

CITATION: Harris v. Bayerische Motoren Werke Aktiengesellschaft, 2020 ONSC 1647
COURT FILE NO.: CV-14-497479-00CP
DATE: 2020/04/02

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:	)	
	)	
PETER SCOTT HARRIS	)	<i>Kathryn Podrebarac, Margaret L. Waddell</i>
Plaintiff	)	and <i>Tina Q. Yang</i> for the Plaintiff
	)	
- and -	)	
	)	
BAYERISCHE MOTOREN WERKE	)	
AKTIENGESELLSCHAFT and BMW	)	
CANADA INC.	)	<i>Peter J. Pliszka and Kimberly E. Potter</i> for
Defendants	)	the Defendants
	)	
Proceeding under the <i>Class Proceedings</i>	)	HEARD: March 4-6, 2020
<i>Act, 1992</i>	)	

PERELL, J.

REASONS FOR DECISION

Hamlet: Madam, how like you this play?
Queen: The lady doth protest too much, methinks.
[Shakespeare, *Hamlet*, Act 3, scene 2, 222–230]

A. Introduction

[1] Pursuant to the *Class Proceedings Act, 1992*,¹ the Plaintiff, Peter Scott Harris, sues Bayerische Motoren Werke Aktiengesellschaft and BMW Canada Inc. (collectively “BMW”). The action is on behalf of all persons or entities in Canada who are or were owners or lessees of certain Mini Cooper vehicles. Mr. Harris alleges that the vehicles had two safety risks arising from a defective power steering system. He alleges that the defective power steering system can: (a) cause a dangerous loss of power steering; or (b) a car fire. Mr. Harris brings a motion to have his action certified as a class action.

[2] BMW admits that its power steering system was defective for a period of time and that the power steering could fail, but it denies that a loss of power steering is dangerous. It asserts about

¹ S.O. 1992, c. 6.

a dozen reasons that there is no basis in fact for Mr. Harris' allegation that a loss of power steering is dangerous. Further, although BMW admits that there was a period of time when its power steering system would cause localized smoldering in the engine compartment, it denies that the defective power steering system causes car fires. BMW provides about a half-dozen reasons that there is no basis in fact for the fire allegation.

[3] Methinks BMW protests too much about the absence of some basis in facts for Mr. Harris' allegations. BMW may have a defence on the merits to Mr. Harris's proposed class action, but Mr. Harris has a viable cause of action, the first certification criterion, and he has - in surplus - bases in fact for the four other certification criteria.

[4] For the reasons that follow, the certification motion is granted.

B. Procedural Background

[5] On January 30, 2014, Mr. Harris commenced his proposed class action by Notice of Action.

[6] On February 28, 2014, Mr. Harris filed his Statement of Claim.

[7] On July 4, 2014, the Defendants filed a Statement of Defence.

[8] Mr. Harris did not file a Reply, and the action languished for four years until the summer of 2018.

[9] On August 29, 2018, Mr. Harris delivered a Fresh as Amended Statement of Claim.

[10] On December 4, 2018, Mr. Harris served his Motion Record for Certification (1,252 pages). The motion was supported by the following:

- a. Mr. Harris' affidavit dated November 27, 2018. Mr. Harris is a professional electrical engineer. He is the owner of a Model Year 2003 Mini Cooper R50, which he purchased new on December 27, 2002 from an authorized Mini Cooper dealer in Ottawa.
- b. The affidavit of **Brian James**, P.Eng. dated October 5, 2018. Mr. James of the City of Pickering, Ontario is a professional mechanical engineer certified as a Vehicle Fire Investigator. He was retained by Class Counsel to provide an expert opinion for the certification motion for the proposed class action.
- c. The affidavit of Dr. **John Otto Phillips** dated November 23, 2018. Dr. Phillips is an associate of the law firm Waddell Phillips Professional Corporation co-counsel with Podrebarac Barristers Professional Corporation, lawyers of record and proposed Class Counsel.
- d. The affidavit of **Nicholas Tkach** of the City of Toronto dated November 21, 2018. Mr. Tkach's father bought him a 2005 Mini COOPER, Series R50 from a dealership in Toronto.

[11] On June 6, 2019, BMW served a Responding Motion Record for the certification motion. That record includes a Fresh as Amended Statement of Defence dated June 3, 2019. The Responding Record included the affidavit dated June 6, 2019 of **Gordon Farrish**. Mr. Farrish is the Senior Safety and Environmental Compliance Manager at BMW Canada Inc. and served in that position since 2005.

[12] In its Fresh as Amended Statement of Defence, BMW pleads that there was a possibility that some Mini Cooper vehicles, those falling within a circumscribed manufacturing date range, could potentially experience a loss of the power steering assist that would make the power steering unavailable. (Mr. Harris defines the affected vehicles more broadly than would BMW.)

[13] In its Statement of Defence, BMW pleads that if the power steering failed, a motorist would be able to maintain steering control because the vehicle would revert to a manual steering mode. It denies that the failure of the power steering is an unreasonable risk to safety. BMW denies that there is any fire risk or an unreasonable risk to safety.

[14] In the summer of 2019, Mr. Harris delivered a Supplementary Motion Record containing the affidavit of Dr. **Alan Bannack** dated July 4, 2019. Dr. Bannack was the registered owner of a 2008 Mini Cooper 2-door convertible that he purchased as a used vehicle in July 2010.

[15] On August 23, 2019, BMW delivered a Supplementary Responding Motion Record (16 pages) containing the affidavit of Mr. Farrish dated August 23, 2019.

[16] On October 10, 2019, by way of a preliminary motion in the certification motion, BMW brought a motion to strike out certain paragraphs from Dr. Phillips affidavit dated November 27, 2018. I granted the motion.²

[17] On October 10, 2019, Mr. Harris brought a motion to inspect certain documents in BMW's Fresh as Amended Statement of Defence. The motion was dismissed.³

[18] On November 27, 2019, Mr. Harris delivered an Amended Motion Record (846 pages) containing the November 27, 2018 affidavit of Mr. Harris, the October 5, 2018 affidavit of Mr. James, the November 21, 2018 affidavit of Mr. Tkach and a replacement affidavit from Dr. Phillips dated November 5, 2019.

[19] On November 29, 2019, Mr. Harris was cross-examined.

[20] On December 4, 2019, Mr. James and Mr. Farrish were cross-examined.

[21] On January 13, 2020, Mr. Harris delivered an Amended Supplementary Motion Record (394 pages) with a Fresh Notice of Motion.

[22] On February 21, 2020, BMW delivered an Undertakings Brief (88 pages).

[23] The class definition is as follows:

All persons or entities in Canada who are or were owners or lessees of:

(i) a 2002, 2003, 2004, 2005 or 2006 model year Mini Cooper or Mini Cooper S; or

(ii) a 2005, 2006, 2007 or 2008 model year Mini Cooper Convertible or Mini Cooper S Convertible,

(collectively, the "Class Cars"), and their estates, executors, successors or assigns.

[24] The plaintiffs proposed common issues are:

(1) Were the Class Cars designed and manufactured by Bayerische Motoren Werke Aktiengesellschaft ("BMW AG") with one or more design or manufacturing defects that can cause

² *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5967.

³ *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, 2019 ONSC 5958.

the loss of power steering assist, engine component melting or smouldering, and/or a vehicle fire (a “Defect”)?

(2) If the answer to Common Issue #1 is yes, is any such Defect dangerous and/or does any such Defect render the Class Cars unfit for their intended purpose?

(3) If the answer to Common Issue #2 is yes, when did the Defendants know or ought they to have known of the dangerous Defect(s)?

(4) Did BMW AG owe a duty of care to the Class Members with respect to the design, manufacturing, and/or testing of the Class Cars?

(5) If so, did BMW AG breach the standard of care owed to Class Members in respect of the design, manufacturing, and/or testing of the Class Cars?

(6) Did BMW Canada, Inc. (“BMW Canada”) owe a duty of care to the Class Members with respect to the distribution of the Class Cars?

(7) If so, did BMW Canada breach the standard of care owed to the Class Members by distributing the Class Cars containing a dangerous Defect?

(8) Did the defendants, or either one thereof, owe a duty of care to (i) warn the Class Members of the dangerous Defect(s), and/or (ii) to recall and repair the Class Cars?

(9) If so, did either or both of the defendants breach the relevant standard of care by (i) failing to warn the Class Members of the dangerous Defect(s), and/or (ii) failing to recall and repair the Class Cars?

(10) Can the Class Members assert a claim for pure economic loss, including the cost of repairs to the Class Cars, and diminution in value of the Class Cars?

(11) If the answer to Common Issue #10 is yes, what is the cost to repair the defect?

(12) Can the Class Members elect to waive the tort and seek disgorgement of the profits earned by the Defendants on the Class Cars? If so, what is the amount of such profit?

(13) Does the conduct of the Defendants warrant an award of punitive damages? If so, in what amount?

C. Facts

1. BMW and its North American Safety Regulators

[25] Transport Canada is the safety regulator of motor vehicles in Canada. The National Highway Traffic Safety Administration (“NHTSA”) is the safety regulator in the United States.

[26] Bayerische Motoren Werke Aktiengesellschaft (“BMW”) is a corporation incorporated under the laws of the Federal Republic of Germany. Since 2000, its subsidiary, BMW AG has designed, tested, and manufactured vehicles under the “Mini Cooper” brand. BMW Canada, another BMW subsidiary, distributes the vehicles to authorized retailers in Canada. BMW North America distributes the same vehicles in the U.S.

[27] The Mini Cooper vehicles distributed in Canada and the U.S. are manufactured by BMW AG at the same facilities and to the same specifications with respect to the electrical systems, power steering pump assembly, and fans that are the subject matter of this proceeding.

[28] The Mini Cooper Class Cars are all equipped with EHPS (electro-hydraulic power steering systems) components. Vehicles equipped with this power steering system require less load force or effort to turn the steering wheel than vehicles with manual steering. A failure of the power steering assist function causes the vehicle to revert to manual steering.

[29] The NHTSA publishes consumer complaints online. On August 17, 2004, the first complaint concerning the Mini Cooper power steering system was posted. Hundreds of complaints about the power steering system were subsequently posted.

[30] In April 2007, after receiving a complaint of fire or smoke from the power steering system of the 2002-2003 Mini Cooper, NHTSA's Office of Defect Investigations ("ODI") opened a Preliminary Evaluation file. (PE 07-22), which was upgraded to an Engineering Analysis (EA-07-011) in August 2007.

[31] A year later in August 2008, NHTSA closed PE 07-22 and EA-07-011.

[32] In September 2010, after receiving a complaint of alleged loss of power steering due a failure of the power steering system in 2004-205 Mini Cooper vehicles, NHTSA opened a Preliminary Evaluation file (PE 10-038) and it asked for information from BMW.

[33] In December 2010, BMW responds to NHTSA's inquiries.

[34] In May-Sept 2011, NHTSA upgrades (PE 10-038) to Engineering Analysis EA-11-055 and requests and receives more information from BMW. BMW discloses that it had received 803 reports regarding power steering problems and 19 reports of fire

[35] In July 2011, Transport Canada, which had been communicating with NHTSA, opens a Level 3 Defect Investigation File (File 3280-3-50) about complaints of loss of power steering, and Transport Canada requests information from BMW Canada.

[36] On July 4, 2011, Transport Canada shared with BMW the 12 complaints about power steering loss that it had received. Four of those complaints included smoke or fire associated with the power steering failure.

[37] In Log Number 2009-0445, Transport Canada reported that the owner of a 2003 MINI Cooper sedan parked her vehicle, turned off the ignition, and observed white smoke billowing from the hood. Transport Canada inspected the car, and it observed: a distinct smell of burning in the engine compartment; blackening on the left side of the engine compartment; the power steering pump and the wires leading to it were burnt and melted; the fuse box had been discoloured; the harness containing the signal control wires for the pump was damaged; the electrical connectors to the pump were destroyed; the power steering high pressure line was damaged. Transport Canada concluded that there had been a thermal event electrical in nature. It was possible that the pump motor was running continuously due to a short circuit within the pump unit, and it is possible that this same fault caused the thermal event. Transport Canada concluded that the damage to the power steering high-pressure line could have resulted in the complete loss of power assist and the possibility of further fire from the fluid leaking from the high-pressure line.

[38] In August 2011, BMW Canada responded to Transport Canada's request for information and advises that it has received 63 consumer complaints about the power steering system. BMW advised Transport Canada that there was the possibility that certain vehicles could lose power steering. (In its answers to undertakings, BMW admits that, since then, it has received 21 additional complaints.) The affected vehicles were:

- a. 2002-2005 Mini Cooper/Cooper-S-Hatch assembled December 17, 2001 to February 9, 2005
- b. 2005 Mini Cooper/Cooper-S-Convertible assembled February 19, 2004-February 9, 2005.

[39] BMW Canada reported to Transport Canada, that there were three potential causes for the loss of the power steering assist function in these vehicles:

- First, the ground cable of the power steering pump on some of the vehicles did not have a sufficient seal at its attachment point to the vehicle chassis. There was potential for water to travel along the power steering pump power cable and come into contact with the power steering pump power cable connector. If that were to occur, the connector could become corroded, and a high thermal load condition could occur, which could result in localized smoldering at the power steering pump, pump connector, and associated wiring.
- Second, the power steering pump cooling fan in some of the vehicles shared a common electrical circuit protection (fuse) with the auxiliary engine cooling fan. Internal corrosion or external blockage of the pump cooling fan could cause the common circuit fuse to blow, which could lead to reduced power steering assist, or possibly to an eventual loss of power steering assist function if the vehicle was operated for extended periods at high ambient temperatures,
- Third, certain vehicles were equipped with a power steering pump that contained incorrect EEPROM/MOSFET electronics, which could result in temporary or permanent loss of the power steering assist function. A "checksum" error in the EEPROM electronics had the potential to prevent the power steering pump from functioning at the start of the driving cycle. Certain problems in the MOSFET electronics could lead to continuous running of the power steering pump and loss of power assist during the driving cycle.

[40] BMW Canada advised Transport Canada that it did not assess the loss of power steering as an unreasonable risk to motor vehicle safety, because in the event of the loss of power steering, the driver would still be able to maintain steering control in manual steering mode. Further, BMW Canada advised Transport Canada that the potential for localized smoldering in the area of the power steering system did not pose an unreasonable risk to motor vehicle safety.

[41] Transport Canada requested a meeting in Ottawa and the meeting occurred on December 7, 2011.



[42] At the meeting with BMW, Transport Canada discussed its finding from complaint No. 2011-1724. In this instance, after the power steering failed, a 2004 MINI veered into oncoming traffic in the opposite lane, as depicted in the photograph. Transport Canada indicated that if the oncoming car had not stopped, there would have been a head-on crash.

[43] In December 2011, BMW Canada corresponded with Transport Canada. BMW advised that although it did not view the power steering assist matter as posing an unreasonable risk to motor vehicle safety, it would voluntarily be implementing a

customer satisfaction initiative that would include an extended warranty.

[44] In December through February 2012, BMW Canada send Transport Canada draft copies of BMW's Notice of Defect and its draft customer notification letter. The Notice of Defect is in accordance with s. 10 (1) of the *Canadian Motor Vehicle Safety Act*.⁴

[45] On February 1, 2012, Transport Canada provided its comments to BMW's draft documents and it sent BMW Canada its draft of Recall Notice #2012029. The Recall was a notice that BMW Canada intended to post on its website. The Recall Notice included the following sentence, which was not included in BMW Canada's Notice of Defect or its customer notification letter: "A loss of steering power assist could result in a crash causing property damage and/or personal injury." Recall Notice #2012029 stated:

Population affected: 9,254

On certain vehicles, the electro-hydraulic power steering pump could fail temporarily or permanently due to problems with the electronics that control the function of the pump, a failure of the pump cooling fan, or a loss of power to the pump. A vehicle experiencing a loss of steering power assist would revert to a manual steering mode which would require greater effort driver effort, especially at low vehicle speeds. Nevertheless, a loss of power steering assist could ultimately result in a crash causing property damage and/or personal injury.

Correction: the electro-hydraulic power steering pump, as well as the pump cooling fan, will be subject to especially extended warranty coverage of 12 years or 200,000 km from first in-service date of the vehicle."

[46] BMW Canada objected to the draft of Transport Canada's proposed posting. BMW and Transport Canada then engaged in an exchange of email. In that exchange, Transport Canada advised BMW that Transport Canada's proposed wording was policy designed to promote uniformity and fairness among manufacturers with similar issues. Transport Canada stated that unless MMW could demonstrate that the potential consequences could not possibly happen, it would not change the language of the notice it intended to post on its website. Transport Canada

refused to change wording and explained that there were some drivers that may be incapable of steering a vehicle in manual steering mode. Transport Canada advised BMW that the sudden loss of power steering was a safety issue and it had an open investigation file.

[47] On March 29, 2012, BMW Canada sent Transport Canada the final version of the Notice of Defect and final version of the customer notification letter. The Notice of Defect stated:

RE: Consumer Notice/Extended Warranty Program – Electro-Hydraulic Power Steering Pump & Related Pump Cooling Fan

2002-2005 Mini Cooper Hatch, Cooper Convertible

Supplemental Notice

Dear Sir:

Please note that this notice supplements our initial notice of defect of January 30, 2012.

This notice is sent to you in accordance with the requirements of the *Canadian Motor Vehicle Safety Act* 10(1). Pursuant to MVSR 15(1) of the above, we submit the following information:

1. Manufacturer: Bayerische Motoren Werke AG (BMW AG)
Designated Agent: BMW Canada Inc.
[...]

2. Make: Mini

Model Year/Model Inclusive Dates of Manufacture:

2002-05 Mini Cooper Hatch Dec. 17, 2001 – Feb. 9, 2005

2005 Mini Cooper Convertible Feb. 19, 2004 – Feb. 9, 2005

3. The number of vehicles affected is 8, 619 as follows:

Model	Approximate Number Affected
Mini Cooper Hatch	8,195
Mini Cooper Convertible	424

[...]

5. The issue involves the electro-hydraulic power steering pump (EHPS) and associated pump cooling fan on the models identified above.

Affected vehicles are equipped with an EHPS that contains incorrect EEPROM/MOSFET electronics, which can result in temporary or permanent loss of power steering assist, either at the beginning of the driving cycle, or while the vehicle is being driven.

Also, the ground cable of the EHPS on some of the affected vehicles does not have a sufficient seal at its attachment point to the vehicle chassis. This can result in a water ingress condition. Water is then able to travel along the EHPS power cable and to come into contact with the EHPS power cable connector. The connector could then become corroded, and a high thermal load condition could occur. This ultimately could result in a localized smoldering condition at the EHPS, the EHPS connector, and associated wiring. If this condition occurs, there is a loss of power steering assist.

Additionally, some of the affected vehicles are equipped with an EHPS cooling fan that shares a common electrical circuit protection fuse with the auxiliary engine cooling fan. Internal corrosion or external blockage of the EHPS cooling fan may cause the common circuit fuse to blow, resulting in a loss of functionality of the EHPS cooling fan, which can lead to reduced power steering assist, and possibly to an eventual loss of power steering assist if the vehicle is operated for extended periods at high ambient temperatures.

In all instances of temporary or permanent loss of power steering assist outlined above, steering control can be maintained, as the vehicle will revert to a manual steering mode but will require greater driver effort especially at low vehicle speeds.

6. BMW became aware of this matter through its internal quality control analyses and processes.

[...]

This meeting with Transport Canada took place December 7, 2011. At this meeting BMW restated our position on this file, and the fact that we view this condition as customer satisfaction/quality related, and introduced a proposal to offer an extended warranty on the related vehicles/components.

On December 16, 2011, as a follow-up to the December 7th meeting with Transport Canada officials, BMW issued a letter to Transport Canada to formalize the extended warranty program proposal.

Transport Canada provided a written response to BMW on December 21, 2011 advising that BMW should move forward with the proposed extended warranty program, and related Notice of Defect.

7. BMW will implement a consumer notification initiative under which affected vehicles as outlined above will receive a special extended warranty coverage of 12 years/200,000 km from first registration. Under this special extended warranty program, vehicles that experience this condition will have the EHPS pump and/or EHPS pump cooling fan replaced. Affected vehicle owners will be notified of this special extended warranty program via notification letter mailing.

8. A copy of the related Service Information Bulletin is attached.

9. A copy of the owner notification letter is attached.

[...]

[48] In April 2012, the Customer Notification Letter was sent to 7694 owners/lessees, for which BMW Canada had names and addresses. BMW's Notification Letter stated:

March 2012

Consumer Notice: Electro-Hydraulic Power Steering Pump and Related Pump Cooling Fan, Warranty Coverage Extension

Dear Mini Owner:

This notice is sent to you in accordance with the requirements of the *Canada Motor Vehicle Safety Act*.

BMW AG has determined that a defect, as outlined below, exists in certain 2002 – 05 Mini Cooper Hatch and Cooper Convertible vehicles. Our records indicate that your vehicle may potentially be affected by the issue described below. As a result of, and in the interest of customer satisfaction, Mini is extending the warranty of the electro-hydraulic steering (EHPS) pump and associated EHPS cooling fan.

We have become aware that the electro-hydraulic power steering pump could fail temporarily or permanently on your vehicle due to either a problem with the electronics that control the function of the pump, or a mechanical failure of the pump cooling fan or pump power supply cable.

This condition could result in temporary or permanent loss of power steering assist. However, in all instances, steering control can be maintained, as the vehicle will revert to a manual steering mode, but will require greater effort especially at low vehicle speeds.

What You Should Do

- **If you experience a loss of power steering assist on your vehicle, please have your vehicle checked and serviced without delay at an authorized Mini Retailer.**
- **Should your vehicle experience a loss of power steering assist, and you do not feel comfortable driving your vehicle until you can have it checked and serviced by an authorized Mini Retainer, contact Mini Roadside Assistance at 1-866-DRV-Mini (378-6464) immediately to have your vehicle brought to the nearest Authorized Mini Retailer.**
- **Mini recommends that you always wear your safety belt, and that all passengers are properly seated and restrained at all times.**
- **If you are not the only driver of this vehicle, please advise all other drivers and passengers of this important information.**

Warranty Coverage Extension

Mini Canada is extending the warranty coverage of the electro-hydraulic power steering pump, and associated pump cooling fan for a period of 12 years/200,000 km. This 12 years/200,000 km coverage starts at the first in-service date of the vehicle, and Mini will cover all necessary repair costs related to this issue.

If you are no longer the owner of this vehicle and have knowledge of the name and address of the new owner, we would appreciate you furnishing this information to Mini Canada by calling the toll-free telephone number noted below:

If you are a lessor of this vehicle, you must forward this notice to your lessee.

We sincerely apologize for any inconvenience. We hope that this extended warranty reassures you that Mini stands behind its products and its customers. Mini is committed to maintaining the highest level of automotive excellence.

Should you have any questions, please contact Mini Customer Service at the following phone number or email address: [...]

Very truly yours,

Mini Canada

[49] In May 2013, in the United States, BMW NA launched an extended warranty campaign relating to the power steering pump issue in the Mini Cooper vehicles. It offered a 13 year/150,000-mile extended warranty coverage.

[50] On January 30, 2014, Mr. Harris commenced his proposed class action.

[51] In May-August 2015, the NHTSA requested and BMW information with respect to EA 11-005.

[52] In September 28, 2015, NHTSA informed BMW NA that a safety recall was a more

appropriate measure than BMW's extended warranty program.

[53] BMW NA's position, however, was that a recall was not called for but, it says, out of deference to the American industry regulator, it agreed to conduct a recall of the affected vehicles in the U.S.

[54] On October BMW NA files Part 573 Recall Report notifying NHTSA that it will conduct a safety recall covering MY 2002-2005 MINI Cooper S, and MY 2005 MINI Cooper/Cooper S convertible manufactured through Feb 9, 2005. The Recall Report states:

Description of the Defect: On approximately 86,018 vehicles that have not previously received an appropriate repair, the electro-hydraulic power steering system may experience temporary or permanent loss of assistance due to manufacturing and field exposure issues

Description of Safety Risk: If there were a temporary or a permanent loss of the power steering assist function manual steering capability would be retained, however, greater steering effort would be required. This may increase the potential loss of vehicle control.

[55] In NHTSA's letter to BMW North America acknowledging receipt of BMW's notice of intention to conduct a safety recall, NHTSA described the consequence of the problem as follows: "If the vehicle experiences a loss of power assist, extra steering effort will be required at lower speeds, potentially increasing the risk of a vehicle crash.

[56] On January 5, 2016, the NHTSA closes EA-11-005 in light of the Recall in the United States. The ODI [Office of Defect Investigation] Resume described the results of its Engineering Analysis, in part, as follows:

ODI identified 20 reports describing crashes consistent with a loss of power assist possibly caused by failure of the Power Pack. Two reports alleged an injury however both were minor in nature and did not require emergency treatment (a subsequent doctor's visit occurred in one case). Ten of these reports described low speed crashes with minimal, or in most cases no property or vehicle damage (e.g. striking a movable barrier in a parking lot). [...]

[57] In March 2016, BMW sends a letter to Mini-Cooper owners and lessees in the United States: The letter states:

"BMW AG has decided that a defect, which relates to motor vehicle safety, exists in certain Model Year 2002-2005 MINI Cooper and Cooper S vehicles and certain Model Year MINI Cooper and Cooper S convertible vehicles."

DESCRIPTION OF PROBLEM:

This recall involves the electro-hydraulic power steering (EHPS) system. If your vehicle has not already received an appropriate repair, the electro-hydraulic power steering system may incur a temporary or permanent loss of assistance due to manufacturing and field exposure issues. If you experience a temporary or permanent loss of power steering assist function, manual steering capability would be retained, however greater steering effort would be required. This may increase the potential for a crash.

PRECAUTIONS FOR YOUR SAFETY

1. CONTACT YOUR AUTHORIZED MINI DEALER IMMEDIATELY TO HAVE THE NECESSARY FREE REPAIR PERFORMED AS SOON AS POSSIBLE [...]

Reimbursement plan attached

[58] Meanwhile in Canada, after the recall was initiated in the U.S., BMW Canada contacted Jean-Leon Morin, the Head of Recalls at Transport Canada. BMW Canada indicated that its views in Canada had not changed, and it did not intend to change the existing approach in Canada of an extended warranty program.

2. Mr. Harris' Mini-Cooper Misadventure

[59] In October 2010, the power steering system on his Mini-Cooper fails. He pays to replace the power steering pump.

3. Mr. Tkach's Mini-Cooper Misadventure

[60] Mr. Tkach's father purchased a Mini Cooper vehicle for Mr. Tkach. The vehicle is one the vehicles that is the subject of this class action.

[61] On August 9, 2013, while driving the vehicle, Mr. Tkach heard a whirring noise that did not stop when the ignition was off. While driving the vehicle he experienced a sudden, then erratic, loss of power steering assist, followed by the "check battery" light coming on. Mr. Tkach drove home and parked the vehicle in his driveway. A few minutes later the car burst into flames. The vehicle was destroyed. His home and the driveway were damaged by the fire. .

[62] In this class proceeding, Mr. Tkach's vehicle was examined by BMW's expert and by Mr. Harris' experts, Mr. James and Michelle Bradley. Mr. James delivered a preliminary expert report.

[63] For the purposes of the certification motion, BMW did not disclose its expert's findings.

[64] In his report, Mr. James concluded that the origin of the fire was the lower rear portion of the engine compartment, at the location of the power steering pump. He opined that the likely cause of the fire was a malfunction or failure of the control circuit or electrical connection at the power steering pump. He said that further destructive testing was required to determine the exact cause of the fire.

4. Dr. Banack's Mini-Cooper Misadventure

[65] Dr. Alan Banack owned a 2008 BMW MINI Cooper S 2-door convertible that he purchased, used, in July 2010.

[66] On September 17, 2017, Dr. Banack drove his vehicle to a north Toronto country club and parked in the parking lot. Less than an hour later, Dr. Banack was informed that his vehicle was on fire. The vehicle was destroyed by the fire.

D. Discussion and Analysis

1. Certification: General Principles

[67] The court has no discretion and is required to certify an action as a class proceeding when the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of

the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[68] For an action to be certified as a class proceeding, there must be a cause of action shared by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers.⁵ On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding.⁶ The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.⁷

[69] The representative plaintiff must come forward with sufficient evidence to support certification, and the opposing party may respond with evidence of its own to challenge certification.⁸ Certification will be denied if there is an insufficient evidentiary basis for the facts on which the claims of the class members depend.⁹ The certification motion is not a merits-based screening of the action, but it is a meaningful screening device. In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,¹⁰ the Supreme Court of Canada stated:

103. [I]t is worth reaffirming the importance of certification as a meaningful screening device. The standard for assessing evidence at certification does not give rise to “a determination of the merits of the proceeding” (CPA, s. 5(7)); nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny.

[70] For certification, the plaintiff in a proposed class proceeding must show “some basis in fact” for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.¹¹

[71] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths

⁵ *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 at para. 14 (S.C.J.), leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

⁶ *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.

⁷ *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.

⁸ *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 22.

⁹ *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.), leave to appeal to S.C.C. ref'd [2003] S.C.C.A. No. 106; *Taub v. Manufacturers Life Insurance Co.*, 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

¹⁰ 2013 SCC 57 at para. 103. See also *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 6098 at para. 19 (Div. Ct.).

¹¹ *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co.*, (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).

of the plaintiff's case.¹² In particular, there must be a basis in the evidence to establish the existence of common issues.¹³ To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members.¹⁴

[72] The some basis in fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.¹⁵

[73] On a certification motion, evidence directed at the merits may be admissible if it also bears on the requirements for certification but, in such cases, the issues are not decided on the basis of a balance of probabilities, but rather on the much less stringent test of some basis in fact.¹⁶ The evidence on a motion for certification must meet the usual standards for admissibility.¹⁷ While evidence on a certification motion must meet the usual standards for admissibility, the weighing and testing of the evidence is not meant to be extensive, and if the expert evidence is admissible, the scrutiny of it is modest.¹⁸ In a class proceeding, the close scrutiny of the evidence of experts should be reserved for the trial judge.¹⁹

2. Some Basis in Fact: Analysis and Discussion: "You had me at hello."

[74] Unlike most motions, where there is a level procedural playing field, for a certification motion, the proposed Representative Plaintiff has a downhill bunny hill ski slide to certification and the Defendant has a Mount Everest climb to resist certification.

[75] From an evidentiary perspective, while the rules of evidence remain in place, there is a vast difference between a finding that there is some basis in fact and a finding of a fact. From an evidentiary perspective, there is a vast difference between an expert having a methodology for an opinion and having an opinion.

[76] These truths are painful for defendants, and sometimes the judge hearing the motion feels the pain of certifying what will turn out to be a meritless class proceeding, but certify he or she must, and defendants just need to get over it and move on to the merits part of the proceeding.

¹² *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co.*, 2012 ONCA 445.

¹³ *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).

¹⁴ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.

¹⁵ *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.

¹⁶ *Cloud v. Canada* (2004), 73 O.R. (3d) 401 at para. 50 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 16-26.

¹⁷ *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Williams v. Canon Canada Inc.*, 2011 ONSC 6571, aff'd 2012 ONSC 3992 (Div. Ct.); *Schick v. Boehringer Ingelheim (Canada) Ltd.*, 2011 ONSC 63 at para.13; *Ernewein v. General Motors of Canada Ltd.* 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545.

¹⁸ *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 76 (S.C.J.).

¹⁹ *Stanway v. Wyeth Canada Inc.*, 2011 BCSC 1057, aff'd 2012 BCCA 260.

[77] And defendants aggrieved with the low standard for certification have the consolation that i after certification, the litigation playing field immediately levels and defendants have the usual opportunities to settle or win the litigation. After certification, there is equal litigation risks and equalized economies of forensic scale to contest the merits of the action.

[78] Resisting certification is often particularly difficult in in a products liability case. In the factual circumstances of the immediate case BMW's resistance was futile and in my opinion it was arrogant and foolish.

[79] In the immediate case, BMW admits that its Mini Cooper vehicles had defects in their power steering systems, but then without any expert evidence and only the rejected submissions it made to Transport Canada, it arrogantly privileges itself by making itself the judge and it decides that there is no basis in fact for the views of Mr. Harris, Mr. Tkach, Dr. Banach, Mr. James, Transport Canada, NHTSA and a host of consumers on both sides of the Canada-U.S. border.

[80] It is the lived and investigatory experience of Mr. Harris, Mr. Tkach, Dr. Banach, Mr. James, Transport Canada, NHTSA and a host of consumers on both sides of the Canada-U.S. border that if a power steering system fails the driver is confronted with a dangerous situation. Transport Canada stated that a loss of steering power assist could result in a crash causing property damage and personal injury, and it showed BMW a report of a near miss of a head on collision. BMW's response is dismissive and persistent in asserting its own self-serving view that there is no reasonable risk to safety.

[81] In the movie, *Jerry McQuire*, there is a famous scene. The lead character played by Tom Cruise makes a lengthy and passionate romantic plea to Dorothy Boyd, the character played by Renée Zellweger. Dorothy finally tells him to stop. She says: "You had me at "hello". In the immediate case, Mr. Harris had me convinced that there some basis in fact for the class definition and all the common issues, when he introduced the evidence of BMW's dealings with the regulator on both sides of the border.

[82] Mr. Harris had me convinced when Transport Canada stated in Recall #2012029 that "a loss of steering power assist could ultimately result in a crash causing property damage and/or personal injury". Transport Canada specifically rejected BMW's request that the Recall state that steering control can be maintained notwithstanding a temporary or permanent loss of power steering because the vehicle would revert to a manual steering mode that would require greater driver effort especially at low vehicle speeds.

[83] Mr. Harris had me convinced that there was some basis in fact for a class action based on car fires when BMW Canada reported to Transport Canada that there was potential for water to travel along the power steering pump power cable and come into contact with the power steering pump power cable connector and that if that were to occur, the connector could become corroded, and a high thermal load condition could occur, which could result in localized smoldering at the power steering pump, pump connector and associated wiring.

[84] In my opinion, an admitted thermal event in the combustion engine that is a motor vehicle fueled and lubricated with combustibles is some basis in fact.

[85] But there was more. There was Mr. Tkach and Mr. Banach's car fires in Mini Cooper vehicles. And there was Transport Canada's confirmation of one burnt power steering pump in a Mini Cooper in 2009 and its confirmation of another thermal event in 2010 in another Mini Cooper.

[86] And there were BMWs answers to undertakings. In its answers to undertakings, BMW

admitted that it is aware of three additional reports of thermal events in Mini Cooper vehicles that were not included in the summary it provided to Transport Canada.

[87] There is also the possibility that apart from the defect that could cause smoldering, which BMW admitted, there may be other defects in the power steering system that may explain the causes of fires in Mini Cooper vehicles.

[88] In the immediate case, together, or separately, the loss of power steering and the potential for thermal events that could lead to car fires establish that the admitted defects are dangerous. There was certainly sufficient demonstrating some basis in fact for the conclusion that the common issues actually exist for all the Class Members who purchased the Mini Cooper vehicles defined by the Class Definition.

[89] I agree with what Mr. Harris submits in his Reply Factum at paragraphs 60-61:

60. Defendants face an inversely heavy standard of proof. They must show that there is no basis in fact for the certification criteria under ss. 5(1)(b)-(e) in order to defeat certification. So long as a plaintiff proves that there is some evidentiary smoke that suggests fire (usually figuratively, but also literally in this case), then they have met the test. To the extent that there is any evidentiary conflict on the record, certification is not the time for the court to resolve it.

Thus, to the extent that there may be any conflicting evidence about the Defects and whether they are dangerous or can cause vehicle fires, the conflict is not to be resolved at certification. The existence of any such conflicts “simply underscores the point that there are valid [common] issues to be tried”.

[90] There was no serious contest in the immediate case that a class action is the preferable procedure and that Mr. Harris is a qualified Representative Plaintiff. There is some basis in fact for these certification criteria.

[91] BMW never got out of base camp in its climb to resist certification based on an argument that there is no basis in fact for certification.

3. The Cause of Action Criterion: General Principles

[92] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The “plain and obvious” test for disclosing a cause of action from *Hunt v. Carey Canada*,²⁰ is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[93] To satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect, or it is plain and obvious that it could not succeed.²¹

[94] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,²² and the court's power to strike a claim is exercised only in the clearest cases.²³ The law must be allowed to evolve, and the novelty of a

²⁰ [1990] 2 S.C.R. 959.

²¹ *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.

²² *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).

²³ *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).

claim will not militate against a plaintiff.²⁴ However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.²⁵

[95] In *R. v. Imperial Tobacco Canada Ltd.*,²⁶ the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success.

[96] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously, and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed.²⁷

[97] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.²⁸

[98] The failure to establish a cause of action usually arises in one of two ways: (1) the allegations in the statement of claim do not plead all the elements necessary for a recognized cause of action; or, (2) the allegations in the statement of claim do not come within a recognized cause of action.²⁹

4. Cause of Action Criterion: Analysis and Discussion

[99] Mr. Harris' cause of action is a product liability negligence claim. There are four established genres of product liability causes of action.³⁰ Mr. Harris pleads all four types of product liability negligence claim.

a. First, there is design negligence; manufacturers have a duty of care in designing

²⁴ *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.

²⁵ *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).

²⁶ 2011 SCC 42 at paras. 17-25.

²⁷ *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).

²⁸ *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.

²⁹ *2106701 Ontario Inc. (c.o.b. Novajet) v. 2288450 Ontario Ltd.*, 2016 ONSC 2673 at para. 42; *Aristocrat Restaurants Ltd. v. Ontario*, [2004] O.J. No. 5164 (S.C.J.); *Dawson v. Rexcraft Storage & Warehouse Inc.*, [1998] O.J. No. 3240 at para. 10 (C.A.).

³⁰ *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950; *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at paras. 264-67, aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *Goodridge v. Pfizer Canada Inc.*, 2010 ONSC 1095; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.).

the product to avoid safety risks and to make the product reasonably safe for its intended purposes.³¹

- b. Second, there is manufacturing negligence; manufacturers have a duty of care to consumers to see that there are no defects in manufacture that are likely to give rise to injury in the ordinary course of use.³²
- c. Third, manufacturers have a duty of care to compensate consumers for the cost of repairing a dangerous product that presents a real and substantial danger.³³
- d. Fourth, there is a duty to warn; manufacturers have a duty of care to warn consumers of dangers inherent in the use of the product of which the manufacturer has knowledge or ought to have knowledge.³⁴

[100] For the purposes of a cause of action analysis, the relevant portions of Mr. Harris' Fresh as Amended Statement of Claim are as follows:

22. The Class Cars contain a common dangerous defect in the power steering system, which makes the Class Cars dangerous when used for ordinary highway and city driving intended by the Defendants.

23. The power steering defect can cause (1) a sudden and unexpected loss of power steering, making the vehicle difficult to maneuver in all driving conditions and potentially resulting in a loss of control, personal injury and property damage; and/or (2) a sudden and unexpected car fire.

24. In the event of a malfunction, dashboard warning lights fail to activate, activate too late to warn drivers of the danger, and/or fail to communicate the gravity of the danger.

25. Consequently, the defect has resulted and is likely to result in injury and damage to the drivers and passengers of the Class Cars, the Class Cars themselves and people and property in their vicinity.

[...]

43. Transport Canada confirmed that the defect "could ultimately result in a crash causing property damage and/or personal injury". Yet, the Defendants stayed silent and failed to adequately warn the Class.

[101] Mr. Harris seeks to recover actual pecuniary losses and also for pure economic losses by the Class Members as a result of the allegedly dangerous power steering system. The Class Members' entitlement to recover pure economic loss is supported by pleading that the admitted defects are dangerous. A dangerous defect is an exception to the bar against recovery for pure economic loss.

[102] The first criterion for certification is that the plaintiff's pleading discloses a cause of action,

³¹ *Vester v. Boston Scientific Ltd.*, 2015 ONSC 7950; *Ragoonanan v. Imperial Tobacco Canada Ltd.* (2000), 51 O.R. (3d) 603 (S.C.J.); *Rentway Canada Ltd. v. Laidlaw Transport Ltd.*, [1989] O.J. No. 786 (H.C.J.), aff'd [1994] O.J. No. 50 (C.A.); *Nicholson v. John Deere Ltd.* (1986), 58 O.R. (2d) 53 (H.C.J.), aff'd [1989] O.J. No. 495 (C.A.).

³² *Donoghue v. Stevenson*, [1932] A.C. 562 (H.L.).

³³ *Arora v. Whirlpool Canada LP*, 2012 ONSC 4642 at paras. 264-67, aff'd 2013 ONCA 657, leave to appeal ref'd [2013] S.C.C.A. No. 498; *Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.*, [1995] 1 S.C.R. 85.

³⁴ *Andersen v. St. Jude Medical, Inc.*, 2012 ONSC 3660 *Bow Valley Husky (Bermuda) Ltd. v. Saint John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Hollis v. Dow Corning Corp.*, [1995] 4 S.C.R. 634; *Lambert v. Lastoplex Chemicals Co.*, [1972] S.C.R. 569.

and BMW concedes that BMW owes a duty of care to take reasonable steps to design and manufacture vehicles in a manner that does not create a risk of vehicle fires. BMW concedes that Mr. Harris has pleaded a cause of action in negligence in so far as his pleading alleges that the Mini Cooper vehicles posed a risk of fire. With this concession, it follows that Mr. Harris satisfies the first criterion for certification with respect to the risk of fire allegation.

[103] I pause to foreshadow that for the discussion below about the other certification criterion, BMW's submission to resist certification about car fires is exclusively built on the argument that there is no basis in fact for common issues for a negligence case built upon the defective power steering posing a risk of fire. BMW does not challenge the preferable procedure or the representative plaintiff criterion being satisfied if the common issues criterion is satisfied.

[104] Returning to the cause of action criterion, BMW audaciously and arrogantly submits that Mr. Harris' product liability negligence causes of action associated with its admittedly defective power steering system in the Mini Coopers does not satisfy the cause of action criterion. The premise of BMW's argument is that the risk of losing power steering does not present a danger. And, therefore, BMW does not have a duty of care with respect to the vehicle attribute. Thus, no duty of care; no viable negligence claim. To quote from BMW's factum:

However, the Claim does not plead a cognizable claim with respect to the risk of the loss of power steering assistance. That is solely a matter of product quality or product performance. While power steering is a feature found in the great majority of contemporary automobiles, it was originally introduced as a premium option. Over time, power steering - like power windows or air conditioning - has come to be regarded as a standard feature. However, also like power windows and air conditioning, a malfunction in this system and a return to manual steering is not "dangerous".

[105] I say that this is an audacious and arrogant argument because BMW concedes that it manufactured a power steering system that has defects and it concedes that Mr. Harris has properly pleaded the constituent elements of his product liability negligence claims, but it is only BMW that is the source of the proposition that power steering is a cosmetic quality feature that raises no safety concerns and therefore BMW has no duty of care for manufacturing a shoddy but safe consumer good. It is only BMW that compares power steering to air conditioning and power windows rather than say comparing it to power brakes.

[106] The regulators beg to differ. I beg to differ. Hundreds of complainants beg to differ. Common sense would beg to differ, since it is patently obvious that power steering is designed to make a vehicle easier to maneuver, and maneuvering is not a cosmetic or performance feature of the vehicle but a matter of safely driving the vehicle.

[107] I suppose power windows might be regarded as a quality item that does not make a vehicle safer to drive, but power steering like power brakes obviously makes a vehicle safer to drive. And, there is the matter that even if power steering were just matter of the quality of vehicle performance, BMW has no argument that the removal of power steering is not an endangerment or a dangerous risk.

[108] Further, if BMW's argument had any traction at all, which it does not, its grip would only be with respect to Class Members who are claiming a pure economic loss for the cost of repairing their Mini Cooper because they suffered no personal or property injury. If a Class Member was involved in a car accident because his or car's power steering failed, then he or she would have a tenable and legally viable cause of action.

[109] I pause again to note that for the discussion below of the other certification criteria, it

should be noted that BMW concedes that if the cause of action criterion is satisfied for the allegation associated with a loss of power steering, then the associated common issues would be certifiable, and, as already mentioned, BMW does not challenge the preferable procedure and the representative plaintiff criteria.

[110] In the immediate case, Mr. Harris adds a waiver of tort claim, as a remedial alternative to his negligence claim. It is not plain and obvious that this remedial alternative, if it is a cause of action, is not a legally viable claim. This claim also satisfies the first criterion for certification.³⁵

[111] I, therefore, conclude that Mr. Harris satisfies the first certification criterion for all of his pleaded causes of action.

5. Identifiable Class Criterion: General Principles

[112] The second certification criterion is the identifiable class criterion. The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice.³⁶

[113] In *Western Canadian Shopping Centres v. Dutton*,³⁷ the Supreme Court of Canada explained the importance of and rationale for the requirement that there be an identifiable class:

First, the class must be capable of clear definition. Class definition is critical because it identifies the individuals entitled to notice, entitled to relief (if relief is awarded), and bound by the judgment. It is essential, therefore, that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified. While the criteria should bear a rational relationship to the common issues asserted by all class members, the criteria should not depend on the outcome of the litigation. It is not necessary that every class member be named or known. It is necessary, however, that any particular person's claim to membership in the class be determinable by stated, objective criteria.

[114] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.³⁸ An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.³⁹ The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.⁴⁰ The class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.⁴¹ A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the

³⁵ *Pro-Sys Consultants v. Microsoft Corporation*, 2013 SCC 57; *Panacci v. Volkswagen*, 2018 ONSC 6312.

³⁶ *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

³⁷ 2001 SCC 46 at para. 38.

³⁸ *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (C.A.), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

³⁹ *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 at paras. 121-146 (S.C.J.).

⁴⁰ *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (S.C.J.).

⁴¹ *Fehringer v. Sun Media Corp.*, [2002] O.J. No. 4110 at paras. 12-13 (S.C.J.), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

defendants.⁴²

6. Identifiable Class Criterion: Analysis and Discussion

[115] As noted above, Mr. Harris proposed a class definition of “all persons or entities in Canada who are or were owners or lessees of: (i) a 2002, 2003, 2004, 2005 or 2006 model year Mini Cooper or Mini Cooper S; or (ii) a 2005, 2006, 2007 or 2008 model year Mini Cooper Convertible or Mini Cooper S Convertible and their estates, executors, successors or assigns.”

[116] Mr. Harris’s Class Definition has been constructed in the following way:

- a. The January 30, 2012, Transport Canada Recall #2012029 identified 9,254 vehicles with power steering problems including: 2002, 2003, 2004, and 2005 model years of the MINI Cooper; 2005 model year of the MINI Cooper Convertible; and 2002, 2003, 2004, and 2005 model years of the MINI Cooper S. These vehicles are included in the Class Definition. I conclude that there is some basis in fact for including these vehicles.
 - i. Although BMW did not send the Advisory to 2005 vehicles manufactured after February 9, 2005, these vehicles were not excluded by the Transport Canada and they were not excluded from the draft of the BMW’s Advisory that was (sent to Transport Canada. I would not exclude those vehicles manufactured after February 9, 2005 from the Class Definition.
- b. In correspondence that it now wishes to recant or explain away, BMW advised the NHTSA that advised that the following MINI models and model years also contain the same components: MINI Cooper / Cooper S model year 2006; and MINI Cooper Convertible / Cooper S Convertible model years 2006 through 2008. I conclude that there is some basis in fact to include these vehicles in the Class Definition.

[117] I do not agree with BMW’s argument that the proposed class definition is overly broad by including: (a) MINI Cooper/Cooper S Hatch vehicles assembled before December 17, 2005 or after February 9, 2005; and (b) MINI Cooper/Cooper S Convertible vehicles assembled before December 17, 2001 or after February 9, 2005. The premise of BMW’s argument is that Mr. Harris’ claims are founded upon the defects that BMW disclosed to the Canadian and American regulators not existing before December 17, 2001 and having being fixed after February 9, 2005. Thus, BMW submits that there is no basis in fact for a class definition that extends to the owners of vehicles manufactured before December 17, 2001 or after February 9, 2005.

[118] I disagree because it is not for BMW to either define what were the defects and when they appeared and when they disappeared. That will be something for the court to determine. For present purposes, Mr. Harris has shown some basis in fact for his proposed Class Definition.

⁴² *Silver v. Imax Corp.*, [2009] O.J. No. 5585 at para. 103-107 (S.C.J.) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 at para. 22 (S.C.J.), leave to appeal ref’d [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref’d [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.)

[119] I also disagree with BMWs argument that the Class Definition is overbroad because it includes past owners and lessees of the Class Vehicles. BMW submits that it is self-evident that past owners and lessees would not have incurred any costs to have the power steering system in their vehicle repaired and would never have suffered any of the alleged losses claimed.

[120] I disagree because this self-serving argument is fallacious. Whether or not past owners and past lessees suffered harm is a merits issue that cannot be pre-determined at certification.

[121] What is self-evident is that if these purchasers of Mini Cooper vehicles did suffer harm, then they will not be able to achieve access to justice without Mr. Harris bringing a class action on their behalf.

7. Common Issues Criterion: General Principles

[122] The third criterion for certification is the common issues criterion. For an issue to be a common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim.⁴³ The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.⁴⁴ In *Pro-Sys Consultants Ltd. v. Microsoft Corporation*,⁴⁵ the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is 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.

[123] All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class.⁴⁶

[124] An issue is not a common issue if its resolution is dependent upon individual findings of fact that would have to be made for each class member.⁴⁷ Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.⁴⁸

[125] Commonality is a substantive fact that exists on the evidentiary record or it does not, and commonality is not to be semantically manufactured by overgeneralizing; *i.e.*, by framing the issue

⁴³ *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.

⁴⁴ *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.

⁴⁵ 2013 SCC 57 at para. 106.

⁴⁶ *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 48; *McCracken v. CNR*, 2012 ONCA 445 at para. 183; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40.

⁴⁷ *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).

⁴⁸ *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).

in general terms that will ultimately break down into issues to be resolved by individual inquiries for each class member.⁴⁹ In *Rumley v. British Columbia*,⁵⁰ Chief Justice McLachlin stated that an issue would not satisfy the common issues test if it was framed in overly broad terms; she stated:

[...] 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.

[126] However, the commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent; it is enough that the answer to the question does not give rise to conflicting interests among the members; success for one member must not result in failure for another.⁵¹

[127] The common issue criterion presents a low bar.⁵² An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.⁵³ Even a significant level of individuality does not preclude a finding of commonality.⁵⁴ A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation.⁵⁵

8. Common Issues Criterion: Discussion and Analysis

[128] As set out above, there is ample evidence in the immediate case to conclude that there is some basis in fact of a manufacturing defect that could cause a loss of power steering and could cause smoldering or fire in the subject vehicles.

[129] The case at bar is not a case of idiosyncratic imperfections manifesting in one or two vehicles. By BMW's own admission, the defects are in Class Cars, all of which are manufactured at the same facility.

[130] The common issues exist, and they can be determined in common for all Class members.

[131] I conclude that the common issues criterion is satisfied for all of the proposed common issues.

⁴⁹ *McCracken v. Canadian National Railway Company*, 2012 ONCA 445 at para. 132; *Microcell Communications Inc. v. Frey*, 2011 SKCA 136 at para. 48-50, leave to appeal refused, [2012] S.C.C.A. No. 42; 197; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43, leave to appeal refused, [2008] S.C.C.A. No. 512; *Rumley v. British Columbia*, [2001] 3 S.C.R. 184 at para. 29.

⁵⁰ [2001] 3 S.C.R. 184 at para. 29.

⁵¹ *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at paras. 44-46.

⁵² *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

⁵³ *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

⁵⁴ *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

⁵⁵ *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

9. Preferable Procedure Criterion: General Principles

[132] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.⁵⁶

[133] In *AIC Limited v. Fischer*,⁵⁷ the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[134] Thus, for a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.⁵⁸ Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues.⁵⁹

[135] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.⁶⁰

10. Preferable Procedure Criterion: Analysis and Discussion

[136] There was no serious argument in the immediate case that if the first three certification criteria were satisfied, which they are, then the preferable procedure criterion would also be satisfied.

[137] I conclude that the preferable procedure criterion is satisfied.

11. Representative Plaintiff Criterion: General Principles

[138] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and

⁵⁶ *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.

⁵⁷ 2013 SCC 69 at paras. 24-38.

⁵⁸ *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

⁵⁹ *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.

⁶⁰ *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

who has produced a workable litigation plan. The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant.⁶¹

12. Representative Plaintiff Criterion: Analysis and Discussion

[139] There was no serious argument in the immediate case that if the first four certification criteria were satisfied, which they are, then representative plaintiff criterion would also be satisfied.

[140] I conclude that the representative plaintiff criterion is satisfied.

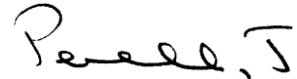
E. Conclusion

[141] For the above reasons, the certification motion is granted.

[142] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Mr. Harris's submissions within twenty days from the release of these Reasons for Decision, followed by BMW's submissions within a further twenty days.

[143] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[144] The parties may submit formal orders for signing and entry once the court re-opens; however, these Reasons for Decision are an effective and binding Order from the time of release.



Perell, J.

Released: April 2, 2020

⁶¹ *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

CITATION: Harris v. Bayerische Motoren Werke Aktiengesellschaft, 2020 ONSC 1647
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DATE: 2020/04/02

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

PETER SCOTT HARRIS

Plaintiff

- and -

**BAYERISCHE MOTOREN WERKE
AKTIENGESELLSCHAFT and BMW CANADA
INC.**

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 2, 2020