could have protected their interests under contract. Even without being in privity of contract, the parties may nonetheless be "linked by way of contracts with a middle party", as Maple Leaf Foods and the Mr. Sub franchisees are linked by way of contracts with Mr. Sub (*Stapleton*, ["Duty of Care and Economic Loss: A Wider Agenda" (1991) 107 Law Q Rev 249] at p. 287). This is particularly the case in commercial transactions (as opposed to consumer purchases: *Arora v. Whirlpool Canada LP*, 2013 ONCA 657, 118 O.R. (3d) 113, at para. 106). Taken together, those contracts may reflect a "clear tripartite understanding of where the risk is to lie" (*Stapleton*, at p. 287). We see this consideration as crucial here when considering the "expectations [and] other interests involved" that must be accounted for in analysing the nature of the relationship (*Cooper*, [2001 SCC 79] at para. 34).
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> …
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> [73] In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of "expectations, representations, reliance, and the property or other interests involved", as well as any other considerations going to whether it would be "just and fair", having regard to the relationship between the parties, to impose a duty of care. In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they?
>
> (Emphasis in original)

[36] The majority declined to recognize a relationship of sufficient proximity between the franchisees and Maple Leaf Foods in tort, partly due to the contractual elements at play in that case:

> [90] A finding of proximity between Mr. Sub franchisees and Maple Leaf Foods would sit uneasily with this state of affairs, linked as these parties were through Mr. Sub by a chain of contracts that reflected the typical arrangement between franchisee, franchisor and exclusive supplier. The appellant was not a consumer, but a commercial actor whose vulnerability was entirely the product of its choice to enter into that arrangement, and whose choice substantially informed the expectations of that relationship to which the proximity analysis must have regard. To allow the appellant to circumvent the strictures of that contractual relationship by alleging a duty of care in tort in a manner that undermines and even contradicts those strictures (in that the proposed duty would impose an obligation to supply upon Maple Leaf Foods whereas its agreement with Mr. Sub imposed no such obligation) would not only undermine the stability of such arrangements, but also of *the appellant's* particular arrangement, which was predicated upon an exclusive source of supply.
>
> (Emphasis in original)

[37] Despite the contractual context present in *Maple Leaf*, in my view the case stands for the proposition that a claim in negligence for pure economic loss is barred where the plaintiff advances no claim for personal injury or property damage nor pleads the imminent risk of a real and substantial danger.

[38] Given the arguments raised by Ms. Kane, it is necessary to discuss the type of goods that are at stake in this matter. She asserts that *Maple Leaf* is not applicable because of the difference in the nature of the goods at issue between the two matters. In *Maple Leaf*, the packages of meat could simply be thrown out and replaced at the manufacturer's expense as new supplies became available. She points out that an entire automobile cannot be easily discarded, particularly when the manufacturer is not willing to replace it with a comparable product. This argument is grounded in the following excerpt from *Maple Leaf*:

> [49] … in applying the *Winnipeg Condominium* liability rule to goods, it must be borne in mind that, properly understood, it states a narrow duty. While, therefore, there is no principled reason for confining its application to dangerously defective *building structures*, what a plaintiff can recover, irrespective of whether the claim is in respect of a building structure or a good, *will* be confined by the duty's concern for averting danger. The point is not to preserve the plaintiff's continued use of a product; rather, recovery is for the cost of *averting a real and substantial danger* of "personal injury or damage to other property" (*Winnipeg Condominium*, at para. 35).
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> [50] It follows that where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's rights, along with the basis for recovery, falls away. …
>
> [51] Whether, then, one is considering defects in a building structure or a good, it is the feasibility of discarding the thing as the means of averting the danger which will determine whether the plaintiff's loss is recoverable. … We reiterate that a breach of the duty recognized in *Winnipeg Condominium* exposes the defendant to liability for the cost of *averting a real and substantial danger*, and *not* of repairing a defect per se.
>
> (Emphasis in original)

[39] FCA submits that Ms. Kane's argument about the majority's discussion of the disposal of defective goods is an attempt to sidestep the ratio of *Maple Leaf*. FCA points out that it has never suggested that the vehicles could or should be discarded and emphasizes its position that all the alleged defects were remediable and have been remediated.

[40] The majority in *Maple Leaf* discussed different types of goods and the feasibility of their disposal:

> [52] An instructive example of a dangerously defective *good* which could not be feasibly discarded is provided by *Plas-Tex* [2004 ABCA 309], where the defendant Dow Chemical sold polyethylene resin to the plaintiffs, knowing that it would be used in the construction

> of 3,000 miles of pipeline (1,700 miles of which was buried underground) used to transport natural gas, and knowing that it was dangerously defective (the resin tended to crack, allowing natural gas to escape, creating the risk of an explosion, and indeed had already caused an explosion). This dangerously defective product was so integrated with the plaintiffs' pipeline operation (and with the pipeline itself) that repair was the only feasible option. Indeed, discarding the pipeline without undertaking mitigation might well have *increased* the already real and substantial danger … .
>
> [53] There will, of course, be other goods containing defects which present real and substantial dangers, and to which La Forest J.'s observations in *Winnipeg Condominium* about the impossibility of discarding homes and other building structures may apply. To be clear, this is a high threshold that we do not anticipate will be regularly met. The plaintiff must, like most homeowners faced with a dangerously defective home, be shown to be effectively bereft of reasonable options. When applied to goods, this describes the rare case.
>
> [54] The foregoing kind of good stands in contrast to two other kinds of goods. First, and more commonly, there is the good whose dangerous defect *can* realistically be addressed by discarding it. This will, we expect, apply to most defective consumer goods. Again, the liability rule in *Winnipeg Condominium* protects a right to be free of a negligently caused real and substantial danger, not to the continued use of a product. If the danger can be removed without repair, the right is no less vindicated. (To be clear, if the plaintiff incurs a reasonably foreseeable cost in discarding the product — such as a regulatory disposal fee — that is recoverable as a cost of removing the danger).
>
> [55] Secondly, there is the kind of good like the [ready-to-eat] meats, for which "repair" is simply not possible. The good must, therefore, also be discarded. While in such circumstances the plaintiff may recover any costs of disposal, that is the extent of its possible recovery under this liability rule. It must be remembered that, because the right protected by this liability rule is that in the physical integrity of person or property, recovery is confined to the cost of removing a real and substantial danger *to that right* — by, where possible, discarding it. Conversely, it does not extend to the diminution or loss of *other interests* that the appellant invokes here, such as business goodwill, business reputation, sales, profits, capital value or replacement of the [ready-to-eat] meats.
>
> (Emphasis in original)

[41] Here, the goods are of such a nature that a repair was possible and was done at the expense of FCA. If one wishes to discuss the issue in terms of disposal for some of the recalls, the defective ignition switch provides a good example. It is the defective part that is replaced and disposed of as a consequence of the repair, not the entire vehicle of which the defective part was merely a component. As noted above, there are no pleadings that the repairs did not fully and adequately remediate the problems with the vehicles. This point is important given that Ms. Kane does not claim repair or disposal costs. There is no claim of an imminent risk and no material facts pleaded to support a real and substantial danger. The claim speaks only of potential problems that *might* arise in the future. In my view, *Maple Leaf* bars the recovery of the economic losses claimed in this matter.

[42] My determination is supported by the analysis of the scope of recovery for claims for pure economic loss in several class action decisions involving allegedly defective motor vehicles, including *Carter*, *Nissan*, and *Hyundai v Engen*, 2023 ABCA 85, 57 Alta LR (7th) 317 [*Hyundai*]. In each of those cases, claims similar to those advanced by Ms. Kane were found to require an assertion of imminent, real, and substantial danger in order to present a reasonable cause of action.

[43] In *Carter*, the claim against the manufacturer listed several vehicles for the model years of 2007 to 2021, alleging that every vehicle had a water pump defect that was manifested within a certain kilometrage range. Damages were claimed for, inter alia, a risk of harm that might occur in the future and diminution in value of the vehicles because of the defect. Justice Perell grouped putative class members into the following categories when analyzing the certifiability of the negligence claims:

> [88] … it is helpful and necessary for analytical purposes to allocate the putative Class Members … into the following analytical groups:
>
> > Group "A" – Putative Class Members who experienced the water pump failure and suffered a personal injury from a car accident. (Personal Injury Claimants).
> >
> > Group "B" – Putative Class Members who experienced the water pump failure and whose vehicle was damaged from the water pump failure. (Property Damage Claimants).
> >
> > Group "C" – Putative Class Members who have not experienced the water pump failure and are now aware that there are dangers inherent in the use of their vehicles because of an allegedly defective water pump. (Risk of Personal or Property Damage Claimants).

[44] Justice Perell certified a class action for negligence in design for groups A and B – in other words, class members "who may have suffered personal injuries or property damage associated with an actual water pump misadventure" (at para 95). However, in Perell J.'s view, *Maple Leaf* established that the presence of an imminent threat is an essential element of a claim for pure economic loss: see *Carter* at para 107. He interpreted *Maple Leaf* as barring an action in negligence where the allegedly defective product does not present an imminent, real, and substantial danger to putative class members, like those in group C (*Carter*):

> [98] As discussed further below, [*Maple Leaf*] holds that defects in goods that do not present imminent threats are not compensable under tort law and are properly only the subject of contract law. In my opinion, Ford Motor Co. is correct that the pure economic products liability claims for Group "C" fail to disclose a cause of action because the Plaintiffs do not and cannot plead material facts capable of establishing a real and substantial danger to the putative Class Members. In the immediate case, the pure economic loss claim is not legally tenable, and it is precluded by the current state of the law. An

implication of this conclusion is that the putative Class Members who constitute Group "C" must be excluded from the class definition.

[99] Pure economic loss is economic loss that is unconnected to injury to the plaintiff's person, or to physical damage to property. The putative Class Members of Group "C" have an allegedly shoddy product. However, the established case law is that there is no recovery in negligence for a shoddy product other than for the cost of repairing a shoddy *and* dangerous product that presents an imminent real and substantial danger. The putative Class Members in Group "C", which would appear to be the largest sized component of the class, have not yet suffered any personal or property loss, and their only claim is therefore a pure economic loss claim.

[100] For Group "C" claimants, the Plaintiffs are confronted with the problems of what in law counts for a product that presents an imminent real and substantial danger. The Plaintiffs are confronted with the ironical problem that they appear to be seeking compensation for repairing an allegedly dangerous product by replacing it with the same product, and this is ironic because the case law establishes that the public policy for allowing a pure economic loss claim in negligence and not leaving the parties to their contractual remedies is to take the dangerous product out of circulation not to continue its use by purchasing the same product. The Plaintiffs are confronted with the problem that apart from claiming the pure economic loss of repairing an allegedly defective and dangerous product, they are precluded from other economic losses such as the diminution in value of their vehicle, which would, in any event, be a difficult claim to prove since the vehicles will have depreciated in value over many years of purposeful non-defective use.

…

[103] In their explanation of the law, Justices Brown and Martin explain that the liability rule from *Winnipeg Condominium Corp No 36 v. Bird Construction Co.*, which would compensate a person for the cost of repairing goods was only rationalizable with the general legal principle that there is no compensation for damages that have not yet occurred by recognizing a legal right not to suffer damages from the exposure to an imminent threat to a person's person or property. Justices Brown and Martin noted that the liability rule in *Winnipeg Condominium* protects a right to be free of a negligently caused real and substantial danger and does not provide a right to the continued use of goods. In other words, it is a predicate for recovery for the pure economic loss that the goods present an imminent real and substantial danger to health and safety.

[104] … The scope of recovery is limited to mitigating or averting the danger, and where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's economic rights along with the basis for recovery falls away.

[105] Justices Brown and Martin explained that it will be rare that there will be recovery for a pure economic loss for consumer goods because more commonly the danger can be avoided by discarding the good. They explained that where there was no choice but to discard the good because it was not repairable the compensation would be limited to the expense of discarding the goods.

[106] … the alleged defect in the design of the water pump does not present an imminent danger and there is no duty of care to warn a consumer that a manufacturer's goods may be shoddy. The theory of the Plaintiffs' negligence cause of action is that the water pumps at some indeterminate time in the future will degrade and present a danger. The Plaintiffs plead that "the Defect only manifests itself after each Vehicle reaches moderate mileage". There is no imminent danger. Thus, for the putative Class Members that are in Group "C", the Plaintiffs have not pleaded a reasonable cause of action.

…

> [111] … I rather rely on the simpler argument that the theory of the Plaintiffs' case does not plead the requisite element of an imminent danger. Rather, the Plaintiffs plead a non-imminent danger, a danger that may happen in the future. They plead a yet to be borne danger and one that may never be borne.
>
> (Emphasis in original, footnotes omitted)

[45] As can be seen from these excerpts, Perell J. found that the class members in group C did not have a reasonable cause of action to ground a claim in negligence for diminution of value or the possibility that an allegedly defective part might become dangerous at some undetermined point in the future.

[46] Turning to *Nissan*, the defendants had issued a series of technical service bulletins to dealerships, qualified technicians, and Transport Canada to address higher than expected warranty claims regarding timing chain mechanism issues. There was no recall or general remediation efforts undertaken by Nissan. Mr. Mueller and another potential class member deposed to having experienced damage to their vehicles from timing chain system failures but neither claimed personal injury as a result. In opposing certification, Nissan relied on the decision in *Maple Leaf*, arguing that the claims in negligence must fail because they were "for pure economic loss for an alleged shoddy product", and there was "no pleading that the danger created by the product was 'sufficiently imminent'" (*Nissan* at para 40).

[47] Justice Griffin, writing for the British Columbia Court of Appeal, agreed that *Maple Leaf* affirmed the principle that "there is no general right in tort protecting against negligent or intentional infliction of pure economic loss" and that such a claim may arise only where the alleged defect poses a "real and substantial danger", meaning "'imminent risk' of 'physical harm' to persons or property" (*Nissan* at para 41). Nissan's argument that Mr. Mueller did not plead a sufficiently imminent danger at the certification stage, however, was rejected:

> [42] Nissan's argument that the ANOCC [amended notice of civil claim] does not plead a sufficiently imminent danger to trigger a duty of care in tort ignores the fact that the ANOCC is replete with allegations that the defect was dangerous and created safety problems and risks that were imminent. The ANOCC expressly pleads that the defect was one that was dangerous, because it could cause a sudden engine failure, loss of control of the vehicle, exposing occupants to accidents because of an inability to maintain an appropriate speed on the road, and thus creating a safety hazard and extreme risk of severe personal injury or death to the occupants of the vehicles and class members … .

[48] *Nissan* interpreted *Maple Leaf* as elaborating on the Supreme Court's decision in *Winnipeg Condominium*, which restricted the scope of a manufacturer's liability under the law of negligence, describing that interpretation as follows (*Nissan*):

> [46] The key to understanding the duty of care in *Winnipeg Condominium* was that the building defect posed an "imminent risk" of physical harm to persons or their property. This is what created a sufficiently proximate relationship to give rise to a duty of care, even though the claim was for pure economic loss: *Maple Leaf Foods* at paras. 45–46.

[49] Since the circumstances under consideration in *Nissan* involved a claim by consumers for a dangerously defective product – unlike the franchisees in *Maple Leaf* – Griffin J.A.'s analysis focused on the pleadings and what constitutes a sufficiently imminent danger in the context of that matter. Including *Carter*, she reviewed several cases involving proposed class actions that were initiated by consumers for defective motor vehicles (*Nissan*):

> [53] It is not a universally held view that every defect that could cause sudden vehicle engine failure is an imminently dangerous defect. In [*Carter*], the plaintiff pleaded that the defect in a vehicle's water pump could lead to "immediate catastrophic engine failure" and that this could occur without warning (para. 38 of the pleading, cited at para. 13 of the reasons). The certification judge found that the plaintiff's theory that "the water pumps at some indeterminate time in the future will degrade" did not create an imminent risk: at para. 106. He concluded that the defect was more about durability, rather than inevitability of danger: at para. 109.
>
> …
>
> [55] I note that a distinguishing fact in *Carter* was that six of the vehicle owners who swore affidavits in support of certification continued to use their vehicles after the failed water pump system was replaced with the same type of system, and continued to drive their vehicles: at paras. 39(k), 40–45. This understandably contributed to the judge's conclusion that the defect in the water pump system was not dangerous.

[50] Justice Griffin found that the absence of a recall for the timing chains – "an 'integral part' and an 'essential component' of the vehicles" (at para 64) – distinguished this case from *Maple Leaf* and severely limited the class members' options for discarding the defective part (*Nissan*):

> [63] Respectfully, in the present case I do not think it can be said, as a matter of law when reviewing the pleadings, that it is plain and obvious the class members' claims will fail because they could reasonably avoid their damages by simply discarding their automobiles. This aspect of Nissan's argument is grounded in a questionable speculative assumption as to the financial means of class members.
>
> [64] Unlike *Maple Leaf Foods* and *Kane* [i.e., this *Chambers Decision* under appeal], there was no product recall here and so the consumers have not been offered the choice of discarding the defective part. Here, the essence of the claim is that the defective part has failed or will likely fail before the expected lifetime of the product, and failure of the part could result in significant harm to persons or property. The claim pleads that the timing chain is an "integral part" and an "essential component" of the vehicles. The pleadings support the claim that the defective part must be replaced to avoid the risk of potential harm.

> [65] In my view, the question of what would be a reasonable way of dealing with the defect, including the scope of a remedy, is going to require evidence and findings of fact at trial.
>
> [66] I also consider that Nissan's argument significantly underplays the special nature of the product it manufactures. It is well known that automobiles are complex, heavy machines, often operated at a fast speed in the midst of other fast-moving traffic, and sometimes in conditions of limited visibility. It seems to me quite reasonable to conclude that if, due to a defective part, an automobile engine failed unexpectedly, it could lead to a tragic accident and serious personal injuries, and that if it is possible to replace a defective part so as to avoid this result, that is the reasonable course rather than waiting for it to fail and then discarding the entire vehicle.

[51] Thus, the British Columbia Court of Appeal in *Nissan* held that, where the issue of unexpected engine failure is raised, a defective part taking a long time to fail does not necessarily preclude a finding of imminent danger. Justice Griffin cautioned against requiring "too much specificity in the pleading regarding the danger posed by a product" at the certification stage (at para 68) and concluded that determining the dangerousness of the timing chain defect in accordance with *Winnipeg Condominium* and *Maple Leaf* was an issue best left for trial: see *Nissan* at paras 67–69. Notwithstanding the result, *Nissan* still required the presence of imminent, real, and substantial harm for a reasonable cause of action to be present for a claim in pure economic loss related to an allegedly shoddy product.

[52] In *Hyundai*, the defendants appealed from a decision certifying a class proceeding which alleged that sunroofs in six models of vehicles designed and manufactured by Hyundai were susceptible to spontaneous shattering while driving. Mr. Engen brought the underlying claim against Hyundai after sustaining property damage and personal injury when the sunroof in his 2013 Hyundai Santa Fe shattered without warning or apparent external cause. There is no indication in the judgment that the defendants had issued a recall notice or undertaken general remediation efforts in relation to the alleged defect. In resisting certification, Hyundai had argued that the claim in negligence was limited to pure economic loss for which recovery was barred by the decisions in *Maple Leaf* and *Carter*.

[53] The Alberta Court of Appeal rejected Hyundai's argument. It adopted the approach from *Nissan* for determining the appropriate remedy for a defective product in the context of motor vehicles:

> [40] … Mr. Engen has pleaded a "loss" (even if purely economic) and this need not be limited to the vehicle having lost value as a result of the alleged defect.

> [41] Where a defective product exists in a vehicle, it will often not be feasible to simply discard it – rather, the defective part must be replaced in order to avoid the risk of harm. Moreover, the scope of such a remedy is not always immediately clear, requiring findings of fact and evidence at trial in order to determine a reasonable way to deal with the defect: *Nissan CA* at paras 63–65. That is certainly so here, where an allegedly dangerous defect is an integral component of the vehicle and there is no assurance that a replacement sunroof would render the vehicle any less dangerous (particularly if any defect is found to be one of design rather than manufacturing).
>
> [42] The negligence claim can proceed to trial, where the question of how best to remedy any dangerous defect found to exist in the sunroofs can be properly determined on a full evidentiary record.

[54] The Alberta Court of Appeal in *Hyundai* interpreted the decision in *Maple Leaf* as allowing a consumer to recover for pure economic loss where a defective product poses a real and substantial danger of personal injury or property damage. It concluded that pleading mere risk of harm is acceptable for claims of this nature (*Hyundai*):

> [43] Nor do we accept Hyundai's argument that common issues relating to a "risk of harm" should not have been certified. Mr. Engen has pleaded a claim in negligence involving a dangerous defect, which brings the claim within recovery for pure economic loss to the extent that there is a "real and substantial danger" to personal injury or property damage. Hyundai does not suggest the claim is improperly pleaded to this extent. Within these confines, pleading mere risk of harm is acceptable because the negligent supply of dangerous goods interferes with one's right to be free from injury to one's person or property: *Maple Leaf Foods* at paras 44–46.

[55] However, unlike the decisions in *Carter* and *Nissan*, there is no separate discussion in *Hyundai* about whether the risk of harm must be imminent; that said, the importance of this factor can be inferred from the Court of Appeal's adoption of paragraphs 45 to 46 of *Maple Leaf*: see paragraph 43 of *Hyundai*, quoted above.

[56] In my opinion, *Carter*, *Nissan*, and *Hyundai* are consistent in requiring a risk of real and substantial harm to be pleaded. *Carter* and *Nissan* also explicitly describe the need for an imminent threat of harm, while *Hyundai* can be taken as inferentially noting this requirement through its reference to *Maple Leaf*. As such, this jurisprudence supports the requirement that a plaintiff must plead an imminent risk of real and substantial harm in order to present a reasonable cause of action to recover damages such as those sought by Ms. Kane.

[57] A recent case from the Ontario Court of Appeal is also relevant to this issue, although it did not involve a claim related to automobiles. In *Palmer v Teva Canada Limited*, 2024 ONCA 220 [*Palmer*], the plaintiffs claimed damages for a potential increased risk of developing cancer

resulting from ingesting contaminated medication. The Ontario Court of Appeal's interpretation of *Maple Leaf* leaves no room for uncertainty as to whether imminent risk is required to recover for pure economic loss – where there is no claim for personal injury or property damage – under the law of negligence in Ontario:

> [72] Relying on *Maple Leaf Foods*, where the Supreme Court recognized that pure economic loss is recoverable in limited circumstances, the motion judge found that, once compensatory damages for physical and psychological injuries were removed, the claim for pure economic loss failed because the product was not imminently dangerous.
>
> [73] The appellants contend the motion judge erred by adding "imminence" of harm as a requirement to recover for pure economic loss. In their view, the liability rule for pure economic loss is "real and substantial harm" as set out in *Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.
>
> [74] I do not agree. Brown and Martin JJ., for the majority in *Maple Leaf Foods*, at para. 45, explained and clarified the test from *Winnipeg Condominium Corp.* to include the concept of imminent risk: [quotation omitted].
>
> [75] The court thus clarified that the liability rule is consistent with the general principle that there is "no right to be free from the *prospect* of damage" but "only a right not to *suffer* damage that results from exposure to unreasonable risk": *Maple Leaf Foods*, at para. 44 citing *Atlantic Lottery Corp.*, at para. 33 (emphasis in original). The basis for recovery for pure economic loss – that the plaintiff must take steps to prevent an imminent injury that it would otherwise suffer – "vanishes where the defect presents no imminent threat": *Maple Leaf Foods*, at para. 46.

[58] Justice Miller, writing for the Ontario Court of Appeal in *Palmer*, concluded that no liability arises in negligence for claims of pure economic loss that fail to meet the standard from *Maple Leaf* – in other words, pleadings that fail to address an imminent risk of real and substantial harm disclose no reasonable cause of action (*Palmer*):

> [76] … The pleadings do not address the imminence (or latency) of the physical harm arising from ingesting valsartan contaminated with NDMA and NDEA. Even on a less exacting conception of "real and substantial harm", the pleadings founder. The plaintiffs failed to plead "real" harm and instead propose to redefine harm to include the prospect of "increased risk", "increased likelihood", "probable carcinogen", etc. Interpreting the pleadings generously, the allegations of the product not being fit for human consumption and dangerously defective due to its contamination by toxic or carcinogenic chemicals may constitute "real and substantial harm". But, as I will explain below in the discussion of the other certification criteria, such an interpretation would not satisfy the common issues criterion.

[59] Finally, Miller J.A. interpreted *Maple Leaf* as limiting the scope of recovery for pure economic loss to the "cost of averting the danger" (*Palmer* at para 77), which may include disposal and repair costs but does not necessarily extend to product replacements or refunds:

> [77] Before moving from pure economic loss, I will address the types or heads of damages pleaded by the plaintiffs: costs of medical services and medical monitoring, costs thrown away from discarding contaminated pills, and refunds. It is clear from *Maple Leaf Foods*, at para. 48, that the basis for the duty of establishing liability for pure economic loss also serves as a principled basis for limiting the scope of recovery. In the context of pure economic loss for dangerous products (or defects in building structures) this means the plaintiff can only recover the cost of averting the danger: *Maple Leaf Foods*, at paras. 49 and 57.
>
> [78] Here, the defect is in the product, valsartan. No one is seeking to correct the dangerous defect. Instead, the plaintiffs state they discarded the product. This presents a difficulty for their claim. *Maple Leaf Foods* directs that "where it is feasible for the plaintiff to simply discard the defective product, the danger to the plaintiff's rights, along with the basis for recovery, falls away": at para. 50. Since the plaintiffs claim no costs for disposing of the product, it is plain and obvious on the pleadings that discarding the pills was feasible and sufficient to avert any danger. The liability rule does not extend to other loss, such as replacement value for the contaminated product (or refund): *Maple Leaf Foods*, at para. 55.
>
> [79] Nor is there a path for recovery of medical expenses or medical monitoring without a viable claim in negligence for physical or psychological damages. Medical monitoring costs do not fall within the *Maple Leaf Foods* liability rule because they do not repair the defect to make the dangerous product safe. Medical monitoring presumes a physical injury: *Dow Chemical Company*, [2010 NLCA 20] at para. 57; see also *Dussiaume*, [2023 BCSC 795] at para. 79. Where there is no present injury, allowing damages for pure economic loss in the nature of medical monitoring and medical services costs is contrary to the principle that there is no liability for negligence "in the air".
>
> [80] Accordingly, I would dismiss the appeal from the motion judge's decision not to certify the appellants' negligence claim grounded in pure economic loss.

[60] Applying the above jurisprudence, it is my view that the Chambers judge correctly interpreted the decision in *Maple Leaf* as requiring Ms. Kane to plead a real, substantial, and imminent danger of physical injury or property damage arising from the alleged motor vehicle defects. A plaintiff advancing a claim for pure economic loss must provide *some* indication in their pleadings that an imminent risk of a real and substantial danger exists. Ms. Kane has failed to do so here, as identified by the Chambers judge (repeated here for reference, *Chambers Decision*):

> [113] I am persuaded that the analysis in *Carter* applies here. In her assertion that Class members were endangered, the plaintiff has simply pleaded the existence of danger, without any averment as to the nature or quality of the danger. Importantly, she does not plead any material facts to support a "real and substantial" danger. More importantly, she pleads nothing to suggest the "imminent threat" of danger. While pleading the existence of the Recalls is barely sufficient to disclose a plea of substandard care, it is not sufficient, by itself, to support a plea of "imminent real and substantial danger". Put another way, pleading the Recalls simply to support the existence of potentially dangerous defects, says nothing about the nature, quality or imminence of the danger.

[61] Moreover, *Maple Leaf* also confirms that "[t]here is no right" in tort "to be free from the *prospect* of damage" (emphasis in original, at para 44, quoting *Atlantic Lottery Corp. Inc. v Babstock*, 2020 SCC 19 at para 33, [2020] 2 SCR 420 [*Atlantic Lottery*]). Ms. Kane's pleadings of an increased risk or increased likelihood of harm arising from the defects identified in the recalls falls short of the standard set by *Maple Leaf* for grounding a claim in negligence for pure economic loss.

[62] I note, as well, that the case at hand is distinguishable from *Nissan* and *Hyundai* in that the recalls in this case offered the proposed class, for example, the choice of replacing the defective parts, resulting in a discarding of the defective parts. Therefore, even if the claim were found to disclose a real, substantial, and imminent danger due to an identified defect, the class members' basis for recovery fell away upon the completion of the repairs contemplated by the recalls and the consequent discarding of the defective part: see *Maple Leaf* at para 50.

[63] Similarly, in my view, there is no reasonable cause of action by the proposed class regarding diminution of the value of the vehicles. The decision in *Maple Leaf* affirmed the point that the scope of recovery for claims for pure economic loss is limited to "the cost of *averting a real and substantial danger* of 'personal injury or damage to other property'" (emphasis in original, at para 49, quoting *Winnipeg Condominium* at para 35): similarly, see *Carter* at para 104, *Nissan* at para 57, and *Palmer* at para 77. An alleged reduction in the resale value of a motor vehicle poses no such danger: "the scope of the recovery would not encompass the diminution in value of the vehicle or consequential losses" (*Carter* at para 97). It is plain and obvious that pleading economic damages of this nature discloses no cause of action in negligence.

[64] Taking all of this into account, it was plain and obvious that the claim for an increased risk or increased likelihood of future harm arising out of the defects and an alleged loss in value of the subject vehicles did not disclose a reasonable cause of action. A claim in negligence for pure economic loss, where the plaintiff neither advances a claim for personal injury or property damage nor pleads the imminent risk of a real and substantial danger, is barred by *Maple Leaf*. The Chambers judge correctly concluded that Ms. Kane's claim disclosed a cause of action in negligence only to the extent that such negligence caused personal injury.

[65] For all of these reasons, the Chambers judge was correct to limit the cause of action in negligence in the manner in which he did. There is no merit to grounds (b) and (c) of Ms. Kane's appeal.

C. Express or implied warranty

[66] The Chambers judge's findings regarding an alleged breach of an express or implied warranty were described thus (*Chambers Decision*):

> [116] The plea that there was a breach of an express or implied warranty is set out in paras. 81–82 of the claim, and reads as follows:
>
> > 81. By marketing, advertising, distributing, and selling defective products, while misrepresenting or failing to report the dangers of such products to the public, the Defendants created and breached both express and implied warranties that the Class Vehicles were safe for use as public transportation, when in fact, they were not.
> >
> > 82. As a result of the foregoing, the Plaintiff and the Class have suffered economic damages in an amount to be proven at trial, members of the Class have suffered personal injury, and members of the Class have been endangered.
>
> [117] It is noteworthy that this excerpt from the claim does not plead any material facts to identify the basis in law for an express or implied warranty claim. It is trite law that, other than a manufacturer's warranty, the existence of an express or implied warranty can only exist by statute or contract. In the present case, there are no pleaded material facts to establish the existence of any express or implied warranty. It necessarily follows that no cause of action is disclosed.
>
> [118] Before leaving this alleged cause of action, I should note that the plaintiff's argument on this point relied on two Ontario decisions, *Panacci v Volkswagen*, 2018 ONSC 6312 and *Romeo v Ford Motor Co.*, 2018 ONSC 6772. Reliance on these authorities is misplaced. In both cases, the plaintiffs had pleaded and relied on the manufacturer's new vehicle warranty, which were expressly referenced in both decisions. That is not the circumstance in the application before this Court.

[67] Ms. Kane's arguments on this issue were very brief. She submits that paragraphs 81 and 82 of her statement of claim assert a breach of a manufacturer's warranty and the existence and breach of statutory warranties under consumer protection legislation. I note that the Chambers judge, at a later point in the *Chambers Decision*, permitted the cause of action founded on a breach of warranty under provincial consumer protection legislation to proceed, so only a contractual warranty or a warranty implied other than through consumer protection legislation is at issue for this ground of appeal. In this regard, Ms. Kane argues, without pleading such, that new vehicle warranties are provided by the manufacturer, which are adopted through the bill of sale with dealerships and, essentially, that their existence is self-evident.

[68] The basic principles regarding express or implied warranties are set out in *Fraser-Reid v Droumtsekas*, [1980] 1 SCR 720 (WL) [*Fraser-Reid*]. That case involved an agreement of purchase and sale for a newly constructed house. The general nature of a warranty was described thus:

> [22] … A warranty is a term in a contract which does not go to the root of the agreement between the parties but simply expresses some lesser obligation, the failure to perform which can give rise to an action for damages, but never to the right to rescind or repudiate the contract: Fridman, *The Law of Contract in Canada* (1976), p. 285. An affirmation at the time of sale is a warranty provided it appears on the evidence to have been so intended: per Buller J. in *Pasley v. Freeman* (1789), 3 T.R. 51, 100 E.R. 450. No special form of words is necessary. In *De Lassalle v. Guildford*, [1901] 2 K.B. 215 (C.A.) at p. 221, A.L. Smith, M.R., said:
>
> > It must be a collateral undertaking forming part of the contract by agreement of the parties express or implied, and must be given during the course of the dealing which leads to the bargain, and should then enter into the bargain as part of it.

[69] The plaintiffs in *Fraser-Reid* had argued that a warranty should have been implied, even though it was not expressly contained in the contract. In rejecting this assertion, Dickson J. stated that an implied warranty, in the circumstances of the matter the Supreme Court was addressing, must arise from a statute: "It appears to me at this time that if the sale of a completed house by a vendor–builder is to carry a non-contractual warranty, it should be of statutory origin, and spelled out in detail" (at para 20).

[70] The principles from *Fraser-Reid* have been examined in several class action certification cases where plaintiffs had broadly claimed a breach of warranty without pleading the terms of a particular contract or collateral contract or referencing an applicable statute. Other than these categories, courts have found no basis for a claim for breach of warranty.

[71] In *Wuttunee v Merck Frosst Canada Ltd.*, 2007 SKQB 29, [2007] 4 WWR 309, rev'd on other grounds, 2009 SKCA 43, [2009] 5 WWR 228, the plaintiffs sought certification of a class action pertaining to the manufacturing and distribution of certain prescription drugs. Among other causes of action, the plaintiffs broadly claimed breaches of express or implied warranty. Justice Klebuc (as he then was) held that the plaintiffs failed to plead a collateral contract between the parties, thus leaving only the warranties that could be implied by statute:

> [65] It is well established that warranties may arise between parties by virtue of *The Sale of Goods Act*, R.S.S. 1978, c. S-1, the *CPA* [*The Consumer Protection Act*, SS 1996, c C-30.1] or the *Competition Act* or by means of a collateral contract. … In the context of the sale of goods, warranties are defined as an agreement with reference to the goods that are the subject of a contract but collateral to the main purpose of the contract. A breach of such warranty gives rise to a claim for damages but not a right to reject the goods. In the context of a collateral agreement, a warranty is "a binding promise", the breach of which may warrant a contract being set aside if the breach is of a serious nature.
>
> [66] In the instant case, no sale is alleged between Merck, as vendor, and any plaintiffs, as purchasers. In the result, *The Sale of Goods Act* does not apply. Similarly, no collateral contract between Merck, as manufacturer, and a plaintiff, as purchaser, is alleged in the amended statement of claim. In these circumstances, I must conclude that the amended statement of claim fails to raise a cause of action based on either an express or implied warranty other than warranties arising pursuant to the *CPA* or the provisions of the *Competition Act*. Consequently, the claims based on a breach of warranty will be struck save as they relate to the *CPA* or the *Competition Act*.

Similar reasoning can be seen in *Singer*, *Richardson v Samsung*, 2018 ONSC 6130, aff'd 2019 ONSC 6845 (Div Ct), and *0790482 B.C. Ltd. v KBK No. 11 Ventures Ltd*, 2021 BCSC 1761.

[72] In *Nissan*, Griffin J.A. discussed a situation where an implied contractual warranty could arise. As noted earlier, the certification judge in that case had certified the class action against Nissan for its manufacturing of certain vehicles that had defective timing chain systems. One ground of Nissan's appeal involved whether the respondents had a viable cause of action pursuant to a breach of warranty allegation. With respect to the express warranty claim, the British Columbia Court of Appeal held that certification of the claim was premature, as there was no evidence that the class members had brought a warranty claim to Nissan within the warranty period: see paragraphs 79 to 88. With regard to implied warranties, the respondents alleged that Nissan had implicitly warranted that the vehicles were safe for use. The claim did not rely on the statutory warranty. The Court commented as follows:

> [92] Nissan also argues that the [statement of claim] did not plead any contractual relationship sufficient to found an implied warranty. Respectfully, I read the [statement of claim] and the judge's findings to the contrary.
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> …
>
> [95] I understand the judge to have read the pleading of an implied warranty of fitness as implicitly based on there being a contract between a purchaser of a new vehicle and Nissan, as seller.
>
> …

> [98] Reading the judge's conclusions as a whole, the judge found that it is possible that purchasers of new Nissan vehicles could have relied on a representation by Nissan, as seller of the vehicles, that amounts to a contractual implied warranty: at paras. 88, 103, 187. I do not see that the judge erred in determining that a claim for breach of implied warranty was not bound to fail, so long as it is limited to a subclass of purchasers of new vehicles. The fact that there could be defences to such a claim does not mean that there was no cause of action pleaded.

[73] In *Hyundai*, also discussed above, the proposed class action related to a defective sunroof in certain Hyundai vehicles. In examining the reasoning from *Nissan*, the British Columbia Court of Appeal noted that the conclusion reached in *Nissan* was based on the existence of a contractual relationship. In *Hyundai*, the certification judge had determined that an implied warranty claim could not proceed because the proposed class members did not have "privity of contract" with Hyundai due to the fact that they had all purchased their vehicles from dealerships (at para 36). This is the opposite situation regarding privity as was alleged in *Nissan*. Thus, in *Hyundai*, the Alberta Court of Appeal confirmed that the absence of a contractual relationship was fatal to the claim for breach of implied warranty: see paragraphs 37 to 38.

[74] As discussed in the jurisprudence above, and in accordance with the principles set out in *Fraser-Reid*, a breach of warranty claim requires either the existence of a contractual relationship or some statutory basis. If it does not arise from a statute, a claim for a non-contractual implied warranty cannot succeed.

[75] In my view, the Chambers judge did not err in determining that there were insufficient pleadings to ground a cause of action for breach of an express or implied warranty. No material facts were pleaded to support such a cause of action. There were no allegations about the existence of contractual warranties between the class members and FCA. Neither were the pleadings related to a claim of collateral contract. Leaving aside consumer protection legislation – and the *Competition Act*, given that leave to appeal was denied on issues related to that statute – the statement of claim did not plead any other legislation that implies a warranty term. As found by the Chambers judge, the bare statement about warranties in the statement of claim was insufficient to ground this cause of action. I cannot give effect to this ground of appeal.

D. Unjust enrichment and disgorgement

[76] The Chambers judge – relying on *Atlantic Lottery* and *Spring v Goodyear Canada Inc.*, 2021 ABCA 182, 459 DLR (4th) 315 [*Spring*] – determined that (a) disgorgement is a remedy and not an independent cause of action, (b) the only meaningful remedy for unjust enrichment in the circumstances of this matter would be restitution not disgorgement, (c) Ms. Kane had not sought restitution, and (d) more importantly, the statement of claim did not disclose the required elements of an unjust enrichment claim because no deprivation was suffered.

[77] Ms. Kane submits that it remains an open question as to whether disgorgement would be an available remedy in this matter and that the certification stage was not the place to determine this issue. Ms. Kane did not challenge the Chambers judge's finding that disgorgement is a remedy and not a cause of action or that the statement of claim did not plead the required elements of unjust enrichment. FCA argues that a claim in unjust enrichment was made with the sole remedy of disgorgement sought. It further observes that the law is settled on the issues engaged in this ground of appeal and that the Chambers judge correctly found that the required elements of unjust enrichment were not pleaded.

[78] This ground of appeal can be addressed summarily. Disgorgement is a remedy, not an independent cause of action: *Atlantic Lottery* at paras 28–34. Disgorgement is not pleaded as a remedy for the claim in negligence and is only sought in relation to unjust enrichment. Leaving aside the unavailability of disgorgement as a remedy for unjust enrichment and its uncertain availability in a claim in negligence (*Atlantic Lottery* at paras 28–34 and *Spring* at paras 53–55), it is trite law that there is no remedy without a valid cause of action. Here, the Chambers judge determined that two of the three elements of unjust enrichment – deprivation and absence of a juristic reason – were not sufficiently pleaded and that it did not represent a valid cause of action. This determination is not challenged on appeal. Without a cause of action linked to the remedy, disgorgement was not available. This ground of appeal has no merit.

E. Notices and their relation to the applicable test

[79] Ms. Kane argues that the safety recall and customer satisfaction notices, on their own, were sufficient to satisfy the evidence-based certification requirements. While FCA admits that the notices are evidence that can be considered, it contends that this evidence falls far short of providing some basis in fact for the certification of the common issues. This section of my reasons will address only the evidentiary value of the notices. To the extent that it is necessary, the issue of whether they, in conjunction with the affidavit evidence, provided the required evidentiary basis for certification is examined in the next part.

[80] At this stage of the analysis, it is worth reiterating that the Chambers judge's determination that the only remaining causes of action were negligence causing personal injury and breach of consumer protection legislation is undisturbed. As such, the evidence that can be gleaned from the notices must be considered in the context of those causes of action.

[81] Generally speaking, recall notices, bulletins, or customer satisfaction notices or advisories have been found to provide evidence in other cases to help establish the some basis in fact of commonality to varying degrees. An examination of some of that jurisprudence is informative.

[82] *Panacci v Volkswagen*, 2018 ONSC 6312, is cited by Ms. Kane as supporting the contention that recall notices are sufficient on their own to justify some basis in fact for certification. In that case, the defect was with the timing chain system found in an engine used in several Volkswagen vehicles manufactured between 2007 and 2013. Upon application for certification, Belobaba J. held that a service bulletin, in conjunction with uncontroverted expert evidence concerning allegations of defect, was sufficient to establish the common defect.

[83] *Evans v General Motors of Canada Company*, 2019 SKQB 98, [2019] 10 WWR 725 [*Evans*], is also relied upon by Ms. Kane for the same purpose. There, certification was sought in relation to defects in the cooling systems of 2011 and newer Chevrolet Cruze vehicles. The representative plaintiff provided affidavits of some of the proposed class action members describing defects in their vehicles, as well as service bulletins that had been distributed by General Motors. These service bulletins identified the precise defect, its ramifications, and the vehicles that it affected. The service bulletins were accompanied by expert evidence, which discussed their implications. Justice Barrington-Foote (ex officio) stated as follows:

> [19] … the standard of proof on a certification hearing is whether there is some basis in fact in relation to the certification criteria. It would be open to a finder of fact, based on [specific service bulletins] and without the benefit of expert evidence, to conclude that there were unspecified design or manufacturing imperfections or shortcomings which affected the water pump and the reservoir in some 2011–2014 Cruze vehicles, and that GM knew those issues sometimes resulted in a loss of coolant or an odor not later than January 2014. *Panacci v Volkswagen*, 2018 ONSC 6312, at paras 19–20 [*Panacci*] demonstrates the use of an automobile manufacturer's technical bulletins of this kind for this purpose. To the extent this application turns on whether there is some basis in fact for the proposition that the cooling system had design or manufacturing defects with those characteristics, [service bulletin evidence], read together with the affidavits sworn by Cruze owners, would be sufficient to meet that standard without the [expert witness's] report.

[84] However, the certification judge in *Evans* found this evidence to be insufficient to provide some basis in fact for some of the other proposed common issues: see paragraphs 57 to 69. The action was otherwise certified. An appeal to this Court overturned the certification order, but that judgment does not directly comment on the evidentiary value of the service bulletins: *General Motors of Canada Company v Evans*, 2024 SKCA 87.

[85] In *Thorpe v Honda Canada Inc.*, 2011 SKQB 72, [2011] 8 WWR 529, the representative plaintiff noticed significant wear on her tires and subsequently came across a Honda service bulletin describing a rapid tire wear issue, which applied to her Honda vehicle. The plaintiff alleged similar issues applied to 2006 and 2007 Honda Civics, generally. In her certification application, the representative plaintiff principally relied on the service bulletin but also deposed to her own experiences. There was also affidavit evidence from other owners who experienced the same problem. The representative plaintiff also deposed that the remediation provided by Honda did not fix the tire wear issue. Justice Popescul (as he then was) found there was a sufficient evidentiary basis for certification. Regarding the common issues requirement, the certification judge found a sufficient evidentiary basis in the affidavit evidence in conjunction with the service bulletins: see paragraphs 69 to 76.

[86] As noted above, in *Spring*, the representative plaintiff sought certification of a class action in relation to defective tires. In early 2012, Goodyear issued a recall notice with respect to 6 types of tires, which were manufactured in a particular 13-week period at a specific plant. The representative plaintiff attended a Goodyear store for a tire replacement after receiving the recall notice but was informed that his tires were not within the 13-week period subject to the recall. Subsequently, he was driving on a highway when one of his tires failed, which he alleged occurred

because of a manufacturing defect. The representative plaintiff commenced a class action and alleged that the issues described in the recall notice, which, as noted, covered only 6 types of tires, applied to 51 types of tires. The only direct evidence relied upon by the representative plaintiff was the recall notice. The certification judge found that the recall notice was sufficient to ground the representative plaintiff's claim.

[87] The Alberta Court of Appeal, in allowing the appeal and setting aside the certification order in *Spring*, held that the recall notice did not establish a sufficient evidentiary basis for the claim:

> [27] At the certification hearing, the representative plaintiff produced no evidence showing the cause of the tread separation of his tires or the tires covered by the Recall Notice. There was no expert evidence, although that is not essential. There was also no indication on the record that there was any specific or systemic manufacturing defect leading to the representative plaintiff's accident, that any negligence was behind the observed tread separation, or whether it was within normal manufacturing tolerances. The problem is not with the potential inadequacy of proof of the merits of the claim. The problem is that unless the representative plaintiff can provide "some basis in fact" for the source or nature of the tread separation in the six types of tires covered by the Recall Notice, he cannot provide any "basis in fact" for showing that this defect might be common to all 51 types of tires covered by the certification. In other words, without knowing the nature of the defect and whether it is systemic, the representative plaintiff cannot prove that answering the common issue about the alleged "admitted" defect in the six types of tires covered by the Recall Notice will answer any common question respecting the other types of tires. Unless there is some indication of a common defect, there is no way to prove a common impact on all class members, demonstrating that the issue is not "common": *N&C Transportation Ltd v Navistar International Corp*, 2018 BCCA 312 at paras. 96–97, 14 BCLR (6th) 217, leave to appeal refused March 28, 2019, SCC #38327.

[88] In *Coles v FCA Canada Inc.*, 2022 ONSC 5575, the representative plaintiff brought a class action against FCA regarding defective air bags. Although there was other evidence that was relied upon, the safety recall notices for the airbags were the "subject at the heart" of the class action (at para 77). The air bags were involved in mass recalls, occurring in multiple countries. In the analysis regarding the common issues, Perell J. found that the recall notices provided evidence that, in conjunction with unimpeached expert evidence, satisfied the some basis in fact test. While the primary evidentiary basis for the claim in *Coles* was the recall notices, and the recall itself of the vehicles, there was a larger context surrounding the recall which supported the class action, including parallel class actions and expert evidence attesting to the dangerous nature of the airbags. In the end, however, Perell J. found the action not to be certifiable due to the preferable procedure criterion not being met.

[89] *Larsen v ZF TRW Automative Holdings Corp.*, 2023 BCSC 1471, involved a potential class action that also pertained to defective airbags. The evidence relied upon was the recall of one category of the vehicles subject to the class action as well as two expert reports. The defective component of the airbags had been subject to recalls by other car manufacturers. The representative plaintiff claimed that the repairs offered to fix the recalled vehicles were ineffective at addressing the issues and that other vehicles, which were not subject to the recalls, had similar issues. The crux of the plaintiff's claim was one in negligent design and manufacturing. The plaintiff tendered expert evidence, which was found to be unreliable and was rejected. In denying certification, Majawa J. commented on the other information provided by the recalls:

> [70] The existence of a recall is some acknowledgement of a defective design or manufacturing. However, as the plaintiff's claim is framed, in order to be certified as a class action, the plaintiff must at least provide some basis in fact that the allegedly defective ACU [airbag control unit] still exists in the vehicles that were recalled and that underwent the prescribed repair. …
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> …
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> [83] For the reasons that I have given above, I find that there is no basis in fact that the alleged ACU defect exists in the Unrecalled Vehicles and in the Recalled Vehicles that have been repaired. That leaves the unrepaired Recalled Vehicles. As mentioned above, the existence of a recall is some basis in fact for the existence of the alleged defect in the Recalled Vehicles. However, the uncontroverted evidence is that the Vehicle Manufacturer Defendants have offered repairs to the owners of the Recalled Vehicles free of charge. In my view, a class action is not the appropriate procedure to address defects that may remain in Recalled Vehicles that have not yet been repaired, nor is it the appropriate procedure to compensate those that have a Recalled Vehicle that has been repaired. I agree with the Ontario Superior Court's conclusion in *Coles v. FCA Canada Inc*., 2022 ONSC 5575 at para. 157, where a class action arising from an airbag recall campaign was not certified, in part, because the existing recall campaign was the more fair, efficient and manageable procedure.

[90] In *Maginnis v FCA Canada Inc.*, 2021 ONSC 3897 (Div Ct), the class action centred on emissions defeat devices installed in certain vehicles manufactured by FCA Canada. The central piece of evidence was the recall issued with respect to the vehicles containing the device. The motions judge dismissed the application for certification on the basis that a class proceeding was not a preferable procedure, given that there was no evidence that any individual in the proposed class suffered a compensable loss following the repair of the recalled vehicles. On appeal, Swinton J. affirmed that, in the circumstances of this case, it was not a palpable and overriding error for the motions judge to determine that the recall, on its own, was not sufficient to ground certification.

[91] In *Nissan*, the class action concerned a defective timing chain mechanism in the subject vehicles. The representative plaintiff, along with another individual, deposed to their personal experiences with their vehicles. He also provided an expert opinion on the defective mechanism and relied on technical service bulletins that had been created by Nissan to be sent to dealerships and to Transport Canada. The British Columbia Supreme Court certified the matter. The certification judge found that the combination of the representative plaintiff's evidence and the expert's evidence, alongside the service bulletins, provided a sufficient basis in fact for the claim. On appeal, Griffin J.A. commented as follows on the certification judge's reliance on the service bulletins, describing them as significant evidence:

> [142] I cannot conclude that the judge made a palpable and overriding error in finding that there was some basis in the evidence to support these issues being common to the class.
>
> [143] In this regard, the judge reviewed and gave weight to the evidence of Mr. Mueller and Mr. Mohan regarding the problems they experienced with their vehicles, [the expert witness's] affidavit regarding these problems being related to the timing chain mechanisms and the possibility these could cause catastrophic engine failure, and the TSBs [technical service bulletins] relating to the timing chain mechanisms.
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> …
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> [145] It is to be remembered that the scope of the class covers approximately 64,000 vehicles. If the evidence evolves to support subclasses because of differences in the timing chain mechanisms, that can be addressed later. The parameters of the class were determined by reference to the TSBs, all of which related to problems with the timing chain mechanisms. The TSBs were significant evidence which the judge was not wrong to consider.
>
> …
>
> [147] In short, I find no fault with the judge's conclusion that there was sufficient evidence to support the common issues certified by the judge concerning the existence of an engine defect.

[92] Lastly, in *Hyundai*, as mentioned, the class action centred around sunroofs installed in Hyundai vehicles. There were no recall notices. The representative plaintiff relied upon his affidavit evidence concerning the shattering of his sunroof and deposed to cases of 36 other individuals whose sunroofs had also spontaneously shattered. The plaintiff also had retained an expert who could not conclusively identify a cause for this phenomenon. This case, and its treatment of the evidence, is included here because it is instructive on the application of the some basis in fact test in the relatively narrow claim pursued in *Hyundai* compared to that in *Spring*, where a broad claim was asserted. The Court of Appeal commented on the difference between the matter before it, which involved a single defect, as compared to *Spring* with its numerous alleged defects (*Hyundai)*:

> [26] In the case of the sunroofs, while they do relate to six different models of Hyundai vehicles over a number of years, there is no suggestion in the record that there is any appreciable difference in the sunroofs from one model to the next or from one year to the next. Nor that the sunroofs were manufactured at different plants. Hyundai could have provided evidence on this point but did not. As noted in *N&C Transportation Ltd. v Navistar International Corporation*, 2018 BCCA 312 [*Navistar*] at para 102, leave to appeal to SCC refused, 38327 (28 March 2019), "[d]efendants to a products liability class action risk an unsatisfactory outcome if they take the position that different models defeat commonality without providing any information explaining how the products materially differ from each other".
>
> [27] This distinguishes the present case from that in *Spring*. In that case, the representative plaintiff sought certification of an action based on an alleged manufacturing defect in 51 different types of tires, manufactured at three different plants over a number of years. However, the only direct evidence of a defect was a recall notice that was limited to six types of tires manufactured within a 13-week period, and there existed no basis in the evidence to conclude that any defect in those six types would be common to the 51 types of tires, let alone extend beyond the 13-week period. Conversely, as noted by Mr. Engen, there is only one type of sunroof, presumably manufactured at the same plant, meaning it is possible to extrapolate from a defect found in one model in one year to other models and years in the class.

[93] As can be seen from the above canvass of the jurisprudence, there is authority for the proposition that a recall notice can provide some basis in fact for the requirements set out in s. 6(1)(b) to s. 6(1)(e) of the *CAA*. However, none of the decisions identified by the parties, or located from the Court's own research, approached the breadth of the claim in the matter at hand. Whether the information contained in a recall notice or similar document constitutes some basis in fact for the evidence-based certification considerations in s. 6(1) of the *CAA* will depend on the circumstances, including the other evidence filed.

[94] Here, the recall notices, standing on their own, provided evidence that could assist in satisfying the some basis in fact test regarding the following:

(a) the existence of defects;

(b) the vehicles that were the subject of the recalls;

(c) the nature of the defects;

(d) some of the risks associated with the defects; and

(e) the action undertaken by the party issuing the recall notices to remedy the defects.

However, the recall notices did not set out any evidence that the defects were irreparable or that the remedial action undertaken by FCA was not complete and effective: i.e., that the defects persisted despite the repairs. There is no evidence of any interrelatedness of the defects from one recall notice to another. They also did not contain evidence about the dangers presented by the defects, did not provide any information that any motor vehicle accident had happened as a result of the defects, and did not address whether any personal injury had occurred. Overall, they did not provide any evidence that a compensable loss had been suffered.

[95] The Chambers judge was cognizant of the use to which the evidence of the recalls could be put. He provided exceptionally detailed descriptions of each of the recalls and demonstrated, by his reasons, that he took that evidence into account when considering the evidence-based considerations. He was also aware of its limitations, as illustrated by the following excerpt from the *Chambers Decision*:

> [49] Before turning to the defence evidence, I think it important to note that, outside of the actual Recalls, the plaintiff presented no independent evidence about the nature or quality of the defects referenced in the Recalls. In particular, the plaintiff presented no expert evidence about: (1) the severity of the risks associated with the defects; (2) the standard of care expected of a vehicle manufacturer in the design of motor vehicles; or (3) the manner in which a defect could result in damage to the vehicle or other operational problems that is likely to cause property damage or personal injury.
>
> …
>
> [157] As for the remaining proposed common issues, I find they are framed in terms that are so broad they would inevitably prevent the litigation from being conducted, as a class action, in a fair and efficient manner. The only common thread running through these proposed common issues is that the Class Vehicles were subject to the Recalls. This common thread says nothing about the disparate nature and circumstances associated with the safety defects to which the Recalls pertain. It must be remembered that the Recalls covered 11 safety defects, involving 22 different Class Vehicles with different model years. In this context, it cannot be said that this common thread demonstrates any common issues that will help to resolve the claim.
>
> [158] It is difficult, if not impossible, to meaningfully connect the circumstances associated with one recalled defect to those of another. For example, a finding that negligent design led to a mirror wiring defect in a 2013 Jeep Grand Cherokee will not help in determining whether negligent design also led to tie rod defects in a 2012 Dodge Ram. Similarly, the circumstances associated with a possible failure to warn about braking defects in a 2015 Chrysler 200 says nothing about an alleged failure to warn about airbag defects in a 2003 Jeep Liberty. The comparison between defects becomes even more troublesome where the defect is singularly attributable to the actions of a third-party supplier.
>
> …

> [181] The most obvious problem with the case against FCA, as described, is that it is entirely premised on the defects and service campaigns for which FCA gave notice in the Recalls. On this point, I acknowledge plaintiff's counsel vigorous assertion, in oral argument, that the Recalls amounted to "indicia of negligence". While this may be so, such indicia do not amount to proof, on the balance of probabilities, that FCA failed to observe the requisite standard of care in the manufacture and design of its vehicles, or that it breached any of the applicable statutory warranties. The indicia may amount to some basis in fact to support one of the evidence-based certification requirements. Beyond that, I am not persuaded that the Recalls afford proof of liability.

[96] While the Chambers judge's comments at paragraph 181 were delivered in his analysis of the summary judgment application, they are illustrative of the view he took of the evidentiary value of the recall notices and the relationship to the some basis in fact requirement. In the circumstances of this matter, taking into account my analysis contained in the next section of these reasons, there is no room for appellate interference in the Chambers judge's treatment of the evidence contained in the recall notices. He took the evidence from the notices into account in his examination of the matter as a whole and gave it the weight which he decided was appropriate. He did not commit a palpable and overriding error in doing so.

F. Common issues

[97] Having narrowed the causes of action to negligence, which is alleged to have caused personal injury, and claims under consumer protection legislation, the Chambers judge concluded as follows regarding the presence of suitable common issues (some repetition here for ease of reference):

> [157] As for the remaining proposed common issues, I find they are framed in terms that are so broad they would inevitably prevent the litigation from being conducted, as a class action, in a fair and efficient manner. The only common thread running through these proposed common issues is that the Class Vehicles were subject to the Recalls. This common thread says nothing about the disparate nature and circumstances associated with the safety defects to which the Recalls pertain. It must be remembered that the Recalls covered 11 safety defects, involving 22 different Class Vehicles with different model years. In this context, it cannot be said that this common thread demonstrates any common issues that will help to resolve the claim.
>
> [158] It is difficult, if not impossible, to meaningfully connect the circumstances associated with one recalled defect to those of another. For example, a finding that negligent design led to a mirror wiring defect in a 2013 Jeep Grand Cherokee will not help in determining whether negligent design also led to tie rod defects in a 2012 Dodge Ram. Similarly, the circumstances associated with a possible failure to warn about braking defects in a 2015 Chrysler 200 says nothing about an alleged failure to warn about airbag defects in a 2003 Jeep Liberty. The comparison between defects becomes even more troublesome where the defect is singularly attributable to the actions of a third-party supplier.

> [159] Turning to another aspect of commonality, I note that the plaintiff also relied, at least in part, on the order of the NHTSA [US National Highway Traffic Safety Administration] to support her contention on the proposed common issues. As I understood this submission, the plaintiff suggested that the consent order between the NHTSA and FCA US amounted to some basis in fact for commonality – a submission with which FCA strenuously disagreed.
>
> [160] In my view, the plaintiff's argument on this point is so absurd that it borders on the risible. As I observed in the recital of evidence, the consent order in the United States has no probative value for any of the certification requirements in this action. The order did not assign any fault or make any liability findings for the presence of the defects noticed in the NHTSA recalls. While it is true that FCA US admitted fault for its failure to comply with the applicable timelines in effecting repairs, there is no similar assignment of blame or admission of fault for the Recalls in Canada. As such, the consent order has no significance to this action, either in the certification requirements or on the merits of the action itself.
>
> [161] In the result, I am not satisfied that any of the proposed common issues can be certified under s. 6(1)(c) of the *CAA*. In saying this, I accept that the Court has found that the plaintiff's claim discloses two causes of action, namely, for negligence leading to personal injury and breach of the *CPBPA* [*Consumer Protection and Business Practices Act*]. Based on these two causes of action, it is conceivable that proper common issues could be proposed, but only if they pertain to a single defect that caused personal injury or supported a claim for damages under s. 28 of the *CPBPA*, or an equivalent provision of another consumer protection statute. No such common issue has been proposed and I think it would be inappropriate for the Court, on its own accord, to propose one.

[98] Ms. Kane argues that the Chambers judge erred by finding that the common issues lacked commonality and in determining that certification can only be granted if a claim relates to a single defect. She asserts that the common issues were drafted so that they could be answered for each separate defect and that they did not require a single answer that applied to all defects. Ms. Kane points out that the first proposed common question was, "Do some or all of the Subject Vehicles contain the defects as outlined in the Transport Canada Recalls (the "Recalls")? If so, which ones?" She acknowledges that if the answer were yes to this first question for each vehicle, this could result in as many as 177 common issues, but she argues there is no principled basis for why common issues have to be simple or limited in number. Ms. Kane observes that having more issues resolved in one trial, as opposed to fewer issues in each of several trials, is one of the fundamental purposes of the class action process. In her view, nuanced determinations were possible, which would allow for different answers for different defects or different vehicle models. She rhetorically asks that, if a claim involving one vehicle with one defect could be certifiable, why would a manufacturer who creates numerous defects escape certification?

[99] In response, FCA asserts that Ms. Kane failed to meet the evidentiary burden in relation to the common issues requirement. It further argues that the proposed common issues were overly broad and vague and that the general nature of the proposed questions provide only a superficial appearance of commonality, which would have inevitably broken down into individual questions. It states that the recalls involved 24 separate models, spanning 20 model years, with no single vehicle being subject to all the recalls. In sum, FCA submits that the Chambers judge made no palpable and overriding error in determining that the requirements of s. 6(1)(c) of the *CAA* were not satisfied.

[100] The term *common issues* is defined in the *CAA* as follows:

> **Interpretation**
> **2** In this Act …
>
> **"common issues"** means:
>
> (a) common but not necessarily identical issues of fact; or
>
> (b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts … .

[101] Recently, in *CA-MacInnis*, this Court described the need for clarity and the overall goals to be served through the proper drafting of common issues:

> [53] … The requirement for clarity in a common issue as to the existence of risks arising from the ordinary use of a product results from the purpose of common issues. The following was noted by Rothstein J. in *Pro-Sys*:
>
> > [106] The commonality requirement has been described as "[t]he central notion of a class proceeding" (M.A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at p. 3-34.6). It is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings" (*ibid*).
>
> [54] In order to achieve this goal, the law requires that a common issue be common to all claims and that its resolution will advance the litigation for (or against) the class or, as applicable, subclass: [references omitted]. In *Western Canadian Shopping Centres Inc. v Dutton*, 2001 SCC 46, [2001] 2 SCR 534 [*Dutton*], McLachlin C.J.C. summarized these principles as follows:
>
> > 39 … there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that

> common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action.
>
> 40 … with regard to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[55] These goals will only be served by a common issue if it is stated with sufficient particularity that it will produce a meaningful answer to a material question that must be addressed to decide the claim. Chief Justice McLachlin noted why this is so in *Rumley v British Columbia*, 2001 SCC 69, [2001] 3 SCR 184 [*Rumley*]:

> 29 … a court should avoid framing commonality between class members in overly broad terms. As I discussed in *Western Canadian Shopping Centres*, *supra*, at para. 39, the guiding question should be the practical one of "whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis". It would not serve the ends of either fairness or efficiency to certify an action on the basis of issues that are common only when stated in the most general terms. Inevitably such an action would ultimately break down into individual proceedings. That the suit had initially been certified as a class action could only make the proceeding less fair and less efficient.

[102] In the matter at hand, as in all certification applications, the putative plaintiff bears the evidentiary burden to establish the commonality of the proposed common issues. Section 6(1)(c) of the *CAA* obliged Ms. Kane to establish that the claims of the class members raise common issues. More specifically, she was required to provide some basis in fact of the following:

(a) the proposed common issues actually existed; and

(b) that they could be answered across the entire class.

For further discussion, see *Kuiper v Cook (Canada) Inc.*, 2020 ONSC 128 (Div Ct) at paras 28–36, 51 CPC (8th) 379), *Jensen v Samsung Electronics Co. Ltd.*, 2023 FCA 89 at paras 77–83, leave to appeal to SCC refused, 2024 CanLII 543, and *CA-Pederson* at para 80.

[103] The Chambers judge correctly identified these two points of law. In my view, contrary to Ms. Kane's argument, he did not go on to make any palpable and overriding errors in applying them. It was open to him to find that the remaining common questions were framed in terms that were so broad that they would "inevitably prevent the litigation from being conducted, as a class action, in a fair and efficient manner" (*Chambers Decision* at para 157). He found that there was

only one common thread in that the vehicles were all subject to recalls, and, obviously, they were all FCA Canada vehicles. There was no meaningful connection among the owners or the lessees, their personal circumstances, the type of defects, or the various models. The recall notices, in conjunction with the affidavit evidence, did not provide any evidence in this regard. As conceded by Ms. Kane, answering the common issues could involve examining as many as 177 different issues. While the number of issues on its own is not determinative, it is illustrative of the breadth of the field that this class action claim attempted to cover.

[104] Ms. Kane failed to establish some basis in fact that the proposed common issues existed or that they could be answered across the entire class. Reading the reasons as a whole demonstrates that the Chambers judge did not demand independent evidence, but sufficient evidence was necessary for him to be satisfied that it met the some basis in fact requirement for commonality.

[105] Ms. Kane did not provide evidence of any collision, property damage, or personal injury related to any of the defects. The recall notices contained no information to that effect. There was evidence that the recalls existed, that remediation had been undertaken, and that the five persons who provided affidavits in support of certification had received the recommended repairs, free of charge, under three of the recalls, but there were no expert opinions about the dangers posed by the defects or the inadequacy of the repairs or the recall process. Four out of the five owners of the vehicles who provided an affidavit continued to drive their vehicles, with the fifth trading hers in for a newer model of the same type of vehicle. There was no evidence of any commonality or connection among the vehicles or among the defects, other than the fact that they all involved FCA vehicles. On the other hand, FCA provided evidence that the recalls and repairs were completed years ago in a successful and effective manner and that Transport Canada took no issue with FCA's actions in resolving the problems. This evidence from FCA was not subject to a response by Ms. Kane.

[106] As acknowledged by Ms. Kane, there was no single proposed common issue that covered more than one defect or more than one vehicle without being broken down into a series of separate sub-questions. There was no proposed common issue that encompasses the entirety of the proposed class without being subdivided under the umbrella of a very general and broad issue. While the inquiry at this stage does not engage the merits of the action, a court must be satisfied that

commonality exists and that common issues could be answered across the entire class. Certification judges must exercise caution in the face of the type of overreach and breadth of claim seen here: see *Ernewein v General Motors*, 2005 BCCA 540, 260 DLR (4th) 488, leave to appeal to SCC refused, 2006 CanLII 8858, *Kett v Mitsubishi Materials Corporation*, 2020 BCSC 1879, and *Spring*.

[107] Contrary to Ms. Kane's assertion, the Chambers judge did not determine that certification could only be granted if a claim related to a single defect or a single vehicle. Indeed, he opined that, theoretically, a claim covering a single defect or a single model of vehicle might be certifiable but, reading his decision as a whole, reveals that he was not under the impression that a claim could only be certified if it were grounded in that way. I am satisfied that he was alert to the applicable legal principles and applied them to the evidence before him. To repeat, the proposed common issues, as structured, would have required separate answers to a myriad of separate questions, which had no meaningful relationship to each other. This was not a case of providing nuanced answers to common questions. To the contrary, there is no single proposed common issue that did not devolve into a series of unrelated subissues. Instead, it was the overbreadth and grouping together of disparate issues that were fatal to the common issues criterion.

[108] It was open to the Chambers judge, after applying the some basis in fact standard to the evidence, to find that Ms. Kane had not proposed suitable common issues and, consequently, that none of her proposed common issues could be certified under s. 6(1)(c) of the *CAA*. I see no palpable and overriding error on the part of the Chambers judge.

G. Proposing common issues or asking for further submissions

[109] Ms. Kane asserts that the Chambers judge erred by denying certification without attempting to craft his own set of common issues or without seeking further submissions on the modification of the common issues. In response, FCA argues that the Chambers judge was not required to "join cause with the Appellant and deconstruct and attempt to reassemble the case for her". It submits that the repairs needed here required wholesale changes, which the Chambers judge properly declined to undertake.

[110] This Court has recently examined the obligation of a certification judge, on their own motion, to modify the common issues or request further submissions from the parties as to whether or how they should be modified. In *CA-MacInnis*, the Court described this aspect of a certification decision in the following terms:

> [65] It is clear that a certification judge has the authority to modify proposed common issues in some circumstances. However, that authority is not unfettered. There is, among other things, support for the proposition that this discretion must be "exercised with caution and restraint and should be the exception rather than the norm" when it fundamentally alters the proposed common issues (*McCracken v Canadian National Railway*, 2012 ONCA 445 at para 144, 293 OAC 274 [*McCracken*]). The following discussion by Richards J.A. (as he then was) in *Alves v First Choice Canada Inc.*, 2011 SKCA 118, 342 DLR (4th) 427, leave to appeal to SCC refused, 2012 CanLII 22165 [*Alves*], illuminates the role of a certification judge when the certification material, including the formulation of the proposed common issues, is deficient:
>
> > [31] Speaking generally, it is obviously not acceptable to simply assume a court will, on its own initiative, repair the problems found to exist in the certification application. A court must operate with an eye to satisfying the objectives of the [*CAA*] and with sufficient flexibility to ensure that justice is done. It must also be sensitive to the reality that new facts and insights into claims can emerge during the certification process as affidavits are filed and arguments are sharpened. Reasonably liberal efforts should be made to accommodate such developments by way of amendments to the pleadings, adjustments to common issues and otherwise. Sometimes the judge or court might have suggestions or thoughts about how best to proceed. However, all of that said, counsel have an obligation to do more than place the raw ingredients of a class action before the court and then expect the court itself to construct a viable proceeding. This is especially so at the appellate level.
> >
> > [32] There are no bright lines in any of this. Each case will have its own dynamics. But, while avoiding an unreasonably rigid approach to the certification process and appreciating its somewhat evolving nature, a judge or a court must nonetheless avoid being inappropriately conscripted into the role of ongoing assistant to one side or the other of the litigation.
>
> [66] This passage reflects the tension between the liberal approach taken by courts to certification applications on the one hand and the need to impose obligations on representative plaintiffs on the other, which results from the fact that certification applications, while procedural, are also an important aspect of, and a common battle ground in, an adversarial process. The same tension, and the resulting need to strike a balance between these different interests, is reflected in the following description of the discretionary authority of a certification judge to amend the common issues proposed by an applicant (The Honourable Mr. Justice Ward K. Branch and Mathew P. Good, *Class Actions in Canada*, loose-leaf (Rel No 2, May 2022) 2d ed (Toronto: Thomson Reuters, 2019) at §4:8):
>
> > When certifying the action, the court has some discretion to redefine the common issues proposed by the representative plaintiff. That said, litigants are entitled to a fair process on certification motions – particularly

> as a certification judge's conclusions are not easily set aside on appeal. Unless the modification made by the judge is a "distinction without a difference", the parties ought to have the opportunity to address any proposed alterations before judgment is rendered.
>
> (Footnotes omitted)

> [67] Wholesale changes to the wording of proposed common issues by a certification judge raise issues of fairness to both parties. While such concerns might be addressed by seeking additional submissions before a final determination is made as to whether or how they should be modified, a certification judge must, as noted in *Alves*, "avoid being inappropriately conscripted into the role of ongoing assistant to one side or the other of the litigation" (at para 32).

[111] In the matter at hand, the Chambers judge considered whether he could make any modifications but concluded that he could not do so:

> [161] In the result, I am not satisfied that any of the proposed common issues can be certified under s. 6(1)(c) of the *CAA*. In saying this, I accept that the Court has found that the plaintiff's claim discloses two causes of action, namely, for negligence leading to personal injury and breach of the *CPBPA*. Based on these two causes of action, it is conceivable that proper common issues could be proposed, but only if they pertain to a single defect that caused personal injury or supported a claim for damages under s. 28 of the *CPBPA*, or an equivalent provision of another consumer protection statute. No such common issue has been proposed and I think it would be inappropriate for the Court, on its own accord, to propose one.
>
> …
>
> [188] While the Court is dismissing the application for certification, it is not foreclosing the possibility that it could be renewed through a substantially amended claim that gives regard to the concerns and issues addressed in this decision. In my view, it is not necessary for the Court to grant leave to renew the application. Rather, the Court will simply address it, *if and when* the time comes for it to do so.
>
> (Emphasis in original)

[112] After the Chambers judge's analysis of the pleaded causes of action had been completed, only two causes of action remained, with the scope of the negligence claim being significantly restricted and the remedy under consumer protection legislation also noted as being limited. This left Ms. Kane's claim fundamentally altered as a result of the Chambers judge's findings regarding the viable causes of action. However, the proposed common issues still covered an astounding array of vehicles and defects. It would have been an enormous, time-intensive task for the Chambers judge to determine what the common questions should have been. It is difficult to imagine the basis on which the Chambers judge could have hived off one defect or collection of defects or one model or group of models in order to craft a set of common questions. Put simply, Ms. Kane's argument was akin to placing the raw material for her proposed class action before the

Chambers judge with the expectation that he would construct a viable proceeding. It was not his role to re-engineer the common issues. That task falls to Ms. Kane, if she wishes to do so. As noted in the excerpt above, Ms. Kane was given leave to substantially amend her claim and renew her application so that she, or a substituted representative plaintiff, will have that opportunity. In these circumstances, I find no reversible error.

H. Representative plaintiff

[113] Having reached the conclusions that I have regarding the absence of errors, there is no room to interfere with the Chambers judge's determination that Ms. Kane could not continue as the representative plaintiff. She would not be a member of any identifiable class and would have no meaningful common interest with any other members of the class.

VI. CONCLUSION

[114] The appeal is dismissed.

[115] Taking into account general costs principles and s. 40 of the *CAA*, I determine that FCA shall have one set of costs for this appeal and one set of costs for the leave to appeal application, both calculated in the usual manner.

"Tholl J.A."

Tholl J.A.

I concur. "Jackson J.A."

Jackson J.A.

I concur. "Schwann J.A."

Schwann J.A.