

# Cassels

## Court Finds the Defendant Doth Protest Too Much in Certifying Power Steering Class Action Over Claims that the Defect was “Not Dangerous”

*Meghan Rourke*

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In *Harris v Bayerische Motoren Werke Aktiengesellschaft*, the Ontario Superior Court of Justice articulated the high standard that a manufacturer must reach to avoid certification in a product liability case on the basis that there is “no danger” arising from an admitted defect.<sup>1</sup> The Court certified a class action against BMW on behalf of all persons or entities in Canada who are or were owners or lessees of certain Mini Cooper Vehicles which were impacted by a power steering issue that could cause a loss of power steering or fire.

BMW admitted that the electro-hydraulic power steering system in the affected vehicles was defective for a period of time and could fail. However, BMW attempted to resist certification by denying that the resulting loss of power steering was dangerous because the vehicle would simply revert to manual steering mode. In rejecting these arguments, the Court described the manufacturer’s resistance to certification as “futile,” “arrogant,” and “foolish” since turning the steering wheel in manual mode without power steering would require the driver to turn the tires under the full weight of the vehicle weighing over 2,000 lbs. In the prologue to the decision, the motion judge quoted the Bard himself, previewing his view of this position: “The lady doth protest too much, methinks.”<sup>2</sup>

### Background to the Case

The proposed class action arose from various complaints of power steering failure resulting in a partial recall and extended warranty campaign by the manufacturer in respect of the affected vehicles. Customer complaints and regulatory investigations disclosed a risk a risk of fire or smoke from the power steering system and a potential loss of power steering while driving. In addition to a safety recall initiated in the United States, the manufacturer offered extended warranty coverage to owners of affected vehicles in the United States and Canada.

The representative plaintiff included an expert opinion from a certified Vehicle Fire Investigator. The expert examined one of the vehicles that had burst into flames after a loss of power steering and 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.

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## You Had Me At “Hello”:<sup>1</sup> Plaintiff Easily Meets the “Bunny Hill” Standard

In describing the comparative threshold for certification of a product liability case, the motion judge noted that the representative plaintiff is faced with a “downhill bunny hill ski slide” to meet the bar for certification whereas the defendant has a “Mount Everest climb” to resist certification.<sup>3</sup>

In reviewing whether the pleadings disclosed a viable cause of action as required by section 5 of Ontario’s *Class Proceedings Act*, the motion judge noted that BMW admitted that the Mini Cooper vehicles had defects in their power steering systems, but then “arrogantly privileges itself by making itself the judge” by denying, without expert evidence, that there was no basis in fact for the views of the representative plaintiff and regulatory authorities who had determined the issue to pose a danger to consumers.

The motion judge found that the plaintiff’s evidence of regulatory findings that “a loss of steering power assist could ultimately result in a crash causing property damage and/or personal injury” easily met the low threshold of “some basis in fact” for the proposed common issues in the class action, likening his impression of the plaintiff’s evidence to the famous “Jerry McGuire” scene where Renee Zellweger’s character says: “you had me at ‘hello.’”

BMW conceded that it owed 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 but argued that the risk of power steering failure did not present a danger, and therefore BMW had no duty of care in respect of those claims. The motion judge rejected this position as “audacious and arrogant” in light of BMW’s concession that the power steering system was defective, finding that it was patently obvious that a defect impacting power steering was a matter impacting the ability to safely drive the vehicle.

### Key Takeaway Principles

This decision highlights the extreme difficulty that a manufacturer faces in attempting to resist certification of a product liability class action where an admitted defect exists, but the manufacturer takes the position that the defect did not pose a danger to consumers. In such circumstances, the manufacturer will likely require substantial evidence to overcome the existence of regulatory findings or expert evidence led by the plaintiff. Without convincing evidence refuting the existence of danger, the plaintiff’s case will move quickly from “you had me at hello” to “show me the money.”

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1 2020 ONSC 1647, <<http://canlii.ca/t/j65jh>>.

2 Shakespeare, *Hamlet*, Act 3, scene 2, 222–230.

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<sup>3</sup> Note, however, that for cases commenced on or after October 1, 2020, the amendments to Ontario's *Class Proceedings Act* changing this standard as [described in this article](#) will apply.

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