CITATION: Richardson v. Samsung, 2018 ONSC 6130
COURT FILE NO.: 2610/16
DATE: 20181016

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
James Richardson	)	Mathew D. Baer and Emily Assini, for the plaintiff
Plaintiff	)	
– and –	)	
Samsung Electronics Canada Inc.	)	Scott Maidment and Calie Adamson, for the defendant
Defendant	)	
	)	**HEARD:** April 17 and 18, 2018

RADY J.

Introduction

[1] This is a proposed class action respecting Samsung's allegedly defective smartphones. The plaintiff seeks certification of a national class. The defendant opposes.

[2] This being a products liability case, one might think it ideal for certification. However, I have concluded that the motion should be dismissed because the claim fails to meet some of the prerequisites that would mandate certification.

The Claim in Brief

[3] The defendant sold Galaxy Note7 cell phones that were found to overheat – so-called "thermal runaway events" – creating a risk of fire or explosion. The problem was caused by a defective lithium-ion battery used in the phones.

[4] Samsung halted sales. Almost contemporaneously, Samsung and Health Canada initiated a recall. The company offered a package that provided either a replacement phone or a full refund and certain related compensation. The essence of the plaintiff's complaint is that the compensation package was inadequate because it did not properly reimburse consumers for their losses. He also alleges that two other devices - the Galaxy S7 and Galaxy S7 Edge - have the same safety risk, and seeks to have the purchasers of those devices included in the class.

Chronology

August 19, 2016	Note7 released to Canadian market
August 19 – September 1, 2016	24,957 phones distributed in Canada
September 2, 2016	Samsung halted sales
September 6, 2016	Samsung announced the availability of replacement phones
September 10, 2016	Samsung posted a statement on its website: "We are asking users to power down their Samsung Galaxy Note7s and exchange them as soon as possible."
September 12, 2016	Health Canada issued a recall posted on its website: "The Samsung Note7 smartphone Lithium-ion battery has the potential to overheat and burn, posing a potential fire hazard" and "the recalled smartphones were sold from August 19th 2016 to September 1st 2016 in Canada, and smartphones sold before September 15th, 2016 in the United States."
September 15, 2016	The U.S. Consumer Product Safety Commission issued a recall posted on its website: "The lithium-ion battery in the Galaxy Note7 smartphones can overheat and catch fire, posing a serious burn hazard to consumers."
October 10, 2016	The U.S. Federal Aviation Administration released a statement posted to its website: "…The Federal Aviation Administration urges passengers onboard aircraft to power down, and not use, charge, or stow in checked baggage, any Samsung Galaxy Note7 devices, including recalled and replacement devices."
October 11, 2016	Samsung posted a statement on its website: "…Samsung will ask all carrier and retail partners globally to stop sales and exchanges of the Galaxy Note7 while the investigation is taking place" and "consumers with either an original Galaxy Note7 or replacement Galaxy Note7 device should power down and stop using the device and take advantage of the remedies available."
October 11 or 12, 2016	Samsung posted a statement on its website: "…Samsung has confirmed it has stopped sales and exchanges globally of the Galaxy Note7 and has decided to stop production" and "beginning on October 13, Samsung Note7 owners can bring their device to the original Samsung or authorized reseller point of purchase, to: Exchange towards a Galaxy S7 or

	Galaxy S7 Edge device. Receive a refund for the Note7 device and Note7 specific accessories."
October 13, 2016	Health Canada updated its recall: "Approximately 39,000 of the recalled smartphones were sold or distributed in Canada, of which 22,000 were included in the original recall" and "the recalled smartphones were sold or distributed from August 19, 2016 to October 10, 2016 in Canada."
October 13, 2016	The U.S. Consumer Product Safety Commission updated the recall.
October 13, 2016	Samsung posted a statement on its website: "Further to announcements made earlier this week, Samsung Electronics Canada Inc. confirmed beginning today it is offering Galaxy Note7 owners who bring their device to their original Samsung or authorized reseller point of purchase, the following options: A $100 credit* for customers who exchanged their Note7s for a Galaxy S7 and S7 Edge. A $25 credit* for customers who exchange their Note7s for a refund or other smartphone."
October 14, 2016	The U.S. Federal Aviation Administration banned all Samsung Galaxy Note7 smartphones from air transport in the U.S.
October 17, 2016	Transport Canada banned all Samsung Galaxy Note7 devices from air transport.
October 18 or 19, 2016	Samsung posted a statement on its website: "In support of our Canadian customers, Samsung Canada along with its carrier and retail partners would like to inform Note7 owners of Transport Canada's notice to prohibit Note7 devices in carry-on and checked baggage on flights. We are working with Canadian airlines and major international airports to help minimize travel inconvenience."
December 7 or 8, 2016	Samsung posted a statement on its website: "...Samsung Canada would like to make our consumers aware of our plans to deactivate service for remaining Note7 devices in the Canadian market" and "functional limitations, including a limitation on the battery charge, Wi-Fi, and Bluetooth disablement will be implemented as early as December 12th,

	2016. Effective December 15th, 2016, customers still using the Note7 will no longer be able to connect to any Canadian mobile network services to make calls, use data or send text messages."

[5] By way of further elaboration, Samsung determined that the reported thermal runaway events arose from a battery manufacturing issue. Samsung was supplied with batteries from two manufacturers. It determined that the defect was associated with one manufacturer and not the second. As a result, replacement phones contained the battery from the second manufacturer.

[6] Unfortunately, reports of thermal runaway events continued, now associated with the replacement Galaxy Note7s. It was in this context that Samsung announced the replacement/compensation package in the October 13, 2016 release. By this time, 35,293 Note7s (both original and replacement) had been distributed in Canada.

The Claim

[7] This action was commenced on November 4, 2016. The claim has been amended many times, including on April 3, 2017 and January 30, 2018 substituting the representative plaintiff both times and discontinuing the action against the U.S. Samsung entity.

[8] Mr. Richardson purchased a Samsung Galaxy Note7 on August 22, 2016, the cost of which was subsumed by his cell phone plan with Rogers.

[9] In September 2016, he returned his cell phone pursuant to the recall and received a replacement Note7. The following month, the plaintiff travelled to Europe. While there, he became aware that the replacement was the subject of a safety recall and travel ban. He alleges that he spent considerable time and expense determining what to do and was stressed as a result. He was obliged to discard his phone in order to board his flight home from Gatwick. He received a Samsung Galaxy Edge in replacement and a $100 goodwill credit. The plaintiff says he was not reimbursed for such items as long distance charges, his time to deal with the matter, inconvenience and lost wages.

[10] The plaintiff pleads the following causes of action or remedies:

(i) misrepresentations in connection with the recall;

(ii) breach of the *Consumer Protection Act*, 2002, S.O. 2002, c.30, Schedule A and the *Competition Act* R.S.C. 1985, c. C-34 and the *Sale of Goods Act*, R.S.O. 1990, c. S.1;

(iii) breach of warranty;

(iv) negligent misrepresentation;

(v) negligence;

(vi) unjust enrichment;

(vii) waiver of tort.

[11] He seeks pecuniary and special damages on behalf of the class of $100,000,000; exemplary, punitive and aggravated damages of $50,000,000; and other relief. The plaintiff pleads the following under the Damages heading:

> 47. The plaintiff claims pecuniary and special damages for costs, time, and expenses incurred in the process of replacement of the devices and the ongoing wireless carrier charges that the plaintiff and class members continued to pay despite not having a safe, reliable, and usable wireless device. As a result of the defendant's conduct, the plaintiff and class members have suffered and continue to suffer expenses and special damages of a nature and amount to be particularized prior to trial.
>
> 48. The plaintiff claims non-pecuniary and general damages for non-monetary losses incurred as a result of the defendant's conduct. Such non-pecuniary and general damages include, but are not limited to, loss of personal data including photographs, pain and suffering, and loss of enjoyment.

[12] The claim alleges more particularly:

1) Breach of the *Consumer Protection Act*, 2002, the *Sale of Goods Act*, and the *Competition Act* for –

- false, misleading or deceptive representations and unfair practice arising from misrepresentations about the characteristics, benefits, or qualities of the devices (para. 29 (a));
- misrepresentations respecting the devices' standard and quality (para. 29 (b));
- misrepresentation due to the use of exaggeration, innuendo or ambiguity as to a material of fact or failure to state a material fact leading to deception (para. 29 (c));
- misrepresentations respecting the availability of and quality of replacement devices (para. 31);
- breach of express warranty of safety and quality by the supply of a product with a known and dangerous defect (para. 30); and
- breach of implied condition as to quality and fitness for use (para. 34).

2) Negligence -

- the defendant owed a duty of care to the class to:

(a) ensure that the devices were fit for intended and/or reasonably foreseeable use;

(b) conduct appropriate testing to determine whether and to what extent use of the devices posed serious safety risks;

(c) properly, adequately, and fairly warn of the magnitude of serious safety risks;

(d) ensure that consumers and the public were kept fully and completely informed of all safety risks associated with the devices in a timely manner;

(e) monitor, investigate, evaluate, and follow up on reports of overheating, fire, and/or explosion of the devices; and

(f) properly inform Health Canada and other regulatory agencies of all risks associated with the devices (para. 38).

- the particulars of negligence are:

(a) failure to ensure the devices were safe;

(b) failure to ensure they were fit for intended purpose and of merchantable quality;

(c) failure to adequately test them in a manner that would fully disclose the magnitude of the risks associated with their use;

(d) failure to provide the proper, adequate, and/or fair and timely warning of the risks associated with their use of the devices;

(e) failure to design and establish a safe, effective, and timely disposal procedure;

(f) failure to adequately monitor, evaluate and act upon reports of overheating, fire and/or explosion;

(g) failure to provide timely updates and/or current information respecting their risks;

(h) consistently underreporting and withholding information about their propensity to cause injuries;

(i) failure to issue adequate warnings or a timely recall, to publicize the problems, and to otherwise act properly in a timely manner to alert the public of their inherent dangers;

(j) representing that they were safe and fit for intended purpose and of merchantable quality when it knew or ought to have known that these representations were false;

(k) the misrepresentations were unreasonable given that the risks that were known or ought to have been known;

(l) failure to cease manufacture, marketing, and/or distribution when it knew or ought to have known that they caused injuries; and

(m) the class, showing callous and reckless disregard for the class' health and safety (para. 40).

3) Unjust Enrichment -

- the defendant was unjustly enriched because it retained profits and consumers were deprived because they purchased defective products. There is no juristic reason for the defendant's enrichment and it should be obliged to disgorge revenues generated as a result (para. 43).

[13] In the alternative, the plaintiff alleges he is entitled to waive the tort and claim an accounting or other restitutionary remedies.

The Parties' Positions

[14] The plaintiff submits that he meets all the criteria under s. 5 of the *Class Proceedings Act*, 1992, S.O. 1992, c.6. As a product liability case, it is said to be ideal for certification.

[15] The defendant responds that no tenable causes of action are pleaded; there is no basis in fact to support a finding of commonality; and the plaintiff has failed to show that a class action is the preferable procedure. As a result, it says that s. 5 (1) (a) (c) and (d) are not satisfied and the action should not be certified.

[16] Each side tendered expert opinion respecting whether damages can be calculated across the class and whether there is a methodology for doing so. Unsurprisingly, they disagree.

The Law

[17] Section 5 of the *Class Proceedings Act* makes certification mandatory if its five criteria are met. The law is well developed and requires little elaboration except to say that the motion is decidedly not a merits evaluation: *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57. The focus is on the form of the action and whether a class action provides the appropriate mechanism by which to proceed. See *Pro-Sys, supra* and *Fischer v. IG Investment Management Ltd.*, 2013 SCC 69.

[18] I have previously observed that the principle is easily stated but, in practice, certification motions increasingly seem to be an invitation to examine the merits of a claim. See *Rooney v. ArcelorMittal et al.*, 2018 ONSC 1878.

Analysis

Section 5(1)(a) – Do the Pleadings Disclose A Cause of Action?

[19] *Pro-Sys, supra* instructs that the test for establishing a cause of action is determined "on the same standard of proof that applies to motions to dismiss, as set out in *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at p. 980. That is, a plaintiff satisfies this requirement unless, assuming all facts pleaded to be true, it is plain and obvious that the plaintiff's claim cannot succeed".

[20] *Hunt* also stands for proposition that if there is a chance the plaintiff's claim might succeed, then the plaintiff should not be "driven from the judgment seat". Only if the action is destined to fail because "it contains a radical defect... should the relevant portions of a plaintiff's statement of claim be struck out..." (para. 36).

[21] Further, the claim is to be read generously with allowance for drafting deficiencies or frailties.

[22] The novelty of a cause of action is not considered fatal at this stage nor the length and complexity of the issues. Neither is the potential for a strong defence: *Hunt, supra* (para. 36).

[23] Finally, unresolved or unsettled areas of law should be permitted to proceed: *Ford v. F. Hoffmann-La Roche Ltd.*, [2005] O.J. No. 1118 (S.C.J.).

[24] The defendant submits that the causes of action advanced are either inadequately pleaded, untenable at law and in some cases untenable because they are not pleaded with sufficient particularity.

Misrepresentation

[25] As noted above, the plaintiff advances claims for misrepresentation in tort; pursuant to s. 52 of the *Competition Act;* and ss. 14 and 17 of the *Consumer Protection Act* 2002.

[26] Section 1 of the *Consumer Protection Act*, 2002 contains the following definitions:

> "consumer" means an individual acting for personal, family or household purposes and does not include a person who is acting for business purposes;
>
> "consumer agreement" means an agreement between a supplier and a consumer in which the supplier agrees to supply goods or services for payment;
>
> "consumer transaction" means any act or instance of conducting business or other dealings with a consumer, including a consumer agreement;
>
> "goods" means any type of property;
>
> "payment" means consideration of any kind, including an initiation fee;

14. (1) It is an unfair practice for a person to make a false, misleading or deceptive representation.

(2) Without limiting the generality of what constitutes a false, misleading or deceptive representation, the following are included as false, misleading or deceptive representation:

1. A representation that the goods or services have sponsorship, approval, performance characteristics, accessories, uses, ingredients, benefits or qualities they do not have.

...

16. A representation that misrepresents the purpose of any charge or proposed charge.

17. A representation that misrepresents or exaggerates the benefits that are likely to flow to a consumer if the consumer helps a person obtain new or potential customers.

17. (1) No person shall engage in an unfair practice.

[28] Section 18 sets out the remedies available if the Act is contravened, including rescission and/or damages.

[29] The defendant complains that the plaintiff simply used the general language of the *Consumer Protection Act* in paras. 29(a)(b)(c) and 31 of the statement of claim and without the required particularity for claims of misrepresentation. This would be contrary to Rule 25.06(8) and inconsistent with authorities such as *Dugal v. Manulife Financial Corp.*, 2011 ONSC 3 and *Lysko v. Braley*, 2008 CarswellOnt 1758 (C.A.). Rule 25.06 (1) dictates that pleadings are to contain a concise statement of material facts but not evidence. Rule 25.06 (8) requires misrepresentation claims to be pleaded with "full particulars".

[30] In *Lysko,* which was an action for alleged pre-contractual misrepresentations, the court noted at para. 30 that the pleading must set out with "careful particularity" the following:

1. the alleged misrepresentation itself;

2. when, where, how, by whom and to whom it was made;

3. its falsity;

4. the inducement;

5. the intention that the plaintiff should rely upon it;

6. the alteration by the plaintiff of his or her position relying on the misrepresentation; and

7. the resulting loss or damage to the plaintiff.

[31] I agree with the defendant that the misrepresentation claim simply mirrors the language of the *Consumer Protection Act*, 2002. While it can hardly be a surprising contention that consumers expect the manufacturer or vendor to represent that its product is worth purchasing and is safe to use, the balance of this part of the claim is so broadly and generically pleaded that it is not possible to discern precisely what is being alleged. The pleading does not comply with the provisions of Rule 25.06(8), nor with the court's direction in *Lysko*. It does not identify when, where, by and to whom, and how the representation was made. To what exaggeration or innuendo does the plaintiff refer? What characteristics or benefits were touted? What material facts were omitted? These are some of the questions unanswered by the pleading.

[32] With respect to the *Competition Act*, s. 52(1) provides:

> No person shall, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever, knowingly or recklessly make a representation to the public that is false or misleading in a material respect.

[33] Section 52(4) requires the court to consider the impression a representation would create in the mind of the reader. In my view, this can only be accomplished with sufficient particulars, which are absent here.

[34] Another problem faced by the plaintiff is that the claim as framed does not apply to claims by consumers against a manufacturer. In *Singer v. Schering – Plough Canada Inc.,* 2010 ONSC 42, a proposed class action was brought alleging that the defendant misrepresented the protective qualities of a sunscreen it manufactured. The court refused to certify the action on several bases. It concluded that with respect to the *Consumer Protection Act* claim, there was no contractual privity between the manufacturer and the consumer. The court noted:

> 85 There are some fundamental difficulties with the plaintiff's claims under the *Consumer Protection Act*. The most significant is that a manufacturer is not a "supplier" under the statute and there is no pleading of any "agreement" entered into between the plaintiff and the defendants. There is no contractual privity between them. There is no pleading of any "dealings" between the plaintiff and the defendants other than his purchase of their products. Although the plaintiff pleads that the purchase and sale of the defendants' products is a "consumer transaction", there are no facts pleaded that would support this assertion…
>
> 86 In this case, s. 17 of the *Consumer Protection Act* provides that no person shall engage in an unfair practice. The prohibited unfair practices are the acts referred to in ss. 14, 15 and 16 of the statute. The remedy for an unfair practice is provided for in s. 8 which allows the consumer to rescind any agreement "entered into by a consumer after or while a person has engaged in an unfair practice".

> acts referred to in ss. 14, 15 and 16 of the statute. The remedy for an unfair practice is provided for in s. 8 which allows the consumer to rescind any agreement "entered into by a consumer after or while a person has engaged in an unfair practice".
>
> 87 The remedy of rescission, under s. 18, or alternatively damages, can only be available as between a consumer and the "supplier" with whom he or she contracted. The remedy under s. 98 only entitles the consumer to a refund if the "supplier" has "charged a fee or an amount in contravention of the Act or received a payment in contravention of this Act." As between the manufacturer and the consumer in this case, there is no agreement to rescind and no money to refund.

[35] Similarly, in *Williams v. Canon Canada Inc.,* 2010 ONSC 42 a proposed class action was brought on behalf of consumers alleging that the defendant's product (a "Sure Shot" camera) contained a design or manufacturing defect. At paras. 190 and 206, the court refused to certify the *Consumer Protection Act* claim for the same reason as in *Singer*.

[36] The pleading in this case suffers from the same defects as identified in *Singer* and *Williams*. There is no privity of contract between the plaintiff and the defendant. None is pleaded. Indeed, the plaintiff pleads that he purchased his Note7 from a third party identified as Imagine Wireless. It is plain and obvious that this claim cannot succeed.

[37] A claim is also advanced in reliance on the *Sale of Goods Act* on the basis that there was an implied condition as to quality and fitness. The plaintiff has pleaded that "the Defendant's marketing and sale of the devices included an implied condition as to the quality and fitness of the goods" and "the Devices were not of merchantable quality or fit for use" (para. 34).

[38] The Act provides at s. 51:

> 51 (1) Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat a breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but may,
>
> (a) set up against the seller the breach of warranty in diminution or extinction of the price; or
>
> (b) maintain an action against the seller for damages for the breach of warranty.

[39] The prevailing authorities make it clear that contractual privity is also required for claims made under this Act: see *Singer, supra* at paras. 74-57; and *Haliburton Forest & Wildlife Reserve Ltd. v. Toromont Industries Ltd.*, 2016 ONSC 3767.

[40] In *Singer*, Justice Strathy noted:

> 75 The fundamental problem with this cause of action is that there is not contractual relationship between the plaintiff and the defendants. The

> It is well established that warranties may arise between parties by virtue of *The Sale of Goods Act*, R.S.S. 1978, c. S-1, the [Saskatchewan *Consumer Protection Act*] or the *Competition Act* or by means of a collateral contract. ... In the context of the sale of goods, warranties are defined as an agreement with reference to the goods that are the subject of a contract but collateral to the main purpose of the contract. A breach of such warranty gives rise to a claim for damages but not a right to reject the goods. In the context of a collateral agreement, a warranty is "a binding promise", the breach of which may warrant a contract being set aside if the breach is of a serious nature.
>
> In the instant case, no sale is alleged between Merck, as vendor, and any plaintiffs, as purchasers. In the result, *The Sale of Goods Act* does not apply. Similarly, no collateral contract between Merck, as manufacturer, and a plaintiff, as purchaser, is alleged in the amended statement of claim. In these circumstances, I must conclude that the amended statement of claim fails to raise a cause of action based on either an express or implied warranty other than warranties arising pursuant to the *CPA* or the provisions of the *Competition Act*. Consequently, the claims based on a breach of warranty will be struck save as they relate to the *CPA* or the *Competition Act*.

[41] In this case, there is no contract of sale between the parties and the *Sale of Goods Act* does not apply. The claim plainly and obviously cannot succeed.

[42] For these reasons, the misrepresentation claim is not properly and adequately pleaded to lead to the conclusion that a cause of action is made out. The statutory claims are untenable at law.

Negligence

[43] The defendant submits that the claim sounding in negligence suffers the same drafting defects as the other claims. It suggests that the plaintiff has failed to properly differentiate between different types of negligence contrary to Rule 25.06(1). It focuses on what it says is a barely discernable negligent design and manufacturing claim. It says that such a claim is not properly pleaded and relies on *Kreutner v. Waterloo*, [2000] O.J. No. 3031 (C.A.) and *Martin v. Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744. According to these authorities, negligent design claims must identify the alleged defect, the harm that was likely to result, and the alternative design that was available.

[44] Having read the claim carefully several times, it is difficult to find a claim for negligent design and manufacture. Instead, the pleading advances negligence claims for failure to warn of the alleged defect and claims associated with the recall program. However, in contrast, the proposed common issues include questions respecting design. They are as follows:

1. Do some or all of the devices contain the defect alleged in the claim, causing them to overhead? If so:

(i) Which ones?

(ii) Was the defendant negligent in the engineering, design, development, testing, and manufacture of the devices? If so:

(A) What is the standard of care applicable to the defendant?

(B) Did the defendant breach the applicable standard of care? How?

(C) Did the defendant owe a duty of care to the plaintiff and class members?

[45] There is a disconnect between the pleading and the proposed common issues. To the extent that such a claim is being advanced, it has not been properly pleaded, if at all. I am prepared to conclude, however, that there is an adequately pleaded failure to warn claim.

[46] The defendant asserts that the economic loss claims are untenable because they are not recoverable in tort, subject only to certain exceptions – for example, a claim for costs to repair a dangerously defective good. The defendant's submission on this point misses the mark because it overlooks the fact that the alleged danger posed by the Note7 could not be fixed through repair nor was a repair offered. However, that does not end of analysis.

[47] The defendant submits that the economic loss claims raise the possibility of indeterminate liability. It goes on to elaborate what the plaintiff received from the defendant through the recall process. This, it seems to me, invites the court to delve into a merits analysis that is inappropriate at the certification stage.

[48] It says the loss of personal data and the pain and suffering claims are untenable because neither psychological injury nor causation are adequately pleaded and, in any event, the court will not compensate for inconvenience and frustration. I agree with the defendant's submissions for reasons that I will elaborate. I will address the data loss claim and pain and suffering claim here and return to the latter under the preferable procedure analysis.

[49] With respect to the data loss claim, there is no pleading of a causal nexus between the alleged negligence and the alleged damage. Further, there is good reason to conclude on the basis of the evidence in the record that such a claim cannot possibly succeed.

[50] There is evidence that automatic backups are available on mobile devices, including through a Cloud–based backup for the Note7 device. Some consumers may have backed up data before they powered down their devices pursuant to the Notice to do so. Further, the Note7 had a removable SD card for data. The Note7 prompted users to elect to store photographs on the SD card rather than on the hard drive. Some users may have removed the SD card before returning the Note7. Consequently, data loss claims, if any, will vary from user to user.

[51] At the very least, the evidence demonstrates that the issue of data loss is highly individualized and would vary widely from user to user. There is simply no commonality

that would permit recovery across the class. Ultimately, the individual inquiries necessary would overwhelm the process. This aspect of the claim would not survive the commonality inquiry.

[52] With respect to the pain and suffering claim, the law is clear by virtue of *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27, that no compensation is recoverable unless the alleged injury reaches a threshold beyond "upset, disgust, anxiety, agitation" (para. 9). Similarly, damages for pain and suffering are not awarded absent a measurable physical or psychological injury.

Section 5(1)(b) – Is There Identifiable Class?

[53] The plaintiff's proposal is:

> All persons (including corporations and other entities) in Canada who purchased a Samsung Galaxy Note7, a Samsung Galaxy S7 and/or a Samsung Galaxy S7 Edge, sold, manufactured, and/or distributed by the Defendant.

[54] This definition meets the test. Members can self-identify based on objective criteria; the class is clearly bounded and not unlimited; and there is a rational connection between the class and the proposed common issues, as discussed in *Hollick v. Toronto (City)*, 2001 S.C.C. 68. The defendant does not take issue with the proposed class definition.

Section 5(1)(c) – Are There Common Issues?

[55] The proposed common issues are appended at Schedule 1.

[56] The plaintiff submits that there are common issues focusing on the defendant's behaviour, the answers to which would meaningfully advance the claim. He correctly states the fact that individual issues remain after the common issues are answered is not fatal to certification.

[57] He also has filed an expert report from Edward M. Stockton who has concluded that there is a methodology to calculate economic harm by the class.

[58] The defendant counters that a myriad of individual issues will remain even if there were certifiable common issues.

[59] The defendant also responds that the plaintiff's expert's report does not establish a workable methodology. It relies on its expert, Dr. Gregory K. Bell. Further, individual inquiries are required because of the myriad distribution routes and sellers, with idiosyncratic contract terms. Moreover, the compensation program depended on choices made by consumers influenced by a host of factors unique to each.

[60] The burden on the plaintiff under this heading is to demonstrate that the common issues can be answered across the class: *Pro-Sys, supra.* Before discussing the competing

idiosyncratic contract terms. Moreover, the compensation program depended on choices made by consumers influenced by a host of factors unique to each.

[60] The burden on the plaintiff under this heading is to demonstrate that the common issues can be answered across the class: *Pro-Sys, supra*. Before discussing the competing expert opinions, the inclusion of Galaxy S7 and Galaxy S7 Edge devices in the proposed common design issues must be addressed.

[61] I have concluded that there is no admissible evidence that supports the inclusion of these devices in the claim. The plaintiff relies on the affidavit of Ms. Noble who deposes that she "was contacted by a putative class member who claims their Samsung Galaxy S7 Edge recently exploded". Ms. Assini has sworn in her affidavit that through her online research "it appears that the Galaxy S7 or Galaxy S7 Edge ... may also pose a safety risk".

[62] These statements are inadmissible hearsay because they are proffered for the truth of their contents and they lack either reliability or necessity.

[63] In respect of Ms. Noble's affidavit, the putative class member is not named; he or she did not offer affidavit evidence in support of the allegation; and he or she is not named as a representative plaintiff respecting those devices. The defendant has had no opportunity to test the reliability and accuracy of the statement. Further, Ms. Assini can only say that it "appears" that the Galaxy S7 or Galaxy S7 Edge "may" pose a safety risk. This is an insufficient evidentiary basis to include these devices in the common issues, even given the reasonably low evidentiary record required.

[64] As already noted, there is conflicting expert opinion about whether damages can be calculated on a class wide basis. In other words, does a methodology exist?

[65] *Pro-Sys, supra* instructs at para. 102 that the certification stage is not the time to "engage in the finely calibrated assessments of evidentiary weight". On the other hand, the court notes at para. 103 that something more than a "superficial analysis" or "symbolic scrutiny" is necessary.

[66] The court continues at para. 118:

> In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class (i.e. that passing on has occurred). The methodology cannot be purely theoretical or hypothetical, but must be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied.

[67] I conclude that the plaintiff has not adduced "sufficiently credible" evidence to demonstrate that damages can be determined for the class as a whole. First, Mr. Stockton has acknowledged that some class members might have sustained no damages at all, for

reasons unique to the individual class members. For example, class members purchased their Note7 phones from a variety of sellers through at least five distribution channels: carriers, such as Bell and Rogers; national retailers such as Best Buy, Costco and Walmart; distributors such as Tech Data Canada Corporation; Samsung Online; and Samsung stores. Pricing varied from one channel to another; from one province to another; and even between vendors in the same channel. Pricing was also highly individualized depending on the circumstances of the buyer. Attractive terms were offered to first time purchasers. Upgrades, credits and various incentives were marketed. Consequently, it is difficult to understand how damages could be calculated on a class wide basis.

[68] I have also concluded that Mr. Stockton's report may not be reliable because it appears to rely heavily on conclusions he drew in another case involving allegedly defective airbags. A copy of Mr. Stockton's report in that case was provided, and - when the two opinions are compared - they bear striking similarities. Indeed, there are footnote references in the report prepared for this case to "the failure to secure a single bolt" and the "allegedly defective airbag". When he was cross-examined, he admitted that he had cut and pasted from a prior opinion to components of his opinion in this case. I am simply not persuaded that Mr. Stockton's opinion is grounded in the facts of this case.

Section 5(1)(d) – Is a Class Action the Preferable Procedure?

[69] *Hollick, supra* instructs that the following principles should guide the preferability analysis:

1) The preferability inquiry should be conducted through the lens of the three principal advantages of a class proceeding: judicial economy, access to justice and behaviour modification.

2) The term *"preferable"* is to be construed broadly and is meant to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation and any other means of resolving the dispute.

3) The preferability determination must be made by looking at any common issues in context, meaning the importance of the common issues must be taken into account in relation to the claims as a whole.

[70] See also *Fischer v. IG Investment Management Ltd., supra.*

[71] It is important to remember that class actions are an important vehicle to redress wrongs to those who would not otherwise bring action because it would be economically ill-advised. The cost of pursuing a claim individually measured against the likelihood and amount of compensation militates against it. As the court has observed: "It is fanciful to think that any claimant could pursue an individual claim in a complex products liability case": *Griffin v. Dell Canada Inc.*, [2009] O.J. No. 418 at para. 92.

[72] An access to justice issue arises as a result: "bad" or negligent behaviour goes unchecked and unchanged and therefore the goal of behaviour modification is unmet.

[73] However, notwithstanding these laudable and important goals, I conclude that a class action is not the preferable procedure in this case. I say this for two reasons in particular. First, the defendant's compensation program is the preferable procedure. The existence of this voluntary compensation scheme squarely addresses access to justice and behaviour modification concerns.

[74] In my view, the defendant's prompt response in concert with Health Canada to safety issues, the recall, the termination of sales, and the compensation package, demonstrates the response of a responsible corporate citizen. It is behaviour that should be encouraged rather than discouraged.

[75] It appears from the evidence reviewed by the defendant's expert that 21,953 Note7s were sold in Canada between August 19, 2016 and September 1, 2016. As already noted, by October, 35,293 Note7s had been distributed. Some 568 were returned before sales were halted on September 2, 2016 pursuant to a program that permitted the return of the device within a specified time of sale for a full refund.

[76] Through the first recall program, the defendant replaced approximately 13,340 original phones. Through the second, consumers acquired 5,015 Galaxy S7s or S7 Edges with a $100 credit; and 7,110 other devices or refunds with a $25 credit. While the $25 and $100 credit system ended on December 31, 2016, some carriers provided their customers similar credits after that date, which were reimbursed by the defendant.

[77] The class has already received compensation and as a result, access to justice issues do not arise. In *Hollick, supra* the court noted that the existence of a compensation scheme does not by itself militate against certification but it is "one consideration that must be taken into account when assessing the seriousness of access-to-justice concerns" (at para. 33).

[78] As to the adequacy of the plan, it is quite possible that some people are out of pocket to some extent. It is also the case that some people sustained no loss at all as the plaintiff's expert acknowledges. In any event, no recall program is likely to satisfy every purchaser. However, the law does not demand perfect compensation. Indeed, perfect compensation is unlikely even if pursued by way of class action.

[79] There were features of the defendant's package that were advantageous to consumers. Those advancing claims under it were not required to prove liability, causation or damages in order to receive a full refund for the phone plus a $25 credit; or a replacement phone and a $100 credit. Refunds for Note7 accessories were also offered.

[80] Furthermore, surely there is a certain amount of stress, upset, anxiety, inconvenience and irritation associated with daily living. However, they must rise to a sufficient level beyond *de minimus* in order to attract compensation in excess of what was offered by the defendant: see *Healey v. Lakeridge Health Corp.*, 2011 ONCA 55; *Mustapha v. Culligan of Canada Ltd., supra.*

Disposition

[81] For all of these reasons, the motion is dismissed.

[82] If the parties are unable to agree, I will receive costs submissions by November 30, 2018. I will leave it to them to work out an appropriate timetable for the delivery of material.

Justice H. A. Rady

Released: October 16, 2018

CITATION: Richardson v. Samsung, 2018 ONSC 6130
COURT FILE NO.: 2610/16
DATE: 20181016

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

James Richardson

Plaintiff

– and –

Samsung Electronics Canada Inc.

Defendant

REASONS FOR JUDGMENT

Rady J.

Released: October 16, 2018

Schedule 1

PROPOSED COMMON ISSUES

Design

1. Do some or all of the Devices contain the defect alleged in the Claim, causing them to overheat? If so:

   (i) Which ones?

   (ii) Was the Defendant negligent in the engineering, design, development, testing, and manufacture of the Devices? If so:

      A. What is the standard of care applicable to the Defendant?

      B. Did the Defendant breach the applicable standard of care? How?

      C. Did the Defendant owe a duty of care to the Plaintiff and Class Members?

   (iii) Did the Defendant breach the express and implied warranties of fitness, merchantability, and quality of the Devices, and if so, did the Defendant breach the provisions of the *Sale of Goods Act* with respect to the implied warranties of fitness, merchantability, and quality of the Devices?

Representations

2. Did the Defendant make some or all of the representations alleged in the Claim?

   (i) If so, which representations were made and were the representations false?

   (ii) Were the representations negligently made by the Defendant to the Plaintiff and Class Members? If so:

      A. Did the Defendant owe a duty of care to the Plaintiff and Class Members?

      B. If so, did the Defendant breach its duty?

      C. In the circumstance of this case, can the reliance of the Plaintiff and each Class Member on the representations be inferred?

Consumer Protection Act/Competition Act

3. Did the Defendant contravene section 17 of the *Consumer Protection Act*, 2002 (and parallel provisions of the provincial consumer protection legislation)? If so:

   (i) Can the Plaintiff and Class Members rely on the waiver of notice provisions of the *Consumer Protection Act*, 2002 (and parallel provisions of the provincial consumer protection legislation)?

   (ii) Did the Defendant made any false, misleading or deceptive representations within the meaning of the *Consumer Protection Act*, 2002 (and parallel provisions of the provincial consumer protection legislation)? If so:

      A. Were any of the representations unconscionable?

   (iii) If a consumer must demonstrate contractual privity to avail themselves of Part III of the *Consumer Protection Act*, 2002 are the third party sellers designated by the Defendant to sell the Devices agents of the Defendant? If so, can privity be established through such agency?

4. Did the Defendant contravene section 52 of the *Competition Act*?

Damages

5. Did the Defendant provide compensation to Class Members subject to the Note7 recall?

6. Should punitive and/or aggravated damages be awarded against the Defendant?

7. If one or more of the above common issues are answered affirmatively, by virtue of waiver of tort, is the Defendant liable on a restitutionary basis to account to the Plaintiff and Class Members on a restitutionary basis for any part of the proceeds of the sale of the Devices? If so, in what amount and for whose benefit is such an accounting to be made?

8. If one or more of the above common issues are answered affirmatively, can the amount of damages payable by the Defendant be determined on an aggregate basis? If so, in what amount?

9. What are the possible categories of damages for which individual Class Members have not been compensated?

CITATION: Richardson v. Samsung, 2018 ONSC 6130
COURT FILE NO.: 2610/16
DATE: 20181016

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

James Richardson

Plaintiff

– and –

Samsung Electronics Canada Inc.

Defendant

REASONS FOR JUDGMENT

Rady J.

Released: October 16, 2018