Cassels

No Harm, No Foul, No Certification: The Role of Effective Recall and Repair in Avoiding Product Liability Class Actions

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The Ontario Superior Court of Justice's recent decision in *Maginnis and Magnaye v FCA Canada et al* highlights the importance of proactive risk management in product liability claims in its refusal to certify of a proposed class action related to the alleged use of "defeat devices" in the defendant's diesel powered vehicles.[1] A motion for certification of a proposed class action must be denied if the plaintiff fails to present evidence that the proposed class members have suffered compensable harm. The Court applied this principle to deny certification in *Maginnis*, illustrating that manufacturers can mitigate or avoid risk of product liability claims by implementing an effective compensation strategy for deficient products.

The Court's reasoning in *Maginnis* echoes that of *Richard v Samsung*, discussed in our previous article on proactive risk mitigation in product liability claims.[2] In *Samsung*, the Court held that Samsung's compensation package to provide customers with either a replacement device or a full refund along with additional compensation was preferable to a class action. Similarly, in *Maginnis,* the Court held that the defendant manufacturer's recall and repair campaign provided customers with emissions-compliant vehicles and was preferable to a class action. Viewed together, the *Maginnis* and *Samsung* decisions provide a compelling basis for manufacturers to avoid potential class actions where an effective and comprehensive recall and compensation strategy has been carried out.

Background: the Ontario Diesel Emissions Class Actions

Maginnis was the latest in a series of proposed class actions against various automobile manufacturers relating to the alleged use of diesel emissions "defeat devices": software that allegedly evades emissions testing by making it appear as though a vehicle is fully compliant with applicable environmental regulations while disabling emissions control systems under real-world driving conditions.

While certification was previously granted in parallel diesel emissions class actions against two other automobile manufacturers,[3] unlike in those cases the defendant manufacturer in *Maginnis* had implemented a comprehensive recall campaign with the approval of regulators to modify the emissions control system at no cost to the customer in May 2019, before the class action was commenced.

If It Ain't Broke: Compensable Harm and the Preferability Analysis

The defendant manufacturer recalled the affected vehicles and reprogrammed the emissions control system with the approval of regulators. Given that the manufacturer had fulfilled its original promise to deliver customers an emissions-compliant vehicle through the recall and repair program, the motion for certification turned on the threshold question of whether the plaintiffs had produced any evidence of compensable harm.

The plaintiffs advanced two arguments in support of their claim that they had suffered compensable harm: that they had paid a "premium price" for the promise of "clean diesel" vehicles, and that their vehicles' fuel economy and performance had deteriorated after the recall was completed. Although the Court acknowledged that both of these arguments *could* provide a possible basis for plausible claims for compensable harm, neither of them succeeded on the evidence. The plaintiffs had not provided any evidence that any class members actually paid a "premium price" for the "clean diesel" feature of the vehicles and there was no evidence that the repair of the defeat device had resulted in reduced fuel economy or vehicle performance. The Court therefore held that the plaintiffs had provided no evidence of compensable loss.

The absence of evidence of compensable loss gives rise to three potential bases for the dismissal of a certification motion:

- the lack of a class of two or more people seeking access to justice;[4]
- the unsuitability of the proposed representative plaintiffs, who have sustained no loss and have no stake in the potential outcome;[5] or,
- that a class action is not the preferable procedure for the resolution of the dispute.[6]

In dismissing the certification motion in this case, the Court relied on the "preferable procedure" analysis because it involves consideration of the three objectives of class actions: access to justice, behaviour modification and judicial economy. In conducting this analysis, the Court held that in the absence of compensable harm, there are no access to justice concerns and behaviour modification has already been achieved through the recall and repair of the impugned products. In such circumstances, certifying the action would not advance any viable claims and would only result in the waste of judicial resources.

Key Takeaway Principles

Maginnis affirms that well-executed risk mitigation strategies may limit the risk of product liability litigation before proceedings are even commenced. Evidence of compensable loss is a fundamental prerequisite for the certification of a class action. Plaintiffs seeking certification cannot rely on mere allegations — they must substantiate their claims. As such, when a manufacturer is faced with potential product liability litigation, a risk mitigation strategy that involves the effective recall and repair of deficient products may limit the manufacturer's liability by reducing or eliminating the compensable harm suffered by consumers. However, it must be borne in mind that compensable loss claims are possible even when a defective product has

been recalled and repaired depending on the circumstances. Before embarking on a specific risk mitigation strategy, manufacturers should carefully weigh their options in consultation with legal counsel to determine how to best protect themselves against potential liability.

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1 *Maginnis and Magnaye v FCA Canada et al*, 2020 ONSC 5462 <http://canlii.ca/t/j9pll> [“*Maginnis*”].

2 *Richardson v Samsung*, 2018 ONSC 6130 <http://canlii.ca/t/hvks1> [“*Samsung*”]

3 *Kalra v. Mercedes Benz*, 2017 ONSC 3795 <http://canlii.ca/t/h4kbx>.

4 *Class Proceedings Act, 1992*, SO 1992, c 6, at s. 5(1)(b) <http://canlii.ca/t/54qzz>.

5 *Ibid,* at s. 5(1)(e).

6 *Ibid,* at s. 5(1)(d).
