

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Reid v. Ford Motor Company*,
2003 BCSC 1632

Date: 20031029
Docket: S023572
Registry: Vancouver

Between:

BARBARA REID

Plaintiff

And

**FORD MOTOR COMPANY
FORD MOTOR COMPANY OF CANADA, LIMITED/FORD DU CANADA LIMITÉE**

Defendants

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Plaintiff

Sharon D. Matthews,
Ward Branch
and Luciana Brasil

Counsel for the Defendants

David A. Hobbs
and Ian Giroday

Date and Place of Hearing:

June 30, 2003,
July 2 and 3, 2003
Vancouver, B.C.

[1] The plaintiff is applying to have her action certified as a class proceeding pursuant to the ***Class Proceedings Act***, R.S.B.C. 1996, c. 50.

[2] This is a products liability case involving the ignition systems in 1983-1995 model years Ford, Lincoln and Mercury motor vehicles equipped with distributor mounted thick film ignition modules (TFI modules) (collectively, the proposed class vehicles). The plaintiff alleges that the TFI modules are defective and the defect is dangerous because it causes the vehicles to stall without warning. She submits that because the cost to repair and/or replace the TFI modules is modest compared to the costs of litigation of this nature, the only practical means for the class members to prove their allegations against the defendants and to recover the expense of making their vehicles safe is to band together in this class proceeding.

[3] The issue is, should the plaintiff be entitled to prosecute this action on behalf of the class described in the statement of claim?

[4] The plaintiff argues that a products liability case such as this one should be permitted to proceed as a class action because the financial burdens of prosecuting the claim would consume all or almost all of the proceeds of a judgment

of any single plaintiff. As a result defendants who would otherwise be found responsible would likely be insulated from lawsuits. It is only by spreading the costs of the litigation amongst many that members of the class will have access to justice. ***Nantais v. Telectronics Proprietary (Canada) Ltd.*** (1995), 127 D.L.R. (4th) 552 (Ont. Gen. Div.).

[5] The defendants submit that it is not appropriate for this case to be permitted to proceed as a class action as the plaintiff has failed to meet any of the requirements set out in the ***Class Proceedings Act.***

[6] For the following reasons I have concluded that this case should proceed as a class proceeding.

FACTS

[7] In April 1998, Barbara Reid bought a 1994 Ford Tempo for \$8,650.00. The car was equipped with a distributor mounted TFI module.

[8] The vehicle was manufactured and/or put into the stream of commerce by the defendants Ford Motor Company and Ford Motor Company of Canada, Limited/Ford Du Canada Limitée (collectively, the defendants).

[9] Certain Ford, Lincoln and Mercury vehicles manufactured between 1983 and 1995 were outfitted with a distributor mounted TFI module.

[10] A TFI module is an electronic device that controls the spark of electricity that ignites the gas and air mixture in the engine cylinders (the combustion process). The function of the TFI module is to control the current through the ignition coil in order to make sparks to initiate the combustion process. Reliability of the TFI module is related to temperature which is determined by the mounting location environment and power dissipation.

[11] Electronic devices used in automobiles, including TFI modules, are sensitive to operation under elevated temperatures. To ensure continued operation of the vehicle's electrical ignition system, the heat generated by the TFI module itself and the surrounding engine components must be minimized and managed.

[12] The plaintiff alleges that in the case of the proposed class vehicles the ability to minimize and manage the heat to which the distributor mounted TFI modules are subjected is limited by the following three design choices:

- the location of the TFI module on the distributor, one of the hotter non-exhaust components under the hood.
- the method by which the heat generated by the TFI module itself is sinked into the distributor, rather than away from the TFI module; and
- the excessive dwell times to which the TFI modules are subjected, (the period of time during which the ignition coil has electrical current running through it and how long it holds the electrical current at a fixed level, both of which generate additional heat).

[13] The plaintiff's theory is that these are the key factors which affect how much heat the TFI module is subjected to, and for how long. If the heat to which a TFI module is subjected is not properly managed, the module will malfunction (the TFI defect), causing the car to either stall or stumble while in use or causing difficulty in starting. When the vehicle engine stalls the vehicle loses its use of power brakes and power steering.

[14] The plaintiff alleges that since at least 1986, Ford recognized that its distributor mounted TFI modules had reliability problems. The first action planned to improve the

reliability of the TFI module was to place it in a cooler more remote location.

[15] Although there were changes to and different TFI modules they remained on the distributor throughout the class period. As well, the TFI modules remained sunked to the distributor, and the dwell times on most models were between 17%-32%, while Ford's competitors experienced dwell times of 12% or less. The TFI modules in issue are all TFI-IV modules.

[16] The plaintiff claims that these three factors are the primary or controlling factors causing the faulty performance of the TFI modules and unless addressed, the TFI modules remain prone to malfunction.

[17] The plaintiff alleges that the TFI defect can be initially difficult to diagnose because the TFI module operates normally once it cools down.

[18] The plaintiff further alleges that on more than one occasion her Ford Tempo stalled without warning, including stalls in dangerous situations such as while travelling down a steep North Shore hill and while on the Burrard Street Bridge in heavy traffic.

[19] While troubleshooting the problem, Ms. Reid incurred expenses in trial-and-error repairs. These stalling and

starting problems arose by 2000, i.e. within about 6 years of manufacture of the vehicle.

ANALYSIS

[20] The Supreme Court of Canada has held that the **Class Proceedings Act** should be construed generously especially at the certification stage. It provides the courts with a procedural tool to deal efficiently and on a principled basis with cases involving vast numbers of interested parties and complex, intertwined legal issues, some which are common and some which are not. Class proceedings have three important advantages over multiple proceedings:

- judicial economy resulting from unnecessary duplication.
- improved access to justice by making economical the prosecution of claims which would otherwise be uneconomical;
- modifying the behaviour of wrongdoers.

Hollick v. Toronto, [2001] 3 S.C.R. 158, ¶ 14 and 15.

[21] The certification stage is not meant to be a test of whether the plaintiff's claim will succeed, i.e. a test of the merits and turns on the facts. **Hollick**, ¶ 16 and 37.

[22] Although in *Hollick* the court was considering the Ontario statute the same principles apply to whether the plaintiff meets the certification requirements set out in the British Columbia *Class Proceedings Act*. *Rumley v. British Columbia*, [2001] 3 S.C.R. 184, ¶ 25.

[23] Applications for certification are governed by sections 4-9 of the *Class Proceedings Act*. Section 4(1) mandates certification if the following requirements are met:

- (a) the pleadings disclose a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
- (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and
- (e) there is a representative plaintiff who
 - (i) would fairly and adequately represent the interests of the class;

(ii) has produced a plan for the proceedings on behalf of the class and of notifying the class members of the proceeding; and

(iii) does not have, on the common issues, an interest that is in conflict with the interests of the other class members.

Section 4(1)(a) - Cause of Action

[24] The test to be applied when considering s.4(1)(a) of the *Class Proceedings Act* is the same as that under Rule 19(24) of the *Rules of Court*: is it plain and obvious that the pleadings cannot sustain a cause of action? Evidence is not considered at this stage; rather, the Court assumes that the facts alleged in the pleadings are true. *Endean v. Canadian Red Cross Society*, [1998] 9 W.W.R. 136 (B.C.C.A.), ¶ 7 and 8.

[25] The plaintiff has commenced this action on behalf of herself and other owners and lessees of the proposed class vehicles. The action is framed in negligent design, negligent manufacture, failure to warn and the statutory cause of action of deceptive act or practice giving rise to damages pursuant to the *Trade Practice Act*, R.S.B.C. 1996, c. 457.

[26] The plaintiff's claim in negligence is that the TFI modules in the proposed class vehicles are defective and that the TFI defect poses a danger to the public. The plaintiff argues that the general rule that a plaintiff cannot sue in tort for pure economic loss does not apply in the case of a dangerous defect and that this case falls squarely into the category of cases for which the Supreme Court of Canada has confirmed a cause of action exists. ***Winnipeg Condominium Corporation No. 36 v. Bird Construction Co.***, [1995] 1 S.C.R. 85.

[27] The defendants argues that it is plain and obvious that the statement of claim does not disclose a cause of action for some of the proposed class members in that there will be individuals who have never experienced problems nor experienced any costs repairing or replacing the TFI module. I do not agree with the defendants because only members of the proposed class who suffer loss as a result of a TFI defect will benefit from the action. It is not intended to provide recompense to those who have owned one of the proposed class vehicles but have not suffered or will not suffer loss.

[28] The defendants' argument that there is no actionable claim in negligence because the plaintiff has offered no evidence that the TFI defect poses a real and substantial

danger is premature as it is an argument regarding the merits of the plaintiff's claim.

[29] The defendants submit that the plaintiff's action with respect to the **Trade Practice Act** is flawed in that there are potentially persons in the proposed class who purchased their vehicles outside British Columbia and do not, therefore, have a cause of action because the statute does not govern transactions which occur outside the jurisdiction. The argument is dependent on assumptions about class members which are not in evidence. The issue of whether a particular class member suffered loss as a result of a TFI defect will be the subject of the individual issues at trial and the claim is confined to those who suffered losses as a result of repairs and replacement of the TFI module. It is not essential for the acts or practices take place within B.C. **Robson v. Chrysler Canada Ltd.** (2002), 2 B.C.L.R. (4th) 1 (C.A.).

[30] As a result, I find that the pleadings disclose a cause of action.

Section 4(1)(b) - An Identifiable Class

[31] In my view the plaintiff has defined the class by reference to objective criteria in that a person is a member if they now or in the past owned or leased a proposed class

vehicle during a specified period of time with a distributor mounted TFI module (the class members).

[32] The plaintiff has shown that there are two or more identifiable class members; namely, the representative plaintiff herself and the approximately 54 people who have come forward without a notification program.

[33] Although the exact size of the proposed class is not yet ascertained, the court must not refuse to certify a class merely because the number of class members or identity of each class member is not known. ***Class Proceeding Act***, s. 7(d).

The class definition must simply state objective criteria by which the class members can be identified. ***Western Canadian Shopping Centre v. Dutton***, [2001] 2 S.C.R. 534, ¶ 38.

[34] While the defendants do not challenge the definition on that basis, they say implicit within the requirement of an identifiable class is that there must be some rational relationship between the common issues and proposed class and, that in this case, the class members do not share a common interest in the resolution of the common issues and the causes of action alleged in the statement of claim.

[35] However, the class members are objectively defined as those who owned or leased vehicles with the TFI module mounted on the distributor during the specified time.

[36] The requirement to show that the class is defined sufficient narrowly is not an onerous one. Not everyone in the class has to share the same interest in the resolution of the common issue; however the class should not be unnecessarily broad. *Hollick*, ¶ 20 and 21.

[37] In this case, I find that there are objective criteria to satisfy the requirement of defining a sufficiently narrow class. If subsequent to certification, differences among class members become material, they can be dealt with either through sub-classes or as individual issues. *Scott v. TD Waterhouse* (2001), 94 B.C.L.R. (3d) 320 (S.C.), ¶ 73.

Section 4(1)(c) - Common Issues

[38] This inquiry is limited to whether common issues of fact or law exist; it is not an exercise, at this stage, of weighing the common issues against individual issues. *Class Proceedings Act*, s. 4(1)(c); *Rumley*, ¶ 33; *Harrington v. Dow Corning Corp. et al.* (2000), 193 D.L.R. (4th) 67 (B.C.C.A.) ¶ 23.

[39] The touchstone to this inquiry is whether proceeding as a class action will avoid either duplication of fact-finding or legal analysis. The questions which should be asked to determine whether issues are common are:

- Is the resolution of the issue necessary to the resolution of each class members' claim? and
- Is the issue a substantial ingredient of each of the class members' claims? *Hollick*, ¶ 18.

[40] This latter requirement has been stated by the British Columbia Court of Appeal as being satisfied if the resolution of a common issue, either for or against the class members, will advance the case; i.e. move the litigation forward, and is capable of extrapolation to all class members. It is not necessary that the resolution of the common issues be determinative of liability. *Harrington v. Dow Corning Corp.*, at ¶ 20-24.

[41] The common issues should be disclosed by pleadings, including particulars. However, common issues may be refined and reduced as litigation proceeds. *Hoy v. Medtronic, Inc.* (2001), 94 B.C.L.R. (3d) 169 (S.C.) at ¶ 49.

[42] The courts have addressed whether certain types of claims and relief raise common issues and have held as follows:

- claims sounding in negligence raise common issues because no class member can prevail without showing duty and breach;
- a changing standard of care over time will not necessarily prevent certification in a negligence case - the court may answer the breach of standard differently for different time periods (and therefore class members) but they all share an interest in the answer to the question; and
- punitive damages are appropriately certified as common issues because the focus of the inquiry into the award is on the conduct of the defendant.

Rumley, ¶ 27-32 and 34; **Chace v. Crane Canada** (1996), 44 B.C.L.R. (3d) 264 (C.A.); **Endean v. Canadian Red Cross Society et al.** (B.C.C.A.), ¶ 40-41; **Griffith v. Winter** (2002), C.P.C. (5th) 336 (B.C.S.C.), ¶ 20-24.

[43] The defendants argue that the issue of whether the TFI modules pose a real and substantial danger cannot be answered as a common question based on the experience of one

or a few vehicle drivers. They submit that there is no single, homogeneous TFI module or operating environment across the proposed class of vehicles. They say that because of the large number of different TFI modules and the changes made to them over the class period from 1983 to 1995 there are no common issues that will move this matter forward.

[44] The plaintiff's theory is that although there may be different TFI modules and changes to them during the class period the defendants' decision to mount and sink their TFI module through the distributor created a dangerous defect, i.e. the TFI defect. The plaintiff alleges that the TFI defect applies across the class.

[45] The defendants argue as well that the standard of care may have varied over the relevant time period. However, it is clear from *Rumley* that is not a basis for refusing certification. Rather it simply may mean that it is necessary to provide a nuanced answer to the common question (¶ 32).

[46] The proposed common issues in this case are as follows:

- (a) Were the defendants the only manufacturers of class vehicles for sale or lease through Canadian dealerships?

- (b) Were the class vehicles originally made commercially available by the defendants?

- (c) Prior to the manufacture of the class vehicles, and to the present, did the defendants know, or alternatively, should they have known, that mounting the TFI module on the distributor of the class vehicles would:
 - (i) subject the TFI modules to temperatures in excess of what are safe operating limits during normal vehicle operation, and
 - (ii) cause the TFI modules to fail?

- (d) Prior to the manufacture of the class vehicles, and to the present, did the defendants know, or alternatively, should they have known that the failure of the TFI modules could cause the class vehicles to stumble or stall suddenly and without warning during normal operations, thereby placing their occupants and others at risk of personal injury and death from loss of vehicle control and collisions?

- (e) Did the defendants owe a duty of care to the plaintiff and the class members?

- (f) Did the defendants breach the standard of care in manufacturing the class vehicles?
- (g) Did the defendants breach the standard of care in failing to recall the class vehicles?
- (h) Did the defendants fail to provide a proper warning about the operation of the TFI modules?
- (i) Were the purchases or leases of class vehicles by the class "consumer transactions" as that term is defined in the **Trade Practice Act**?
- (j) Were the defendants "suppliers" to consumer transactions, as that term is defined in the **Trade Practice Act**?
- (k) Did the defendants engage in deceptive acts or practices, within the meaning of section 3 of the **Trade Practice Act** by:
 - (i) failing to disclose the TFI defect to the class members;
 - (ii) actively concealing the TFI defect;

(1) Are the defendants liable to pay punitive damages having regarding to the nature of the established breaches?

[47] Essentially, these can be divided into negligence issues (a - h), **Trade Practice Act** issues (i - k) and punitive damages (l).

Negligence Common Issues

[48] In **Chace v. Crane Canada Inc.**, the B.C. Court of Appeal confirmed that in a products liability case a determination that the product in question is defective or dangerous as alleged will advance the claim to an appreciable extent and that an alleged inherent defect in a product is the type of question for which a class proceeding is ideally suited (¶ 16).

[49] The defendants say that throughout the proposed class period they made modifications to the proposed class vehicles and the TFI modules to try to improve the performance of the TFI module. At the trial of the common issues, the court may find that in spite of these modifications, and in considering evidence which is not yet before the court on this certification hearing, the defendants were in breach of their duty of care throughout the entire class period, during parts

of the class period only, or not at all. Such alternate scenarios are present in many class actions where negligence is alleged yet the common issues remain truly common, because the answers resolve or advance the litigation for all of the class members.

[50] I agree with the plaintiff that the resolution of the negligence common issues are necessary to the resolution of each class member's claim, i.e. each must be able to prove that the defendants were the manufacturers and suppliers of their vehicles with the TFI modules, that they owed a duty of care, the nature of the duty of care and whether it was breached. These issues are primary issues in each proposed class member's claim for negligence and failure to warn and therefore a decision on them will in my view advance the litigation.

[51] There is a rational connection between the class as defined and the asserted negligence common issues based on the definition of the proposed class vehicles as including those models with distributor mounted TFI modules. All proposed class vehicles have distributor mounted TFI modules, and all proposed class members have an interest in determining whether their placement was defective or negligent. The fact that other collateral factors may have made a particular vehicle

more or less likely to fail does not diminish the fact that all are concerned with whether the design, including the placement of the TFI module, was defective.

[52] The defendants have not yet filed a statement of defence setting out what they say are alternate causes. The defendants' arguments that they believe that factors other than the alleged defects in the TFI modules play a role in the failure rates of the TFI modules, and that there is no TFI defect as alleged by the plaintiff and no common questions which can be certified relating to a TFI defect are premature. They require a finding during the certification stage that the alleged TFI defect does not exist.

[53] The plaintiff has narrowed the case, as she is entitled to do to enhance and facilitate the prospects for certification. *Rumley*, ¶ 30. The common questions the plaintiff proposes are based on her theory that the placement of the TFI modules on the distributor, the sinking of the modules to the distributor and the excess dwell times caused problems with stalling and starting the vehicles.

[54] I am of the view that if the plaintiff establishes at the common issues trial that the alleged TFI defect poses a substantial danger that will advance the case of each class member.

[55] If the defendants are right that the plaintiff's theory has no merit then it will resolve the claims being asserted, but the time for that determination is the trial of the common issues.

[56] I would note that the defendants' denial of negligence cuts both ways in that they argue that in order to determine the cause of what the plaintiff says is a large number of TFI modules having to be replaced or repaired is a matter of considerable complexity. The cost of litigating the issue will be high in comparison to the modest damage sustained in most individual cases, i.e. it is an argument in favour of finding that this is an appropriate issue to be explored in the context of a class proceeding. ***Chace v. Crane Canada Inc.***, ¶ 12.

[57] Even accepting the defendants' submissions that other issues may also be causally connected to the failures being experienced does not prevent certification because those issues would have to be considered in the context of whether the plaintiff's theory is correct regarding the alleged TFI defect and its cause.

[58] The defendants further argue that the plaintiff must proceed on the basis of proving that the "best vehicle" is defective. However, this argument has not been accepted by

the courts which have held that a common issue may be one where the answers are different for different class members. So long as the issue is one which is necessary to be resolved for each class member's claim and is a substantial ingredient of the claim, the issue is common. It is not whether the answer is common, but whether the question is common. *Rumley*, at ¶ 27-32 and 34.

[59] As a result, I conclude that the proposed questions (a) to (c), (e), (g) and (h) are common questions. In my view (d) and (f) should be reworded as follows:

(d) Prior to the manufacture of the class vehicles and to the present did the defendants know, or alternatively, should they have known that the failure of the TFI modules could cause the class vehicles to stumble or stall suddenly and without warning during normal operations? Did this place their occupants and others at risk of personal injury and death from loss of vehicle control and collisions?

(f) Did the defendants breach the standard of care in the design, manufacture and placement of the TFI modules?

Trade Practices Common Issues

[60] The plaintiff concedes that the portion of the definition of "consumer transaction" in the *Trade Practice Act* pertaining to the purpose of the transaction is an individual issue. The plaintiff proposes to recast the common issues by eliminating question (i).

[61] The plaintiff submits that the *Trade Practice Act* common issues meet the test of eliminating duplication of fact finding and legal analysis.

[62] The pertinent provisions of the *Trade Practice Act* are:

"consumer transaction" means any of the following:

- (a) a sale, lease, rental, assignment, award by chance or other disposition or supply of any kind of personal property or real property to an individual for purposes that
 - (i) are primarily personal, family or household, or
 - (ii) relate to a first time business opportunity scheme;
- (b) a solicitation or promotion by a supplier with respect to a transaction referred to in paragraph (a);
- (c) a solicitation of a consumer by a person requesting any of the following:
 - (i) a contribution of money by the consumer;

- (ii) a contribution of any other property by the consumer;

"supplier" means a person, whether in British Columbia or not, other than a consumer, who in the course of the person's business solicits, offers, advertises or promotes the disposition or supply of the subject of a consumer transaction or who engages in, enforces or otherwise participates in a consumer transaction, whether or not privity of contract exists between that person and the consumer, and includes the successor to, and assignee of, any rights or obligations of the supplier;

Deceptive acts or practices

- 3 (1) For the purposes of this Act, a deceptive act or practice includes

- (a) an oral, written, visual, descriptive or other representation, including a failure to disclose, and

- (b) any conduct

having the capability, tendency or effect of deceiving or misleading a person.

(2) A deceptive act or practice by a supplier in relation to a consumer transaction may occur before, during or after the consumer transaction.

(3) Without limiting subsection (1), one or more of the following, however expressed, constitutes a deceptive act or practice...

[63] A finding that the defendants introduced the proposed class vehicles into the stream of commerce is arguably sufficient to meet the definition that they are "suppliers". *Robson v. Chrysler Canada Ltd.*, ¶ 12-15. Such a finding can be made without reference to any of the

individual class members but is necessary to the resolution of each of their claims under the **Trade Practice Act**. Similarly, a determination of whether the purchase and lease of proposed class vehicles are "consumer transactions" can be made by reference to the statute. The defendants have proffered no evidence of varying contractual frameworks other than the "leases and purchases" specified in the common issue. As such, there is no evidence that individual evidence would be required to assess this issue.

[64] Once the common question as to whether, at law, the introduction of the class vehicles into the stream of commerce and other activities the defendants undertook in respect of the proposed class vehicles are sufficient to render them "suppliers", the determination of whether the defendants were "suppliers" to a particular "consumer transaction" would be a simple factual matter at the individual issues stage.

[65] The plaintiff argues that in order to determine whether the defendants engaged in a deceptive act or practice within the meaning of the **Trade Practice Act** by failing to disclose the TFI defect the key factual issues will be what the defendants knew about the alleged TFI defect before and during the class period and whether the defendants were silent about the TFI defect. I agree that this analysis will be

common to all class members because it does not require analysis of representations between the defendants and each class member. Reliance is not pleaded and is not necessary if the allegation is failure to disclose.

[66] The plaintiff submits there is a good arguable case that mere silence is a "deceptive act or practice" within the meaning of the *Trade Practice Act*. *Robson v. Chrysler Canada Ltd.*, ¶ 16-23; *Olsen v. Behr Process Corp. et al.*, 2003 BCSC 429, ¶ 28-32.

[67] The factual analysis with respect to this common issue will simply be whether the defendants knew and were silent about the TFI defect. I do not accept that the case is analogous to the case relied on by the defendants, *McKay v. CDI Career Development Institutes Ltd.* (1999), 64 B.C.L.R. (3d) 386 (S.C.), which dealt with the issue of positive representations.

[68] Accordingly, I conclude that the proposed questions (j) and (k) are common issues in the class proceeding.

Punitive Damages Common Issues

[69] Punitive damages have been accepted by the courts as an appropriate common issue in many cases because the focus of

the inquiry is on the conduct of the defendants. *Rumley*, ¶ 34.

[70] The defendants' submissions regarding the common issue of punitive damages are with respect to the merits and are premature.

[71] In my view, the appropriateness and amount of punitive damages is a question which is amenable to resolution as a common issue in this case and I would allow proposed question (1).

Representative Plaintiff - Section 4(1)(e)

[72] Section 4(1)(e) of the *Class Proceedings Act* mandates that the representative plaintiff must be able to fairly and adequately represent the class, has developed a plan for proceeding and does not have a conflict with the interests of the class on common issues. The representative plaintiff must be prepared to vigorously represent the interests of the class. *Campbell v. Flexwatt* (1997), 44 B.C.L.R. (3d) 343 (C.A.) at ¶ 75.

[73] The inquiry with respect to the issue of whether the representative plaintiff adequately and appropriately representing class members and potential conflicts of interest is focused on the proposed common issues. If differences

between the representative plaintiff and the proposed class do not impact on the common issues then they do not affect the representative plaintiff's ability to adequately and fairly represent the class, nor do they create a conflict of interest. *Hoy v. Medtronic*, ¶ 83-85; *Endean v. Canadian Red Cross Society* (1997), 148 D.L.R. (4th) 158 (B.C.S.C.) at ¶ 66.

[74] There is no indication that Ms. Reid has any interest in conflict with the class members on the proposed common issues. If such a conflict were to arise, sub-classes are available to deal with differences. See, for example, *Anderson v. Wilson* (1999), 44 O.R. (3d) 673, 175 D.L.R. (4th) 409 (C.A.) at p. 24 (QL); *Endean v. Canadian Red Cross Society*, (S.C.) at ¶ 66; *Hoy v. Medtronic*, at ¶ 83-85.

[75] The purpose of the plan for proceeding at the certification stage is to aid the court by providing a framework within which the case may proceed and to demonstrate that the representative plaintiff and class counsel have a clear grasp of the complexities involved in the case which are apparent at the time of certification and a plan to address them. The court does not scrutinize the plan at the certification hearing to ensure that it will be capable of carrying the case through to trial and resolution of the common issues without amendment. It is anticipated that plans

will require amendments as the case proceeds and the nature of the individual issues are demonstrated by the class members.

Hoy v. Medtronic, at ¶ 81-82; *Scott v. TD Waterhouse*, at ¶ 164-167.

[76] In my view, the proposed litigation plan sufficiently addresses the requisite issues and demonstrates that the plaintiff and class counsel have thought through the process of the proceeding.

[77] I conclude that the plaintiff's theory of the case does permit her to represent all class members since a common defect is alleged. The defendants' submission that some class members may wish to argue certain parts of the case differently because of differences across the vehicles, or that they may wish to focus on certain parts of the case that the representative plaintiff does not, assumes that individual actions are a viable alternative which class members can and will pursue. I agree with the plaintiff that the economic realities of this case are such the class members only prospect of recovery is to engage in a simplified claim with a common theory of the TFI defect. *Endean v. Canadian Red Cross Society et al.*, (S.C.) ¶ 68.

[78] For those class members who wish to control their own actions or develop special theories inconsistent with the

theory being advanced by the plaintiff in this action remain free to do so after opting-out of the class proceedings.

Section 4(1)(d) - Preferability

[79] The test for whether the class action is the preferable procedure for the resolution of the common issues is set out in s. 4(2) of the *Class Proceedings Act*.

[80] The list is of factors to consider is not exhaustive and no single factor trumps. *Elms v. Laurentian Bank of Canada*, (2001), 90 B.C.L.R. (3d) 195 (C.A.), ¶ 51.

[81] The extent to which the proposed proceeding will achieve the goals of the *Class Proceedings Act*, namely, access to justice, judicial efficiency and behaviour modification, should be considered in the preferability assessment along with the considerations mandated by s. 4(2). *Hollick*, ¶ 32 - 34; *Elms v. Laurentian Bank of Canada*, ¶ 54-55; *Endean v. Canadian Red Cross Society*, (S.C.) ¶ 23, 53-64.

Section 4(2)(a) - Common Questions Predominate

[82] There are usually individual issues of injury and causation that have to be determined in individual proceedings following the resolution of the common issues.

[83] Where the common issues are at "the heart of the litigation", concerns about the relative weight of individual issues are much less troubling. *Scott v. TD Waterhouse*, ¶ 117, 120-122, 130-137.

[84] However, products liability cases have been certified even where the court determined that the individual issues predominated over the common issues. In *Endean v. Canadian Red Cross Society*, (S.C.) the court recognized this as follows:

In my view, the intention behind these provisions of the *Act* is to put more emphasis on the goal of access to justice than on that of judicial economy. That was the approach taken in *Harrington, supra*, where a class proceeding was certified despite the many unresolved, difficult, individual issues associated with establishing claims arising out of allegedly defective breast implants. Accordingly, the undoubted predominance of individual issues here is not in itself fatal to the application.

(p. 71)

[85] I agree with the plaintiff that the common issues that have been enunciated, i.e. the negligence of the defendants and/or the deceptive acts or practices, are at the heart of this litigation. Resolution of the common issues will either conclude the litigation in favour of the defendants or leave very little for individual consideration

in the event that the common issues are decided in favour of the class. The key remaining individual issues will be:

- whether and from whom the class member purchased or leased a class vehicle with a distributor mounted TFI module; and
- if so, what damages, if any, has the class member has suffered as a result of the TFI module?

[86] Both issues are clearly capable of resolution and the fact that damages require individual assessment is not a bar to certification.

[87] Section 7 of the ***Class Proceedings Act*** deals with individual issues. The presence of individual issues does not make individual litigation preferable to class litigation. The same issues will be faced in both litigation structures. The ***Class Proceedings Act*** is not directed solely to the resolution of the common issues, but also to the simplification and management of any individual issues that remain. These simplification and management tools are incorporated into the plaintiff's case management plan. ***Class Proceedings Act***, s. 27; ***Endean v. Canadian Red Cross Society***, (S.C.) ¶ 60.

[88] Although the defendants have argued that "individual" issues predominate, the material adduced in support of their position provides some indication of the commonality of the TFI defect. Despite the defendants' arguments that other variables affect the ultimate amount of heat to which the TFI module is subjected, their affidavits outline efforts to address and minimize the heat applied to the TFI modules. The plaintiff has not yet been able to pursue her theory of a common defect through discovery and trial. This case may well develop into a battle of experts. The battle should proceed to a trial of the common issues, not be halted at certification.

[89] In my view a class procedure will address the concern of the class members in a much more expeditious manner than a proliferation of individual lawsuits.

Section 4(2)(b) - Class Members Do Not Have An Interest In Controlling Separate Actions

[90] There is no evidence that any class members wish to control separate actions. The evidence is to the contrary.

Section 4(2)(c) - Claims That Are or Have Been the Subject of Other Proceedings

[91] There is no evidence of other B.C. proceedings pertaining to this problem. As such, there is no evidence that class members are able to sustain individual claims, or that the issues will be addressed in some other litigation.

Section 4(2)(d) - Other Means of Resolving the Claims

[92] There is no proposed alternative method for resolving these claims before the court. There is no claims process in place, accordingly individual litigation is the only alternative.

[93] Individual litigation affords no advantage over a class proceeding in this case. Class proceedings provide a number of benefits which enhance its preferability. I find it is likely that a determination of the common issues will permit the individual issues to proceed more efficiently and expeditiously. As well, depending on the outcome, the determination of the common issues may encourage settlement. A class proceeding in the circumstances of this case allows the access to justice for those who would not otherwise have the means to prosecute an action. The common issues will be determined and simplified structures and procedures can be implemented for the individual issues if appropriate. To

require each individual to separately address the common issues identified rather than have them determined in a class proceeding would, in my view, lead to inefficient use of resources and the potential for inconsistent decisions.

[94] The defendants suggest that complaining to Transport Canada is a more practical and efficient means of resolving the proposed class members' tort and other claims.

[95] There is evidence that complaints have been made to Transport Canada regarding stalling problems in the proposed class vehicles and Ford Canada was made aware of these complaints, as copies of the complaints are routinely sent to Ford Canada. The defendants' claim that they are not aware of such complaints is a clear indication that complaining to Transport Canada is not an effective means to resolve these types of claims. The evidence is that Transport Canada has not engaged in any prosecutions for the last ten years. A determination by Transport Canada is not binding or governing in any civil proceeding nor does it have the power to award damages. Hence, it is not an appropriate alternative to the proposed class proceedings.

Section 4(2)(e) - The Administration of this Class Proceeding

[96] There is no indication that this class proceeding will create any undue difficulties beyond those customarily faced in product liability cases defended by large well funded corporations. There are only two related defendants, there is no suggestion of any third parties, and the individual issues appear to be few and resolvable. This is a homogeneous class action which should proceed smoothly.

[97] The administration of this class proceeding will not present greater difficulties than those likely to be experienced if relief were sought by other means. All of the same issues would need to be considered in any individual litigation, but in a less controlled procedural environment.

CONCLUSION

[98] In this case, the claims of the individual plaintiffs are not economically feasible on their own. Product liability issues are complicated and it is not practical for an individual plaintiff to litigate a case without the assistance of counsel. The costs of retaining experts will easily outstrip any one class member's claim.

[99] The gains from a class action are self-evident with respect to judicial economy and efficiency. The duty,

standard of care, breach of standard of care and **Trade Practice Act** issues will only be heard once by this court.

[100] Judicial economy will also be enhanced because the class members do not need to participate in the initial discovery process or the common issues trial. If the defendants are successful at the common issues trial, the court and the class will be saved from having to manage and participate in such individual procedures. If the plaintiff is successful, any procedures necessary to resolve the individual litigation will be no more complex than they would have been within individual litigation, and given the many management tools available in class proceedings, should be simpler.

[101] With respect to behaviour modification, McLachlin C.J. noted in ***Western Canadian Shopping Centres Inc. v. Dutton***, at ¶ 29:

Without class actions, those who cause widespread but individually minimal harm might not take into account the full costs of their conduct, because for any one plaintiff the expense of bringing suit would far exceed the likely recovery. Cost-sharing decreases the expense of pursuing legal recourse and accordingly deters potential defendants who might otherwise assume that minor wrongs would not result in litigation ...

[102] Manufacturers who distribute products which fall below acceptable standards should, if they are negligent, account to all of their customers for resulting damage.

[103] The class as defined and the proposed common issues meet the touchstone of the analysis enunciated in ***Western Canada Shopping Centres v. Dutton*** and ***Hollick***, i.e. they will enable the court to avoid duplication in fact finding and legal analysis. In my view the common issues identified are at the heart of this litigation and will advance the litigation.

[104] As well, certification is appropriate in order to achieve access to justice. Given the relative simplicity of the individual issues and the tools available under the ***Class Proceedings Act***, I have concluded that a class proceeding is the preferable proceeding for the fair and efficient resolution of these claims.

[105] Accordingly, I am granting the following orders:

- that the action be certified as a class proceeding;
- the class be described as all persons resident in British Columbia who:
 - currently own or lease a class vehicle

- owned or leased a class vehicle and paid or were charged for the cost of replacing a TFI module in such vehicle;
- purchased or leased a class vehicle and paid or were charged for the cost of replacing a TFI module when the vehicle was new;
- the plaintiff Barbara Reid is appointed representative plaintiff;
- the questions as modified are certified as common issues of fact or law.

The Hon Madam Justice L.B. Gerow