

CITATION: Oberski v. General Motors LLC, 2024 ONSC 345
COURT FILE NO.: CV-14-502023-00CP
DATE: 20240116

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:)	
)	
EDWARD OBERSKI, AMANDA OBERSKI, AND STACEY GREEN)	<i>Joel P. Rochon, Ronald Podolny, Megan B. McPhee and Alexander Mulligan for the</i>
Plaintiffs)	Plaintiffs
- and -)	
)	
GENERAL MOTORS LLC and GENERAL MOTORS OF CANADA LIMITED (now known as GENERAL MOTORS OF CANADA COMPANY))	
)	
Defendants)	HEARD: January 8, 2024
Proceeding under the <i>Class Proceedings Act, 1992</i>)	

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] This is a motion on consent for the certification of this action for settlement purposes and for leave to discontinue certain causes of action. More particularly, the Plaintiffs seek an Order granting the following relief:

- a. certifying the action as a class proceeding in respect of the economic loss claims;
- b. discontinuing the class action in respect of alleged class claims for wrongful death, personal injury, claims under the *Family Law Act*¹ (and analogous legislation in other Provinces), and actual physical property damage claims arising from a motor vehicle accident;
- c. appointing JND Legal Administration as Settlement Administrator to perform the duties set out in the Settlement Agreement;
- d. approving the Short-Form Certification Notice, Long-Form Certification Notice

¹ R.S.O. 1990, c. F.3.

and the Notice Program;

- e. setting a date for the Settlement Approval Hearing; and
- f. setting a date for the Opt-Out Deadline.

B. Factual Background

1. Nature of the Proceeding

[2] This proceeding arises from a defect in millions of ignition switches designed and installed by General Motors LLC and General Motors of Canada Limited, now known as General Motors of Canada Company (collectively “GM”) in certain vehicles from 1997 onwards.

[3] GM began recalling the vehicles in February 2014.

[4] This proceeding also concerns: (a) a recall regarding Chevrolet Camaro ignition keys; and (b) a recall regarding electric power steering. These recalls also occurred in 2014.

[5] The recalls are defined in the Settlement Agreement as: (a) the “Delta Ignition Switch Recall”; (b) the “Key Rotation Recall”; (c) the “Camaro Knee-Key Recall”, and (d) the “Electric Power Steering Recall.”

[6] The principal allegation is that the subject ignition switches are prone to too-easy rotation and can inadvertently move from the “run” position to the “accessory” or “off” position while the vehicle is in motion, resulting in a shutdown of the vehicle’s electrical system, complete loss of engine power and steering/braking assists, and disabling of the airbags. This defect is dangerous and has been associated with serious injuries and deaths.

[7] GM denies many of the Plaintiffs’ allegations and GM does not admit liability.

2. Procedural Background

[8] This action was commenced on April 11, 2014, in Toronto. Around the same time, several other putative class actions were commenced in Ontario relating to the subject recalls. There were also similar actions across the country.

[9] The putative Class Counsel entered into a consortium agreement, and on **October 11, 2014**, I consolidated the Ontario actions, under court file number CV-14-502023-00CP.

[10] Meanwhile, economic loss class claims were filed in the United States in 2014 and litigated in the *In re: General Motors LLC Ignition Switch*, No. 14-MDL-2543 (JMF), Multi-District Litigation matter in the United States District Court for the Southern District of New York.

[11] On **June 13, 2017**, Justice Morawetz, R.S.J., as he then was, on consent, consolidated parallel actions that had been filed in Windsor, Ontario, with the actions in Toronto.

[12] All the while, two parallel class actions were commenced in Québec, both under the title *Gagnon c. General Motors of Canada et al.*; Court File Nos.: 500-06-000687-141 and 500-06-000729-158.

[13] The counsel in the Ontario Action, the *Gagnon* proceedings and in related actions in other provinces entered into a consortium to prosecute the various actions on a national basis, in Ontario.

[14] On **November 8, 2017**, the Plaintiffs served a Request to Admit.

[15] Pursuant to the Order of Justice Mark G. Peacock, J.S.C., dated **November 16, 2017**, authorization motions were stayed in Québec pending the outcome in the Ontario and American proceedings.

[16] On **January 22, 2018**, the Plaintiffs served an Amended Request to Admit.

[17] On **February 12, 2018**, GM responded to both Requests to Admit. GM admitted that there was a safety defect in which there was a low-torque ignition switch installed in many of the vehicles under certain circumstances, which may inadvertently move out of the ‘Run’ position. GM admitted that if this movement occurs, the driver loses the assistance of power steering and power brakes. GM also admitted that if a collision occurs while the switch is in the ‘Accessory’ or ‘Off’ position, the vehicle’s safety airbags may fail to deploy, which would increase the risk of death and serious injury in certain types of crashes in which the airbag was otherwise designed to deploy.

[18] GM made these admissions in respect of vehicles subject to Recalls No. 2014-038 and 2014-060 but denied the allegations in respect of vehicles subject to Recalls No. 2014-246, 2014-284, 2014-273, 2014-243 and 2014-101.

[19] After the responses to Requests to Admit were obtained, the Plaintiffs in this Ontario Action finalized their experts’ opinions and compiled the certification record.

[20] The economic loss class claims in the U.S. litigation were resolved via a nationwide class certified for settlement purposes only, which was preliminarily approved on **April 27, 2020**, and finally approved on **December 18, 2020**.

[21] The certification record in this Ontario Action was delivered on or about **June 29, 2020**.

[22] In the later part of **2020**, Class Counsel and counsel for the Defendants began settlement discussions. Negotiations proceeded on two tracks.

[23] First, to resolve personal injury, wrongful death, and related dependent claims, the parties engaged in a one-day mediation in Chicago on **November 10, 2021**, and a one-day virtual mediation on **May 31, 2023**, assisted by Daniel J. Balhoff, a third party neutral, who also served as mediator for such claims alleged against GM in the United States.

[24] Second, to resolve the economic loss claims, the parties engaged the mediation services of former Supreme Court of Canada Justice, the Honourable Thomas A. Cromwell. The parties held a series of negotiations, including on **March 26, 2021; December 6, 7, 2021; May 16, 2022** and **October 6, 2022**.

[25] The parties eventually agreed to a settlement of the economic loss claims and to an approach to resolve the personal injury, wrongful death, and related dependent claims.

[26] In broad terms, in exchange for the resolution of all Canadian class action litigation related to: (a) the Delta Ignition Switch Recall; (b) the Key Rotation Recall; (c) the Camaro Knee-Key Recall; and (d) the Electric Power Steering Recall, a \$12 million Settlement Fund was to be established to pay compensation to Settlement Class Members nationally with eligible economic loss claims. The Plaintiffs’ Counsel Fee Amount will be paid separately and in addition to the \$12 million Settlement Fund.

[27] The \$12 million Settlement Fund is the full and total amount to be paid by the Defendants

to resolve the economic loss claims, all Administrative Expenses, and any honoraria payments that are awarded. All settlement payments are to be paid by the Settlement Administrator pursuant to the terms and conditions of the Settlement Agreement.

[28] Under the proposed settlement, no claims in respect of personal injury, wrongful death or under the *Family Law Act* (and analogous legislation) will be certified in the Ontario Action or the Québec Actions.

[29] Personal injury or wrongful death claimants, and claimants under the *Family Law Act* (and analogous legislation in other provinces), known to the Consortium and identified in the confidential settlement agreements will be eligible to participate in an aggregate settlement process set forth in the confidential settlement agreements entered into on their behalf by the Consortium with the Defendants, in which Mr. Balhoff examines each claimant's individual documents and allocates a confidential settlement amount to each claim in exchange for a release, provided other terms and conditions of the settlement are met.

[30] The Settlement Class Members' Release does not include the release of any individual claims for personal injury, wrongful death or actual physical property damage. It is a condition of the Settlement that such claims be discontinued or removed from the Ontario Action and the Québec Actions.

[31] Class Counsel has received instructions from the Plaintiffs to discontinue those class claims. If any claims in these categories are not resolved through the aggregate settlement process established by the parties, then the individuals involved can pursue individual litigation against GM.

[32] If the Ontario Action is certified as a class proceeding and the Québec Actions are authorized as class actions (all solely for settlement purposes), the Parties will bring motions before the Ontario and Québec Courts seeking approval of the Settlement.

[33] If the Ontario and Québec Courts approve the Settlement, then counsel in the related Actions (as defined above) filed across the country shall seek the dismissal of the related Actions with prejudice pursuant to motions brought before the relevant court for each related action.

C. Discussion and Analysis

1. The Discontinuance

[34] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, dismissal, or settlement of a proceeding commenced under the Act. Section 29 states:

Discontinuance, abandonment and settlement

29. (1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.

Settlement without court approval not binding

(2) A settlement of a class proceeding is not binding unless approved by the court.

Effect of settlement

(3) A settlement of a class proceeding that is approved by the court binds all class members.

Notice: dismissal, discontinuance, abandonment or settlement

(4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,

- (a) an account of the conduct of the proceeding;
- (b) a statement of the result of the proceeding; and
- (c) a description of any plan for distributing settlement funds.

[35] A motion for discontinuance or abandonment should be carefully scrutinized, and the court should consider, among other things: whether the proceeding was commenced for an improper purpose; whether, if necessary, there is a viable replacement party so that putative class members are not prejudiced; or whether the defendant will be prejudiced.²

[36] As noted above, the Plaintiffs request the discontinuance of the personal injury or wrongful death claims, and the associated claims under the *Family Law Act* (and analogous legislation in other provinces).

[37] I am satisfied that the Plaintiffs have met the test for a discontinuance in the immediate case.

[38] The immediate class action is a product liability claim where a resolution has been reached of the economic loss claims. The economic injury claimants comprise the bulk of the putative class membership. The smaller group of personal injury claimants, however, are not prejudiced by the discontinuance. They may either participate in a settlement scheme or they are free to bring claims of their own for compensation for their injuries.

2. The Consent Certification

[39] This action was commenced prior to coming into force of section 35 of Schedule 4 to the *Smarter and Stronger Justice Act, 2020*, and therefore, the test for certification as it read immediately before this legislative amendment applies to it.

[40] Pursuant to s. 5(1) of the *Class Proceedings Act, 1992*, the court shall certify a proceeding as a class proceeding if: (1) the pleadings disclose a cause of action; (2) there is an identifiable class; (3) the claims or defences of the class members raise common issues of fact or law; (4) a class proceeding would be the preferable procedure; and (5) there is a representative plaintiff or defendant who would adequately represent the interests of the class without conflict of interest and

² *Green v. The Hospital for Sick Children*, 2021 ONSC 8237; *Batten v. Boehringer Ingelheim*, 2021 ONSC 6606; *Johnson v. North American Palladium Ltd*, 2021 ONSC 3346; *Bardoul v. Novartis Pharmaceuticals Canada Inc.*, 2021 ONSC 2261; *Winter v. C.R. Bard*, 2020 ONSC 3532; *Naylor v. Coloplast Canada Corporation*, 2016 ONSC 1294; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2012 ONSC 5288; *Frank v. Farlie, Turner & Co, LLC*, 2011 ONSC 7137; *Hudson v Austin*, 2010 ONSC 2789; *Sollen v. Pfizer*, [2008] O.J. No 4787 (C.A.), aff'g [2008] O.J. No. 866 (S.C.J.); *Logan v. Canada (Minister of Health)*, [2003] O.J. No. 418 (S.C.J.), aff'd (2004), 71 O.R. (3d) 451 (C.A.).

there is a workable litigation plan.

[41] The fact that an action is certified on consent for settlement purposes does not dispense with the need to meet the certification criteria but they may be less rigorously applied in a settlement context.³

[42] For the purposes of a consent certification, in the immediate case, the Plaintiffs are advancing causes of action for products liability negligence.

[43] The Plaintiffs define the Settlement Class as follows:

“**Settlement Class**” means, for settlement purposes only, all Persons resident in Canada other than Excluded Persons who, at any time on or before the Recall Announcement Date of the Recall(s) applicable to their Subject Vehicle(s), owned, purchased, and/or leased a Subject Vehicle in any of the provinces/territories in Canada. The Settlement Class is comprised of the four Subclasses, as defined below. For Subject Vehicles subject to both the Delta Ignition Switch Recall and the Electric Power Steering Recall, the date for determining Settlement Class membership shall be the later of the Recall Announcement Date for the Delta Ignition Switch Recall or the Electric Power Steering Recall.

[44] There are also a series of subclasses comprised of class members whose vehicles contained specific defects. Subclasses prescribe the compensation Settlement Class Members will be eligible for, should the settlement be approved.

[45] The Québec Settlement Class is defined as:

“**Québec Settlement Class**” means all Settlement Class Members whose Subject Vehicles are identified based on reasonably available information from GM as having been first retail sold in Québec.

[46] The National Settlement Class is defined as:

2.37 “**National Settlement Class**” means all Settlement Class Members who are not part of the Québec Settlement Class.

[47] The Ontario Action is to be certified as a single Canada-wide (except the Québec Settlement Class) class proceeding in Ontario for settlement purposes on behalf of the National Settlement Class, on behalf of the following class:

All Persons resident in Canada other than Excluded Persons and other than Persons whose Subject Vehicles are identified based on reasonably available information from GM as having been first retail sold in Québec who, at any time on or before the Recall Announcement Date of the Recall(s) applicable to their Subject Vehicle(s), owned, purchased, and/or leased a Subject Vehicle in any of the provinces/territories in Canada.

[48] The Plaintiffs propose the following common issue:

Did any of the Defendants owe a duty of care to National Settlement Class members and if so, what was the standard of care?

[49] The proposed Representative Plaintiff in the Ontario Action, Stacey Green, is capable of representing the National Settlement Class members. She is a member of the National Settlement Class.

[50] I am satisfied that all the criteria for certification are satisfied in the immediate case.

³ *Osmun v. Cadbury Adams Canada Inc.*, [2009] O.J. No. 5566 at para. 21 (S.C.J.).

[51] I am also satisfied with the form and substance of the Notice of Certification and the Notice Plan and with the appointment of JND Legal Administration as Settlement Administrator to perform the duties set out in the Settlement Agreement. The Notice Program incorporates elements of direct mailing/emailing notification, supplemented by a print media campaign, along with bilingual press releases and website notification.

[52] JND acted as the administrator in respect of the U.S. economic loss class action settlement in: *In re: General Motors LLC Ignition Switch Litigation*, MDL No. 14-MD-2543 (JMF). As a result, JND has direct experience with the same vehicle models and U.S. recalls parallel to the Canadian recalls which form the subject of this proceeding. In addition, JND has an Auto Solutions team with experience implementing notice programs and claims administration for well over fifty other automotive class actions.

[53] As set out in the proposed Notice Program, a Settlement Phone Number will be established as soon as practicable after the entry of the Certification Orders, which will be a toll-free phone number that Settlement Class Members can call to receive information in English and French about (among other things), the Settlement Agreement, obtaining the Long-Form Certification Notice, the Objection Deadline, the Opt-Out Deadline, the dates of the Approval Hearings, and how to submit a Claim. The information accessible through the Settlement Phone Number, and the format by which it is presented, shall be agreed to by the parties in writing with the Settlement Administrator before the establishment of the Settlement Phone Number.

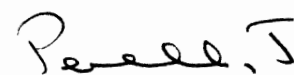
[54] The cost of Settlement Administration, including notice, will be paid from the \$12 million Settlement Fund. The Notice Program is designed to inform class members about the certification of the proceedings (along with their right to opt out) and to raise their awareness of the settlement and to facilitate their understanding of the claims process.

[55] The Long-Form Certification Notice states that the personal injury and *Family Law Act* claims do not form part of the Settlement and will be discontinued:

As part of the Settlement, all class claims for personal injury (and related family/dependent claims), wrongful death or actual physical property damage arising from an accident involving a Subject Vehicle have been discontinued or removed. The Settlement will not include the release of any individual claims for personal injury (and related family/dependent claims), wrongful death or actual physical property damage. Participating in this Settlement will not restrict you from bringing an individual claim for damages related to personal injury (and related family/dependent claims) wrongful death or actual physical property damage.

[56] The proposed Notice Program, including the proposed Short Form Notice of Certification and the proposed Long Form Notice of Certification, is an effective and efficient means of bringing the Certification of the Action as a Class Action to the attention of National Class Members in order that they are informed of their right to opt out of the certified Class Action if they choose to do so.

[57] Order to go as asked.



Perell, J.

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BETWEEN:

**EDWARD OBERSKI,
AMANDA OBERSKI, AND STACEY GREEN**

Plaintiffs

- and -

**GENERAL MOTORS LLC and GENERAL
MOTORS OF CANADA LIMITED (now known as
GENERAL MOTORS OF CANADA COMPANY)**

Defendants

REASONS FOR DECISION

Perell J.

Released: January 16, 2024