

No harm, no foul, no class: Ontario Court of Appeal denies certification in pure economic loss case

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In *North v. Bayerische Motoren Werke AG*¹, the Court of Appeal for Ontario overturned an order certifying a product liability class action on the basis that the plaintiffs' pure economic losses were not recoverable because the proposed representative plaintiffs did not incur costs associated with removing or repairing a dangerous defect.

The decision underscores the high bar for pleading recoverable losses in negligence where the only harm or damage is to the product itself, as well as the requirement that a representative plaintiff have a viable cause of action for the specific losses claimed.

What you need to know

- **Diminished value is not recoverable in negligence.** Repair costs to fix a defective product cannot be recovered in negligence unless they are incurred to avert a real, ongoing, and substantial danger to persons or "other property". Loss for diminished value of the product itself is not recoverable
- **"Catastrophic damage" a bane, not a boon.** If the product is already inoperable due to the defect, arguing that subsequent repairs are required to avert danger becomes much harder. For example, an engine that is catastrophically damaged cannot be driven, so there is likely no further risk to life or limb and, therefore, no danger to avert.
- **A product is the sum of its parts.** Where, as here, one component (part of the engine) is defective and damages other components (the rest of the engine) in the overall product (the vehicle), a plaintiff cannot recover the replacement cost of the product by "artificially segregating" it into discrete components. The other components of the same product are not "other property" that has been damaged.
- **There is no duty to warn of diminished value.** Duty to warn claims framed as "would not have bought it if warned" (i.e., alleging a loss of value related to a non-dangerous defect) are not viable. This would amount to a failure to warn of a diminution of value, for which a defendant cannot be held liable.
- **No representative plaintiff with a viable claim is fatal to certification.** There must be a representative plaintiff who has personally incurred the legally cognizable losses that the class action seeks to remedy. In product defect claims, simply owning a defective product is not enough.

Background: alleged defect in vehicle engines

The claim involved N20 engines in BMW vehicles that allegedly stopped functioning due to a defective timing chain guide, resulting in the need to replace the engine. Although BMW had not received a single report of an accident or property damage involving the alleged timing chain guide defect, in 2018, it issued an extended, seven-year warranty to address the issue. BMW offered to provide a free replacement timing chain system to any eligible vehicle that experienced a “whining noise”. Some 800 vehicle owners (out of 66,000 vehicles with an N20 engine) were serviced under the warranty.

The class action hits a speed bump at first instance

The plaintiffs commenced a proposed class action against BMW, alleging that the timing chain guide defect could lead to sudden power loss and “catastrophic” engine damage in vehicles with N20 engines. The plaintiffs asserted three subsets of product liability negligence: negligent design, negligent manufacture, and a breach of the duty to warn.

The motion judge refused to certify the duty to warn claim because the plaintiffs had not pleaded a viable claim in that cause of action. The plaintiffs only alleged that the vehicles they purchased were worth less than the amount they paid because of the defective engines, not that they had suffered any personal injury or property damage that would have been avoided had BMW warned about the engine defects.

The motion judge certified the claims in negligent design and manufacture but on a narrower basis than proposed by the plaintiffs. He certified only those claims that were alleged to have resulted in one of two types of losses: 1) the cost of repairing the damage incurred to an engine; or 2) the cost of repairing an engine to avert imminent damage to persons or property. The motion judge also carved out from the class the approximately 800 N20 engine vehicle owners who had presented warranty claims under BMW’s program. Those individuals suffered no recoverable losses, since their repair costs were covered by the warranty.

The Court of Appeal hits the brakes, denying certification

Both parties appealed the certification decision.

The Court of Appeal agreed with the motion judge that the plaintiffs had no failure to warn claim and denied the plaintiffs’ appeal on this issue. The Court of Appeal agreed that the plaintiffs were not alleging that, if they had been warned, they would have averted some physical harm or property damage. Rather, they were alleging that, if they had been warned, they would not have bought a defective vehicle (or would have paid less for it), which was not a viable cause of action.

The Court of Appeal also allowed BMW’s cross-appeal and dismissed the plaintiffs’ certification motion in its entirety on the basis that the manufacturing and design defects alleged were similarly for unrecoverable economic losses and could not support a viable cause of action in negligence. The Court of Appeal explained that product defect claims protect the right to be free of a negligently caused real and substantial danger to person or property, not a right to the continued use of a product.

It is well established that pure economic loss is not recoverable outside of certain limited exceptions, one of which relates to the costs of averting a real and substantial danger of personal injury or damage to “other property” caused by a design defect. The plaintiffs sought to fit within this narrow exception by arguing a “complex structure theory”—i.e., that in the case of a complex structure, damage to one part caused by a defect in another part could qualify as damage to “other property”. The Court rejected this argument, holding that where a component (timing chain system) is an integral part of the product (vehicle) as a whole, the rest of the product is not “other property”.

The Court of Appeal also found that repairing an engine that has already suffered "catastrophic damage" serves primarily to restore its use and functionality, not to avert any ongoing real and substantial danger². Once the engine fails, the vehicle cannot be driven, and any immediate danger to persons or property posed by the defect is largely removed.

In addition to concluding that the plaintiffs' claim failed at the pleading stage, the Court of Appeal also held that certification failed because there was no suitable representative plaintiff. Neither proposed representative plaintiffs had incurred any costs to avert a real and substantial danger. The absence of a suitable representative plaintiff with a viable cause of action for the class claims was fatal to certification³.

Implications

The Court of Appeal's decision is a welcome development for defendants facing product liability class actions in respect of allegedly defective products. Following the Court of Appeal and Supreme Court's earlier rulings in *Maple Leaf Foods*⁴, *North v. Bayerische Motoren Werke AG* re-emphasizes established tort principles to significantly limit the scope and viability of product defect claims for pure economic loss in Ontario.

The decision clarifies the limited exposure manufacturers of products may face in negligence for latent defects that cause damage only to the product itself. Only a defect that poses a clear and immediate risk to the safety of persons or other property triggers a recoverable repair or disposal cost in negligence.

The motion judge's decision also highlights the importance of proactive steps to address potential defects and mitigate the risk of a class action lawsuit. A manufacturer that becomes aware of a (non-dangerous) product defect can issue extended warranties or take other remedial measures to address the issue. Such measures simultaneously demonstrate commitment to customer satisfaction and product reliability, while reducing legal liability. As *North v. Bayerische Motoren Werke AG* shows, courts view participation in warranty and repair programs as mutually exclusive with damages for negligence in pure economic loss cases.

FOOTNOTES

¹ 2025 ONCA 340.

² This principle is similar in Québec: a consumer who presents a claim for a reduction of its obligation is not exempted from proving damages, a "real financial impact", such as a decrease in the value of property, according to the Court of Appeal in *Fortin v. Mazda*, 2022 QCCA 635 (this case, however, was rendered on the merits and not at certification like the present case).

³ This principle is also applicable in Québec, see notably *Sofio c. OCRCVM*, 2015 QCCA 1820, para 10.

⁴ 1688782 *Ontario Inc. v. Maple Leaf Foods Inc.*, 2018 ONCA 407, aff'd 2020 SCC 35.

To discuss these issues, please contact the author(s).

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