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ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
JASMINE RAGOONANAN AND PHILIP RAGOONANAN, BY THEIR ESTATE REPRESENTATIVE, DAVINA RAGOONANAN, AND RANUKA BABOOLAL, BY HER ESTATE REPRESENTATIVE, VASHTI BABOOLAL	)	***Andrew Roman, Joel Rochon*** and ***Saki Tambakos*** -- for the Plaintiffs
Plaintiffs	)	
- and -	)	
IMPERIAL TOBACCO CANADA LIMITED	)	***Lyndon A.J. Barnes*** **and** ***Deborah Glendinning*** -- for the Defendant
Defendant	)	
-and-	)	
DAVINA RAGOONANAN AND RONALD BALKARRAN	)	
Third Parties	)	
	)	**HEARD:** September 13, 14 and 15, 2005

REASONS FOR DECISION

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

CULLITY J.

[1] The statement of claim in this action commenced under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("CPA") was issued on January 11, 2000. For reasons reported at (2000), 51 O.R.

(3d) 603 (S.C.J.), the defendant's motion to strike the pleading as disclosing no reasonable cause of action was dismissed by Cumming J. Earlier this year, the defendant moved unsuccessfully for summary judgment: [2005] O.J. No. 86 (S.C.J.). The plaintiffs' motion to certify the proceedings under the CPA has since been heard and must now be considered.

[2] The proposed representative plaintiffs are the personal representatives of Jasmine and Philip Ragoonanan and Ranuka Baboolal who died as a result of a fire at a residential property in Brampton, Ontario in the early hours of January 18, 1998. It is claimed that the fire was started when a cigarette that Philip had been smoking - and that had been manufactured by the defendant - came in contact with a sofa. In the statement of claim, as originally filed, the plaintiffs sought to represent all persons in Canada who suffered injury, or loss, as a result of a fire that occurred after October 1, 1987 where the fire was caused by a cigarette manufactured by the defendant igniting upholstered furniture or a mattress. The estates of deceased persons and persons with derivative claims were also included in the putative class. As I will indicate below, various amendments to the class definition have since been proposed. The statement of claim has also been amended.

[3] The claims are for damages for the alleged negligent manufacture and design of cigarettes produced by the defendant. It is pleaded that the defendant knew, or ought to have known: (a) that its cigarettes were dangerous because they were not "fire safe"; and (b) how to manufacture and sell a fire-safe cigarette. A statement of defence has been delivered and the defendant has also filed a third-party claim against one of the proposed representative plaintiffs and another individual.

[4] Proceedings will be certified under the CPA only if each of the requirements in sections 5 (1) (a) through (e) is satisfied. The risk of non-persuasion is on the plaintiff who must adduce evidence to show that each of the requirements for certification - other than that in section 5 (1) (a) - has some basis in fact: *Hollick v. City of Toronto*, [2001] 3 S.C.R. 158, para 25.

[5] The question whether the requirement in section 5 (1) (a) - that the pleading discloses a cause of action - is satisfied is to be decided without evidence by the same "plain and obvious" test that applies to motions to strike pursuant to rule 21.01 (1) (b): *Hollick*, at para 25. It was, therefore, not disputed on this motion that the decision of Cumming J. effectively disposes of the question that would otherwise arise under section 5 (1) (a).

[6] I will consider each of the other requirements in turn.

1. Section 5 (1) (b) - the existence of a class

[7] The requirement of an "identifiable class of two or more persons that would be represented by the representative plaintiff" provides a battleground on which motions for certification are now often fought. In *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (G.D.), Winkler J. identified the purposes of class definition as follows:

> (a) It identifies those persons who have a potential claim for relief against the defendants;
>
> (b) It defines the parameters of the lawsuit so as to identify those persons who are bound by its result;
>
> (c) It describes who is entitled to notice pursuant to the Act.

[8] This description was echoed in the reasons of the Chief Justice in *Western Canadian Shopping Centres v. Dutton*, [2001] 2 S.C.R. 534 (at para 38) and has been accepted in numerous other cases, including *Caputo v. Imperial Tobacco Ltd.* (2004), 44 C.P.C. (5th) 350 (Ont. S.C.J.), at para 38.

[9] In this jurisdiction defendants' counsel increasingly rely on supposed rules that, they submit, serve to distinguish between acceptable class definitions and those that cannot be accepted for certification. It is said that a class must neither be over-inclusive nor under-inclusive, that class criteria must not depend on the merits of the claims and that they must be "objective" rather than "subjective". Taken to their logical extreme, the suggested interpretation and effect of these rules often appear to lead inexorably to decisions that certification must be denied for want of an acceptable class. However, I note that, more often than not, such deficiencies in the class definition provide only an alternative ground for such a decision.

[10] As was the case on this motion, defendants' counsel have no difficulty in referring to judicial statements in numerous cases - and in decisions that are binding in this court - that appear to provide support for the supposed rules. While the extent that the authorities support the supposed rules relating to over-inclusiveness and under inclusiveness can be questioned, the meaning and status of the other rules - and of all of them taken in conjunction - raise difficulties that are relevant to the class definitions proposed in this case.

[11] It is argued that a proposed class that contains persons who will not have valid claims is unacceptably over-inclusive, while a class that "arbitrarily" excludes persons who have - or may have - valid claims is under-inclusive. I adhere to the view I have expressed in other cases that neither of the suggested restrictive rules is supported by the following passage from the reasons of the Chief Justice in *Hollick*, at paras 20-1, that is commonly relied on as authority for each of them:

> It falls to the putative representative to show the class is defined sufficiently narrowly.
>
> The requirement is not an onerous one. The representative need not show that <u>everyone</u> in the class shares the same interest in the resolution of the asserted common issue. There must be some showing, however, that the class is not <u>unnecessarily</u> broad - that is, that the class could not be defined more narrowly without

> arbitrarily excluding some people who share the same interest in the resolution of the common issues. Where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended ...

[12] I understand that passage to accept a concept of over-inclusiveness confined to cases where more narrow class definitions would be possible without arbitrarily excluding persons who share the same interest in the resolution of the common issues. I do not understand it to imply that a plaintiff cannot choose - arbitrarily or otherwise - the persons whom he, or she, wishes to represent, or that the only class proceedings permissible are those where the class contains everyone with the same interest. Rather than supporting either of the suggested rules of class definition, it seems to me that the Chief Justice was recognising that an "over-inclusive" class contemplated by the first of those rules is permitted if a more narrow definition would arbitrarily exclude persons whose claims the plaintiff wishes to enforce. A class may be over-inclusive if necessary but not necessarily over-inclusive.

[13] The restrictive effects of the supposed rules relating to inclusiveness are buttressed by a insistence that membership in the class must be determined without reference to the "merits of the action". Such a rule makes perfect sense - and is obviously necessary - where the reference to the "merits" results in circularity. A class, for example, could not be defined meaningfully in terms of persons to whom the defendant was liable, or owed a duty of care, if liability, or the existence of a duty of care owed to class members, was a common issue. However, where the reference to the merits relates to disputed individual issues - rather than common issues – circularity, in this sense, is not necessarily involved.

[14] When it is sometimes said that merits-based individual issues create circularity, what appears to be meant is that persons who will be bound by a judgment on the common issues cannot (logically?) be identifiable by criteria that will determine whether they will have valid claims. As section 27 (3) of the CPA provides that a judgment on common issues binds class members, it is thought to follow that the class must be ascertainable before, or at least at the end of, the trial of the common issues. This will be relevant only where the common issues are decided in favour of the defendant but, so the argument proceeds, the defendant must then be able to identify the class members. Moreover, because only members will be able to make claims in reliance on common-issues judgments that are favourable to the class, it is thought that it must be possible to identify them before proceeding to proof of loss and the resolution of any other individual issues that will determine liability. Where merits-based criteria beg questions that are individual issues, the result of a decision on the common issues in favour of a defendant would be that the identity of members of the class might, and often would, never be determined.

[15] Such objections are, I believe, formal rather than substantive and certainly not logically compelling. Whatever class criteria are employed, class members will very often not have been identified when an action is dismissed as a result of a decision on the common issues favourable to a defendant. Where the plaintiffs are successful on the common issues, the actual composition

of the class will very often not be determined until the individual issues have been decided, as it will only then have been determined whether claimants satisfy whatever class criteria are employed. Even then as, pursuant to section 25 of the CPA, claimants will usually be required to come forward within a stipulated period, there may be class members whose identity is never ascertained. In short, at the conclusion of a trial of common issues - and before any individual issues are addressed - it will often be possible to identify the members of a sizable class only in terms of the class criteria.

[16] It follows that, a defendant wishing to rely on *res judicata*, or issue estoppel, arising from a decision on the common issues in a class proceeding, may never have the benefit of a prior judicial, or other binding, decision on whether the plaintiff in the subsequent case was a member of the class. In consequence, the defendant might have to prove that the criteria for the plaintiff's membership in the class was satisfied. This, however, would be so whether the criteria were, or were not, considered to be merits-based. As I will indicate, I believe that the implications for subsequent proceedings may require that some limits be placed on the use of criteria that are likely to be seriously in dispute, but I do not believe this would justify a rejection of “merits-based” criteria as such. Most fundamentally, no meaningful distinction can, I think, be drawn between criteria that require proof of material facts that constitute the cause of action and other “objective” criteria. The ability of a claimant to satisfy any class criteria might be challenged by a defendant as a ground for denying liability to such person and any such criteria will be included in the material facts that comprise the cause, or causes, of action pleaded in the proceeding.

[17] Authorities I must follow do draw a line between acceptable objective criteria for determining class membership and other unacceptable criteria that are said to relate to the merits. In particular, class definitions in terms of persons who suffered damages as a result of the defendant's conduct have been held to be of the latter kind. Such a definition was accepted by Sharpe J. in *Chadha et al v. Bayer Inc. et al* (1999) 45 O.R. (3d) 29 (S.C.J but rejected by the Divisional Court [(2001), 54 O.R. (3d) 520] and the Court of Appeal [(2003), 63 O.R. (3d) 22], In delivering the judgment of the majority of the Divisional Court, Somers J. stated (at para 49):

> I have concluded that the class definition approved of by Sharpe J. is flawed because it refers to those "who have suffered loss or damage" as a result of the defendant's conduct. In *Hollick* ..., the Ontario Court of Appeal confirmed ... that " ... when the court is considering s. 5 (1) (b) it is not appropriate to define the class in terms that depend upon the merits; e.g., those who have suffered injury." similarly, in *Robertson v. Thomson Corp* (1999), 43 O.R. (3d) 161 at p. 169, ... Sharpe J. stated:
>
> > I agree with Winkler J. in *Bywater*, and with Newberg, Class Actions, 3rd ed. at p. 6 - 61, that the class should be defined in objective terms, and that circular definitions referencing the merits of the

> claim or subjective characteristics ought to be avoided. Such definitions make it difficult to identify who is a member of the class until the merits have been determined. Definitions based upon the merits of the claim also violate the statutory policy that the merits are not to be decided at the certification stage.

[18] The Court of Appeal agreed with this conclusion.

[19] The decisions that have rejected merits-based criteria have not been concerned only with those expressed in terms of injury or damages and related questions of causation. In *Nixon v. Canada (Attorney-General),* [2002] O.J. No. 1009 (S.C.J.), for example - where an action was commenced on behalf of inmates of a penitentiary who allegedly suffered injury from a fire - Molloy J. held that a class definition that would have included all inmates in a particular part of the building other than those who set the fires was not acceptable. The learned judge stated:

> The class proposed in this case cannot be determined without a preliminary finding on the merits. Counsel for the plaintiffs proposes that upon certification a series of mini-trials would be conducted to determine the members of the class by weeding out those individuals who set the fires and identifying those who impeded the efforts of the correctional officers attempting to extinguish the fires. Such a determination would require the trier of fact to explore everything that happened on the range that night including the cause of the fires, who set the fires, how the fire progressed, which inmates obstructed the correctional officers and the effect of their conduct upon the progress and effects of the fire. These practical difficulties illustrate the rationale behind the principle that a class should not be defined in terms that require a determination on the merits of the underlying claim.

[20] An assumption, again, appears to be that it will be necessary to identify each class member before individual claims can be considered. What is not explained is why merits-based criteria – like other class criteria - cannot, and should not, be considered to raise individual issues like any others that will determine whether individual claims will be sustained, and that may also be relevant to the question whether a resolution of the common issues will sufficiently advance the proceedings.

[21] The inevitable tension between rejecting a merits-based test and requiring that a class must not be over-inclusive is also illustrated by the finding of the Divisional Court in *Chadha* that the deletion of the reference to damage would result in an unacceptably over-inclusive definition.

[22] Again, in *Bywater*, a class definition in terms of persons who were exposed to smoke as a result of a fire in a subway was accepted while a definition that would have further restricted the class to those who suffered injury as a result of smoke inhalation was held to be objectionable. I do not understand why the unacceptable criteria should be considered to go to the merits of the proceeding while the acceptable criteria do not. The question whether a claimant in *Bywater* was exposed to smoke might, for example, be an issue raised in defence of the claim on which the liability of the defendant would stand or fall.

[23] In practical – as well as logical - terms, the problem created by the supposed over-inclusive rule and the prohibition on merits-based class definitions is that they operate in opposition to each other. While the former insists that only those with valid - or, in the words of the Chief Justice, "colourable" - claims are included in the class, the latter restricts the possibility of achieving this end. If they are applied strictly, their combined application will tend to exclude the possibility of any acceptable class definition.

[24] Rachael Mulheron, in *The Class Action in Common Law Systems: A Comparative Perspective* (2004, Hart Publishing), at pages 322 - 337, analyses the approach of the courts in this jurisdiction closely and contrasts it unfavourably with that adopted in Australian cases that do not appear to be consistent with the rejection of merits-based definitions. The learned author refers, in particular, to the following passage in the judgment of Wilcox J. in *Nixon v. Philip Morris (Australia) Ltd* (1999), 95 F.C.R. 453 (F.C.) - a decision subsequently reversed on other grounds:

> Another Philip Morris complaint arises out of the fact that subpara (c) of the definition of group members in the revised draft refers to people "who commenced, continued, or failed to quit smoking wholly or partly because of" the respondents' conduct. Counsel say this ingredient in the definition depends upon a subjective matter; it will not be known whether a particular person fulfils the criteria stated in subpara (c) until that person gives evidence. If the person fails to establish the causal link referred to in subpara (c), it will follow that person is not a group member and, therefore, is not bound by the result of the proceeding. The person would be free to bring a later proceeding against the respondents or any of them.
>
> The argument has a superficial charm. But it fails to sustain analysis. The result suggested by counsel is correct. However, the person could not base a later proceeding on either of the causes of action pleaded in this case. Both those causes of action depend upon the person having been influenced to commence or continue smoking, or to fail to quit smoking, by the conduct of one or more of the respondents. If it is held in this proceeding that a particular person was not so influenced, the doctrine of issue estoppel would prevent a person contending to the contrary in a later action. Of

> course, the person would not be precluded from bringing a later action on a different cause of action, one that did not depend upon establishing a link between a respondent's conduct and the commencement and/or continuation of smoking; for example, a product liability claim. But it is always true that a group member is free to bring a second action against the same defendant in relation to a different cause of action.

[25] The hypothetical considered by the learned judge assumes that it was decided, in the class proceeding, that the merits-based criteria were not satisfied. This, of course, is unlikely to have been the case under the *CPA* if the common issues had been decided in favour of the defendant. However, there would surely be an estoppel on such issues if, in subsequent proceedings, a plaintiff pleaded, or relied on, facts that would satisfy the class criteria in the earlier action.

[26] As I have indicated, I have difficulty in appreciating the force of the objections to all merits-based criteria and, in particular, the argument that such criteria would permit the common issues to be relitigated subsequently. Difficulties that may be thought to arise from an inability to identify each member of a class who will be bound by a decision on the common issues are, I believe, likely to be more theoretical than practical. In particular, I do not understand the sense in which harm, or damage, as a criterion necessarily involves unacceptable circularity, or a violation of the statutory policy that the merits are not to be decided at the certification stage. “Circularity” – in the questionable sense that class membership is dependent on individual issues that will determine the defendant’s liability – cannot be avoided and acceptance of a merits-based criterion would not, in itself, require any decision on the merits. On the other hand, by placing the focus on the only persons who could benefit from the proceedings, merits-based criteria may make it unnecessary to define classes that are hugely over-inclusive, and their acceptance would avoid the difficulty of distinguishing between objectionable and unobjectionable criteria in terms of merits.

[27] While the views that I have expressed may be consistent with the decision of Sharpe J. in *Chadha*, I am satisfied that they are not consistent with the reasoning of the Divisional Court that was accepted by the Court of Appeal in that case. Although I must accept that reasoning, I have discussed the difficulties that appear to me to exist because they are mirrored in the problems plaintiffs' counsel have experienced in framing an acceptable class definition.

[28] Although counsel for the parties made impressive attempts to find a principled analysis that would explain, and reconcile, the repeated insistence in the authorities that a class must not be over-inclusive, under-inclusive or merits-based, they did not claim to have achieved unqualified success. Towards the end of the hearing, Ms Glendinning doubted whether such an analysis was possible and, in his closing submissions, Mr Roman suggested the court should adopt a pragmatic approach to prevent the search for an objectively-defined class from "colliding" with the rejection of merits-based criteria.

[29] While I do not believe that the purposes of class definition identified in *Bywater* eliminate the difficulty of distinguishing unacceptable merits-based definitions from those which are considered to employ acceptable "objective" criteria, the second of the purposes identified by Winkler J. may still point to the missing elements in the search for principle in the authorities I must follow. Fairness to defendants, as well as finality and the requirement that a class proceeding should significantly advance the proceedings and be an efficient method of doing so, may be thought to require that the identification of persons who will be bound by a decision on the common issues will not depend on the resolution of issues that are likely to be at the forefront of - or seriously in dispute in - the proceedings in question. In some – but not, I think, all - cases, fairness may require that such persons should be identifiable for the purpose of subsequent proceedings without the need to litigate substantial issues that – but for the defendant's success on the common issues - would have been seriously disputed in the class action, and on which the respective positions of the parties would have been the reverse of those advanced in the subsequent proceedings.

[30] A pragmatic approach based on a distinction between substantive issues that are likely to be seriously in dispute in the litigation - such as those relating to causation and damages in *Bywater*, and other "objective" criteria - such as those accepted in *Bywater* - would not provide a bright line test for distinguishing unacceptable merits-based criteria from other class criteria. Principles of fairness, finality and efficiency are, however, always considerations that can impact on the question whether the statutory requirements relating to the existence of a class, commonality and the preferable procedure are satisfied. An application of such principles to distinguish between acceptable, and unacceptable, criteria would militate in favour of class definitions that are over-inclusive in that they will include persons who will not be able to prove their claims. This, however, has very commonly been the case when proceedings have been certified under the CPA. In *Bywater*, for example, the class accepted by the court would almost certainly have included people who suffered no damage and who, therefore, could not establish liability against the defendant. Any definition will be over-inclusive in this sense if it does not incorporate, within the class criteria, success on every individual issue on which liability will depend.

[31] The supposed rule that depends upon a distinction between objective and subjective criteria can most conveniently be considered in the light of the alternative class definitions proposed by the plaintiffs.

[32] As defined in the amended statement of claim, the class would comprise:

> (a) persons in Canada who have suffered a loss, or were injured, as a result of a fire which occurred after October 1, 1987, where the fire was caused by a cigarette igniting upholstered furniture or a mattress...;

> (b) the estates of persons in Canada who were killed in fires occurring after October 1, 1987, where the fire was caused by a cigarette igniting upholstered furniture or a mattress...; and
>
> (c) persons including, but not limited to, executors, administrators, personal representatives, spouses and relatives who, on account of a relationship to those persons described in the above defined class, have a derivative claim for damages....

[33] In an amended notice of motion, the class was redefined as follows:

> a) persons in Canada who suffered a loss, or were injured, as a result of a fire which occurred after 1st October, 1987, who claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress ...;
>
> b) the estates of persons in Canada who were killed in fires occurring after October 1, 1987, who claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress...;
>
> c) persons including, but not limited to, executors, administrators, personal representatives, spouses and relatives who, on account of a relationship to those persons described in the above defined class(es), have a derivative claim for damages ... .

[34] Towards the end of the hearing - and in response to the submissions of defendant's counsel - Mr Roman proposed two further alternative definitions. Alternative #1 was as follows:

> (a) Persons in Canada who suffered personal injury, death and/or property loss after October 1, 1987 as a result of a lit ITCL cigarette igniting upholstered furniture or a mattress;
>
> (b) the estates of persons described in paragraph (a) above;
>
> (c) [persons with derivative claims]

Alternative #2 comprised:

> (a) Persons in Canada who suffered personal injury, death and/or property loss after October 1, 1987 arising from an upholstered furniture or a mattress fire, where the use of a lit ITCL cigarette was contemporaneous to the fire;

(b) the estates of persons described in paragraph (a) above;

(c) [persons with derivative claims]

[35] The difficulties experienced by plaintiffs' counsel in attempting to frame a class definition that falls within the limits that previous decisions have considered to be acceptable - and the different alternatives suggested - are similar to those that confronted counsel in *Caputo*. There, Winkler J. rejected each of the alternatives and held that the failure to provide an acceptable class definition was a sufficient reason to deny certification. Counsel for the defendant submitted that the result should be the same in this case for reasons that I believe can fairly be summarised as follows:

> (a) the definition proposed in the amended statement of claim is obviously over-inclusive to the extent that it is not confined to cigarettes manufactured by the defendant. In addition, it is unacceptably merits-based in that the criteria employed require proof of loss caused by a fire igniting upholstered furniture or a mattress;
>
> (b) although the over-inclusiveness identified in the definition in the statement of claim would be cured by the reference to ITCL cigarettes in the first of the alternatives proposed at the hearing, the merits-based objections would remain and would be supplemented by a further potentially disputed question of fact - namely, whether the cigarette that caused ignition was manufactured by the defendant;
>
> (c) the second of the alternatives proposed at the hearing also offends the principle applied in *Chadha* in so far as membership in the class would be dependent on proof of causation and loss. This defect is not remedied by the substitution of a requirement of contemporaneity for the additional issue of causation in the first such alternative - a substitution that would include within the class persons whose loss was wholly unrelated to any conduct, or breach of duty, of the defendant, and who, therefore, would have no possible claim against it; and
>
> (d) the alternative contained in the notice of motion - and initially advanced at the hearing - is entirely subjective in that it is dependent on a decision by a potential claimant to make a claim. In effect, it would establish an opting-in procedure. Defendant's counsel pointed also to the vagueness, and uncertainty, as to when the claim would have to be made. Ms Glendinning submitted that, unless - contrary to the policy of the CPA - an opting in procedure

> was adopted prior to a trial of a common issues, a potential member could await the result of that trial and then, if it was in favour of the defendant, choose to ignore it with impunity. If, for example, the common issues in this case were decided in favour of the defendant, there would be no members of the class who would be bound by the decision if none subsequently made a claim.

[36] The fact that the submissions of defendant's counsel on each of the proposed alternative class definitions can be supported by authority illustrates, not only the danger that hair-splitting and artificiality will be permitted to govern the legal question of class definition, but, also, how the various "rules" I have referred to earlier tend to work in opposition to each other. The greater the attempt to avoid over-inclusiveness, the more likely it will be the definition will be unacceptably merits-based - and *vice versa*.

[37] While acceptance of the first of the alternatives produced by plaintiffs' counsel during the hearing might appear to represent a rational, and sensible, method of confining the class to those persons who have potentially valid claims, I believe I am compelled by authorities such as *Chadha* to conclude that it is unacceptably merits-based and must be rejected. It is merits-based because its application depends, on proof of damage caused by fire and also on the resolution of a number of other issues of causation which may be seriously in dispute. These would include the question whether the fire started on upholstered furniture, or a mattress; whether the ignition source of the fire was a cigarette; and, if so, whether it was manufactured by the defendant. Only persons who could prove that each of these requirements was satisfied, in the particular circumstances in which damage occurred, would qualify as members of the class. As the motion for summary judgment on the plaintiffs' claims illustrated, each of the various issues may be strongly contested and, in cases where the fire was extensive and the damage considerable, expert evidence may be required to determine the ignition site, and source. Questions of credibility are also likely to be in issue in such cases and, in particular, on whether the cigarette was an ITCL brand. For these reasons, I find that the membership of such a class would not be sufficiently "identifiable" within the meaning of section 5 (1) (b). Having said that, I have difficulty in understanding how the defendant in this case would be prejudiced in subsequent proceedings by a person who claimed not to be a class member and, in consequence, not bound by a decision on the common issues in favour of the defendant. It is not clear to me that such a person could rely on a breach of the duty of care to establish a cause of action without pleading, and admitting, the same facts that would establish class membership and raise an issue estoppel on the common issue of breach of duty. If the authorities allowed it, I would be inclined to accept merits-based criteria that would not create unfairness to a defendant in subsequent proceedings and, in cases like this and *Nixon v. Canada*, leave the significance of the existence of the "merits-based" criteria to be considered as part of the enquiry into whether resolution of the common issues would sufficiently advance the litigation.

[38] The other alternatives must, I believe, also be rejected. They, too, are unacceptably merits-based in the sense identified in the previous decisions I have mentioned and, in the case of

that contained in the amended notice of motion, unacceptably subjective. In view of certain decisions I will mention, the subjective definition requires some further comment.

[39] The problems of class definition have, arguably, achieved too great a prominence in certification motions. The suggestion that they can all be avoided simply by inserting the words “who claim” before what would otherwise be merits-based criteria has obvious attractions. Acceptance of the possibility may reflect a silent recognition of the problems with the supposed rules I have mentioned. It appears to have had its source in the decision of the British Columbia Court of Appeal in *Rumley v. British Columbia* (1999), 180 D.L.R. (4th) 639 – a decision that was upheld - without comment on this point - in the Supreme Court of Canada [(2001), 205 D.L.R. (4th) 39]. The class was defined by the Court of Appeal as:

> Students at the Jericho Hill School between 1950 and 1992 who reside in British Columbia and claim to have suffered injury, loss or damage as a result of misconduct of a sexual nature occurring at the school.

[40] The application for certification in *Rumley* defined the class in terms of those who suffered damage resulting from the operation and management of the school. The reasons of the Court of Appeal contain no explanation for the introduction of the words "and claim”. The addition of the words may have simply reflected the fact that claims had been made and investigated by public officials prior to the commencement of the action. It is, also, possible that the original formula was considered to be unduly merits-based and that this defect was considered to be remedied by including the requirement of a claim as an objective class criterion. A further possibility is that the reference to a claim was intended not strictly as a criterion for class membership but merely to reflect that, if the common issues were resolved in favour of a class, claims to be entitled to relief would have to be made. If the second interpretation is correct, a resolution of the common issues in favour of the defendant would likely result in there being no members of the class, as approved, and no one bound by the decision on the common issues other than the representative plaintiffs. For this reason, I prefer the third interpretation as being more in accordance with the purposes of class definition identified in *Bywater*, as well as with the following statements of MacLachlin C.J. in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at page 554:

> It is essential ... that the class be defined clearly at the outset of the litigation. The definition should state objective criteria by which members of the class can be identified.

[41] The view that accepts that "objective" class criteria can be framed in terms of a person's claim to have suffered injury or harm was, however, quite clearly adopted in *Wheadon v. Bayer Inc*, [2004] N.J. No. 147 (S.C.) and *Walls v. Bayer Inc*, [2005] M.J. No. 4 (Q. B.). In *Wheadon*, the class was defined in part as including:

> Persons resident in Newfoundland and Labrador who were prescribed and ingested Baycol and who claim personal injury as a result...

[42] Barry J. stated:

> Bayer says the class proposed by the plaintiffs in this case suffers from the fundamental defect that members of the proposed class cannot be identified at the outset of the litigation by the application of objective criteria, since the proposed definition leaves it to each possible class member to decide, subjectively, and at the time of the person's choosing, whether he or she wishes to assert injury that he or she attributes to use of Baycol.
>
> ... But although there will obviously be a subjective reason for making a claim, whether or not one makes a claim can be objectively determined. It is not necessary that every class member be named or known at the outset but only that a "claim to membership in a class be determinable by stated, objective criteria.

[43] Similarly, in *Walls*, where the class was defined in essentially the same terms, MacInnes J. concluded that the existence of a claim was an objective criterion that could be used to circumvent the prohibition on merits-based definitions:

> While it may be true that one's determination of personal injury may be subjective, the fact of a claim to personal injury is not. That is, it will be easy to determine objectively whether and which prospective plaintiff claims not only to have been prescribed and to have ingested Baycol purchased in Canada, but also to have suffered injury as a result. The proposed class definition is silent as to the merits of the claims, but as the criteria should not depend on the outcome of the litigation, it is not necessary that prospective class members be able to successfully establish that they have suffered injury. The criterion is simply that they claim to have suffered injury.

[44] References to "objective" and "subjective" standards are notoriously ambiguous. In Mulheron, *op. cit.*, and the passage I have quoted from *Nixon v. Philip Morris (Australia) Ltd*, references to subjective criteria appear, for example, to relate to all those that raise individual issues rather than to those only that relate to a state of mind, exercise of judgment or personal choice of a particular individual. Whether the wider, or narrower, notion of subjective criteria is adopted it should, I believe, be understood to apply to the reference to persons who "claim that the fire was caused by an ITCL brand cigarette igniting upholstered furniture or a mattress" in the amended notice of motion. A criterion that leaves a potential claimant free to decide at a

convenient time whether he, or she, will be a class member and be bound by the judgment of the court, is, in my opinion, neither objective nor in accordance with the policy of the CPA or the purposes of class definition.

[45] If it were possible to define a class in terms of persons who claim that one, or more, individual issues should be decided in their favour, there would very likely be no members of the class – and no one bound by the decision - if the common issues were decided in favour of the defendant. Persons who made no such claim could, in subsequent proceedings, resist a defence of issue estoppel on that ground. In a class action for damages for breach of contract, for example, a decision at a trial of common issues, that there was no contract, could be ignored by putative class members who had never been called on to make a claim, and who subsequently commenced proceedings for restitutionary, or equitable, remedies that did not depend on proof of damages.

[46] Accordingly, and despite the respect and deference due, and accorded, to the judges who have expressed inconsistent views in other jurisdictions, I do not consider that the problem of merits-based definitions can be avoided in this case by replacing causation as a fact with the fact that causation is claimed or asserted – at some unspecified time - by a potential class member.

[47] I conclude that none of the proposed class definitions is acceptable and that certification must be denied on that ground. I do not believe this is a case where I should struggle to find a definition that would satisfy the reasoning in the authorities I have cited, or properly allow certification on condition that the definition of a class would be amended. An invitation to find an acceptable definition was rejected by Winkler J. in *Caputo* (at para 41) where, after referring to comments of McLachlin C.J. in *Hollick* (at para 21), he continued:

> As I read her reasons, the court may either reject certification where the class is not properly defined or otherwise grant a conditional certification on the basis that the plaintiffs will have to provide an acceptable definition to the court. In some circumstances, it may be appropriate for the court to alter or amend a class definition to be consistent with other findings made on a certification motion. That is not the case here. What the plaintiff suggests is akin to having the court perform the role of class counsel by making wholesale changes to arrive at a definition that the court itself would accept. That goes beyond a simple exercise of discretion and verges into the prohibited territory of descending "into the arena" with the parties to the motion.

[48] I reach the same conclusion. Experienced counsel have given this question considerable thought and have been unable to provide a definition that is in accordance with my understanding of the authorities I must follow. I will add only that no such acceptable definition is readily apparent to me. Given the first of the proposed common issues - to which I will refer

below - I am not persuaded that any non-merits-based definition that would not extend to everyone in Canada could be formulated.

[49] As there is no reason to suppose that my decision on the proposed class definitions will be the last word on the question, I will consider the other requirements for certification on the assumption that the first – and more restricted - of the alternative definitions provided during the hearing would be acceptable.

2. *Section 5 (1) (c) - common* issues

[50] The common issues proposed on behalf of the plaintiffs are as follows:

> 1. whether the defendant owed a duty of care to the Class to design, manufacture and market cigarette products that are "fire safe" and to phase out its conventional cigarettes and, if so, when did these duties arise and what is the scope of such duties?
>
> 2. whether the defendant breached either or both of these duties by selling only defective cigarettes, giving rise to liability to members of the Class;
>
> 3. whether it is appropriate to determine the degree of the defendant's contributory negligence on a class-wide basis in accordance with section 4 of the *Negligence Act* of Ontario (and similar legislation in other provinces); and
>
> 4. whether the defendant's conduct warrants the imposition of a global award of punitive damages and, if so, in what amount.

[51] In the statement of claim, the plaintiffs defined a "fire safe cigarette" to be one "with a reduced propensity for igniting upholstered furniture and mattress fires". The evidence on the motion for summary judgment, and on this motion, indicates that whether cigarettes with a significantly reduced propensity for igniting upholstered furniture and mattresses can be manufactured, and whether the methodology for accurately measuring such propensity exists, are matters of some scientific controversy. On the motion for summary judgment, I held that these questions raised genuine issues for trial and they would fall to be determined by the trial judge for the purposes of the first of the common issues. In this context, I note that section 3 (1) of the *Cigarette Ignition Propensity Regulations* S.O.R. / 2005-178 (June 7, 2005), made pursuant to section 7 of the *Tobacco Act*, S. C. 1997, c. 13, provides:

> 3. (1) Every manufacturer shall ensure that the cigarettes of every brand that it manufactures on or after October 1, 2005 burn their full length no more than 25% of the time when tested on 10 layers of filter paper using ASTM International method E2 187 - 04,

> dated July 1, 2004 and entitled *Standard Test Method for Measuring the Ignition Strength of Cigarettes*.

[52] As the concept of a fire safe cigarette is defined in relative and not absolute terms, the determination of the standard of care would require the court to draw a line between acceptable, and unacceptable, levels of propensity or, at least, to determine that, for the purpose of common issue # 2, all the cigarettes marketed by the defendant fell on the wrong side of the line. Strictly, it seems that such cigarettes would not necessarily be confined to those marketed in Canada. If it was open to me to accept the first of the alternative class definitions proposed at the hearing, I am satisfied that there would be the required rational connection between that definition and common issues #s 1 and 2 and that such issues would have the necessary attributes of commonality in that they would be essential ingredients of each class member's claim. The reference, in issue # 2, to liability arising would, however, have to be deleted as that would be dependent, in respect of each class member, not only on proof of harm to persons or property, but also on whether the fire was caused by the breach of duty: namely, whether it would not have occurred if the ignition source was a fire safe cigarette.

[53] I would not accept proposed common issue # 3. As framed, it seeks to relieve the motions judge of the task of determining whether commonality exists - and to transfer it to the judge at trial. The identification of common issues is required to be made on a motion to certify the proceedings and not later: *Caputo*, at para 56. I am satisfied that the answer to the question posed by common issue # 3 is that the possible application of section 4 of the *Negligence Act* cannot be appropriately determined on a class-wide basis. The section provides as follows:

> 4. If it is not practicable to determine the respective degree of fault or negligence as between any parties to an action, such parties shall be deemed be equally at fault or negligent.

[54] The question whether it is practicable to determine the respective degrees of fault as between the defendant and class members can only be determined separately in respect of each claimant. In consequence, the possible application of section 4 raises an individual, and not a common, issue.

[55] In *Rumley*, McLachlin C.J. accepted that an award of punitive damages on a class-wide basis may often be appropriate as it would be premised on an inquiry into a defendant's overall conduct, unrelated to its effect on particular class members. I believe that, if this case was to be certified in respect of common issues # ‘s 1 and 2, proposed common issue # 4 could properly be accepted. The allegations relied on in support of the claim are in paragraph 41 and 42 of the statement of claim:

> 41. The defendant's failure to manufacture fire safe cigarettes in Canada is intentional, and shows a callous disregard for public safety. The defendant has acted in a high-handed manner towards

> the public, including the plaintiffs, and has engaged in conduct which is reprehensible and which cries out for punishment.
>
> 42. The defendant has deliberately chosen not to manufacture fire safe cigarettes because such cigarettes may cause a decrease in their[*sic*.]sales volumes, and hence, lower their [*sic*.] profits. A smoker who walks away from an ignited fire safe cigarette, which is designed to self-extinguish, may return a few minutes later to find a cigarette which is still long enough to be used again, rather than just ashes, as is the case with the conventional, continuous burn cigarettes marketed by an defendant. Overall then, smokers would tend to consume fewer fire safe cigarettes than non-fire safe varieties.

[56] In my judgment, the required minimum evidential basis for the allegations in paragraph 41 of the statement of claim has been provided in the affidavits filed on behalf of the plaintiffs that deposed to the scientific research that supports the possibility of designing and manufacturing fire safe cigarettes and the defendant's knowledge of, and reaction to, such research. Whether the inferences necessary to prove the allegations pleaded in either of the paragraphs should be drawn from the evidence is not a matter to be dealt with on this motion.

[57] There remains the important question whether a favourable decision for the plaintiffs on the common issues would sufficiently advance the proceedings to justify certification. This question impinges on those that arise under the preferability requirement in section 5 (1) (d) and may require a consideration of the litigation plan that has been produced to satisfy one of the requirements of section 5 (1) (e).

3. *Section 5 1) (d) - the preferable procedure and 5 (1) (e) - a workable litigation plan*

[58] Plaintiffs' counsel submitted that the requirement that a class action is the preferable procedure will be satisfied as individual actions are likely to be too expensive for most, if not all, class members. This, however, is to ignore the requirement implicit in section 5 (1) (e) that a class proceeding will itself provide a workable method of advancing the proceeding. Counsel accepted that the question whether a class action would be a fair, efficient and manageable method of advancing the claims of class members is at the "core" of the preferability requirement. The availability of manageable procedures for dealing with individual issues has been repeatedly insisted on in previous decisions: see, for example, *Chadha* (at paragraph 56, (C.A.)) and *Moughteros v. DeVry Canada Inc.* (1998), 41 O.R. (3d) 63 (G.D.), at page 73.

[59] It follows that, in approaching the question of preferability, the possibility of devising acceptable procedures for the determination of the individual issues is crucial to the analysis. To be acceptable, such procedures must be workable - and manageable - and must provide a fair and just method of resolving the individual issues as between the parties. While, pursuant to section 25 of the CPA, it is for the trial judge to determine the procedures that are to be followed, the

motions judge must determine whether there is, at least, a realistic possibility that acceptable procedures will be found. The nature and complexity of the issues, their number, the expense involved in resolving them relative to the amounts at stake and the size and definition of the class may be considerations that are relevant, to varying degrees, in different cases.

[60] In this case, while, proposed common issues #'s 1 and 2 are important, and central, to the claim of each of the supposed class members - and, no doubt, raise questions of some scientific interest and considerable difficulty - their resolution would in my opinion simply mark the commencement of litigation in which separate - and in some cases lengthy - trials would be necessary to determine, in respect of each individual claim, not only the preliminary question of causation - whether damage was caused by an ITCL cigarette igniting upholstered furniture or a mattress - but, also, whether any such fire was caused by the defendant's failure to market only fire-safe cigarettes. As the concept of a fire-safe cigarette is a relative one, and it is not disputed that even such a cigarette could cause a fire, it would be necessary to decide in respect of each class member's claim whether a fire would have occurred in the particular circumstances if a fire-safe cigarette had been involved.

[61] It follows that, in approaching the question of preferability, the possibility of devising acceptable procedures for the determination of the individual issues is crucial to the analysis. To be acceptable, such procedures must be workable - and manageable - and must provide a fair and just method of resolving the individual issues as between the parties. While, pursuant to section 25 of the CPA, it is for the trial judge to determine the procedures that are to be followed, the motions judge must determine whether there is, at least, a realistic possibility that acceptable procedures will be found. The nature and complexity of the issues, their number, the expense involved in resolving them relative to the amounts at stake and the size and definition of the class may be considerations that are relevant, to varying degrees, in different cases.

[62] As well as a detailed examination of the circumstances in which each particular fire was started, expert evidence would inevitably be required to determine whether the substitution of a fire-safe cigarette would have prevented it. A finding at a trial of common issues that it is possible to test the relative fire propensity of different cigarettes would not be sufficient to resolve this question. A determination that one cigarette is likely to continue to burn for less time than another will not determine whether it would have produced ignition before it extinguished. This would have to be decided on the facts of each individual case. Although the expert evidence on which the parties relied differed on the existence of reliable standard tests of fire propensity, they were in agreement that the combustion process in cigarette-caused fires would be affected by the composition and configuration of the fabric which provided the combustible element, or fuel-source, as well as environmental factors such as room temperature, ventilation and humidity. In particular, it was not disputed that different fabrics may have different degrees of flammability. In order to determine whether the substitution of a fire-safe cigarette would have prevented a fire that occurred, these variable factors would have to be considered in the light of expert opinion evidence and the facts relating to each individual claim. There is no reason to believe that the opinions of the expert witnesses on this issue are likely to be any less

controversial than those in the record that bear on the reliability of standard tests for measuring the relative fire propensity of different brands of cigarettes.

[63] The question whether there was any evidence from which it could reasonably be inferred that the causal link existed in the particular circumstances of the Ragoonanan fire was raised on the motion for summary judgment in the light of expert evidence filed on behalf of the each of the parties. In *Kearney v. Philip Morris*, 916 F. Supp. 61 (1996) – in granting summary judgment to a defendant - Judge Robert E. Keeton had found that the expert evidence filed on behalf of the plaintiff could not bridge the gap between the results of the testing in that case and their application to the actual fire that had occurred. An "inferential leap for which no reasoned basis is proffered" was said to be required if that was to be done. The inference that the learned judge declined to draw concerned the appropriateness of applying to upholstered furniture the results obtained from a particular laboratory test of the relative fire propensities of different brands of cigarettes. In this case that question would be raised in determining the common issues. There is still, in my judgment, a significant gap between the conclusions of the plaintiffs' witness, Dr Hoffman, in the two paragraphs in which he summarized the opinions provided in his affidavit:

> 66. The ignition propensity of cigarettes can be reasonably and reliably measured. Conventional cigarettes have a high ignition propensity. 'Fire-safe' cigarettes have a low ignition propensity. 'Fire-safe' cigarettes are demonstrably less likely to cause fires.
>
> 67. Had ITCL adopted a 'fire-safe' cigarette design features in its products its [sic.] is more likely than not that the Ragoonanan fire, and many others like it, would have been prevented.

[64] Although each of these opinions might ultimately be found to be correct, I do not think the conclusion in respect of the Ragoonanan fire follows from Dr Hoffman's opinion that it could be proven that ITCL cigarettes were not fire safe, and I do not believe that he intended to suggest that it did. On the motion for summary judgment I considered that there was a triable issue on whether the substitution of a fire-safe cigarette for the particular ITCL brand would have prevented the Ragoonanan fire, but I am satisfied that it - and the same question in respect of each other fire for which a claim may be made – would be an individual issue that must be decided on the facts of each case. In short, a decision on the common issues as proposed by the plaintiffs would not resolve the question of a causal link between a breach of duty and the actual fires that may have occurred, and I am satisfied that it must be determined on a claim by claim basis.

[65] Even what I have described as the preliminary question of causation would involve a number of sub-issues that would potentially be seriously in dispute. The defendant would be entitled to challenge the claim that a cigarette was the ignition source, that ignition resulted from its contact with upholstered furniture or a mattress and that the cigarette was an ITCL cigarette. Fires – and particularly serious fires - have a tendency to destroy physical evidence and, on the defendant's motion for summary judgment, it was submitted that there was no evidence on

which any of these issues could be decided in favour of the plaintiffs. Although I held that there were triable issues on each of these questions, I held, also, that the motion could not be regarded as unreasonably made for the purpose of the costs sanctions in rule 20.06 (1). Expert evidence was relied on by each side with respect to the first two of the submissions, and questions of credibility also arose.

[66] It does not, of course, follow that each, or any, of the sub-issues involved in the preliminary question of causation would be significantly in dispute in connection with every claim. They are, however, serious issues raised by the claim as pleaded - as well as by the class definition that, contrary to my finding, I am assuming to be acceptable - and each of them would need to be decided against the defendant before a finding of liability to any claimant could be made. I do not believe I am entitled to conclude - without any evidentiary basis - that the existence of one or more of such issues is not likely to be raised in a significant number of cases.

[67] In addition to the individual issues of causation, there are those relating to contributory negligence, *volenti non fit injuria* and limitations. These defences have been pleaded by the defendants and they also raise individual issues. The nature of the product in question and its obvious propensity for causing fires makes it likely that the possibility of an apportionment of fault will be raised in the context of each class member's claim. In my judgment, neither a proportional allocation of fault, or negligence, between the parties – or between the defendant and third parties - nor the question whether particular class members voluntarily assumed the risk, could be determined without a consideration of the circumstances surrounding the fire's occurrence in each individual case. The possibility of other third-party claims - such as that made by the defendant against one of the representative plaintiffs - would further complicate, extend and delay the progress of the proceedings on the individual issues.

[68] The number of the individual issues that would determine the defendant's liability - and the diversity of the evidence that would be relevant to each claim - are such that, unless the plaintiffs could produce a satisfactory litigation plan for dealing with the issues, I would not consider the proceedings amenable to certification. The following comments of Winkler J. in *Caputo* (at para 75) are particularly pertinent to the facts of this case:

> The Act mandates that the representative plaintiffs produce a "plan" that sets out a "workable method of advancing the proceeding on behalf of the class...". McLachlin C.J. held in *Hollick* that the preferability analysis must be conducted through a consideration of the common issues in the context of the claims as a whole. (para. 30) In this context, the litigation plan is often an integral part of the preferability analysis. Frequently, in more complex cases, it is only when the court has a proper litigation plan before it that it is in a position to fully appreciate the implications of "preferability" as it pertains to manageability, efficiency and fairness.

[69] The plan proposed is for the individual issues to be resolved through a "streamlined largely paper driven claims process, developed with the cooperation of the defendant and under the supervision of a common issues trial judge or case management judge". Claimants would provide sworn statements, with supporting documentation, dealing with the various questions of causation and setting out details of the injuries and losses suffered. This material would then be submitted to Claims Adjudicators consisting of a roster of qualified experts selected by the parties - whose decision on each claim would be binding subject to appeal, with leave, to "selected regional judges in each province and major city of Canada".

[70] The proposed plan raises many questions of detail. Most fundamentally, and remarkably, it would deny the defendant any input into the resolution of individual issues, let alone recourse to any of the procedural safeguards to which it would be entitled in individual actions. As defendant's counsel stated in their factum:

> The proposed claims process would be woefully inadequate for addressing the complex evidentiary inquiries that would be required to properly resolve the many individual issues raised by this case. The plaintiffs have provided no justification whatsoever for the radical denial of procedural rights to all parties, including individual plaintiffs, that would result from the claims adjudication process that would prevent them from presenting a proper case, including discovery of the parties and the full examination and cross-examination of experts and other witnesses in order to prove or disprove the various individual material elements of each claim. The CPA is a procedural statute; it cannot be used to supplement or derogate from the substantive rights of parties to a full and fair hearing.

[71] In my opinion the validity of these objections is unchallengeable. The goals of the CPA - access to justice, judicial economy and behavioural modification - are not to be achieved by abrogating to this extent a defendant's right to contest liability on grounds - and by the adversarial procedures - that are ordinarily recognised by the justice system. The plaintiffs have, in my opinion, overreached by a long way. If, in an individual action, the proposed common issues #'s 1 and 2 were conceded by the defendant, liability could still be contested at a trial of the individual issues. The individual issues potentially in dispute – and on each of which liability would depend - are such in this case that I see no justification for detracting in a class proceeding from the defendant's substantive, and procedural, rights to the extent, and in the manner, proposed.

[72] Section 25 of the CPA recognises that summary procedures for resolving individual issues may be appropriate after a trial of common issues. This will ordinarily be the case where the issues raise questions of fact that can be resolved on the basis of documentary evidence, or can otherwise be readily determined. The nature of the individual issues in this case, and the evidentiary difficulties to which they may give rise - and particularly those relating to the causal

nexus between the defendant's breach of duty and each fire that occurred - are such that the defendant should not be deprived of its right to have those issues tried; *cp., Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 (S.C.J.), at para 36. I recognise, again, that the selection of an appropriate procedure for resolving the individual issues is within the jurisdiction of the judge who tries the common issues. At the certification stage, however, the motions judge must be satisfied that procedures could be devised that would be consistent with the objectives of class proceedings.

[73] If, as the defendant submits, it would be entitled to separate trials of the individual issues, I am not persuaded that this is a case where a decision on the common issues would sufficiently advance the proceedings to achieve the objectives of the CPA. This is not a typical product-liability case. Quite apart from the obvious risks inherent in the product if it is used carelessly, and the virtually ever-present relevance of contributory fault on behalf of a smoker, the diverse circumstances in which fires can occur are reflected in the individual issues. As well as the likelihood that expert evidence on each side would be required with respect to the causal link between a breach of a duty of care and the damage or injury claimed, proof of the essential fact that a cigarette provided the ignition source, and that it ignited upholstery may, as in the case of the Ragoonanan fire, also be in dispute and require expert evidence. In addition, the question whether any such cigarette was manufactured by ITCL, is likely to depend largely and, perhaps, solely on questions of credibility in many instances. I cannot assume that trials of the individual issues would be of short duration. The motion for summary judgment, which dealt with the individual issues that would arise out of the Ragoonanan fire, was heard over five days on, of course, an exclusively paper record. Even on the basis of the, possibly optimistic, estimates of plaintiffs' counsel provided at the hearing - estimates that, among other things, assume that no more than 25 per cent of class members who suffered injury or property loss from serious fires caused by ITCL cigarettes would make claims – many thousands of trials of potentially some length might be required. Plaintiffs' counsel did not suggest that this would be a manageable procedure. Their oral, and written, submissions were directed entirely at possible alternatives - of which the streamlined paper-driven claims process was the only one explored in detail. In this context, the estimate in the litigation plan of only 500 claimants in respect of each of the 18 years in the class period was not supported by the evidence and it was not consistent with Mr Rochon's submissions at the hearing.

[74] Counsel's estimate at the hearing that only 25 per cent of the class members would make claims was based on his professional experience. In the present circumstances, I would not be disposed to certify on the basis of experience in other cases on different facts even if, contrary to my opinion, it would reduce the number of the potential trials to manageable proportions. Before I could properly determine whether the proceedings would be manageable by considering the number of potential claimants who are likely to participate, there would have to be some evidence to support a finding on the question.

[75] There is no evidence that addresses the number of likely claimants. If I were to infer that some - and, perhaps, many - of the class would not be prepared to take the financial risk of litigating the individual issues - a risk that the plaintiffs propose each claimant should bear -

there is no basis in the record on which I could conclude that the number of necessary trials would be manageable. The record is silent on the issue. Indeed, although the action was commenced more than six and one half years ago, there is no evidence that any of the putative class members - other than the representative plaintiffs - has any interest in participating in it. Nor is there evidence of such interest from any of the approximately 200 property/casualty insurance companies that the plaintiffs' expert witness, Mr Todd B. Hilsee, has estimated may have subrogated claims. While I do not believe I could properly infer from the absence of such evidence that there would be no other claimants, I cannot draw any inference with respect to the number of claimants who are likely to come forward.

[76] The burden of demonstrating that class proceedings would provide an efficient and manageable method of resolving the claims of class members is on the plaintiffs. As I have indicated, I consider the procedure they have proposed for resolving the individual issues to be quite inadequate and I am not satisfied that the alternative of individual trials is manageable -let alone efficient. I do not believe it is appropriate to certify a proceeding on the basis of an unsupported assumption that only a small proportion of the class members with valid claims will participate, or on the basis of the possibility that the proceedings might be decertified if the assumption turns out to be incorrect.

[77] Finally, there is the submission of plaintiffs' counsel that, as I should accept their submission that individual actions would not be economically viable, I should conclude that a class action "has to be the preferable procedure because it is the only procedure". For this purpose, they cited, and relied on, the statement of Winkler J. in *1176560 Ontario Ltd v. Great Atlantic & Pacific Co of Canada Ltd* (2002), 62 O.R. (3d) 535 (S.C.J.), at para 46 that "[a]rguments that no litigation is preferable to a class proceeding cannot be given effect." That statement was made in a different context and I do not understand it to mean that, if individual actions would not be viable, an unworkable class proceeding must be considered to be a preferable procedure.

[78] In short, while proof of a breach of a duty of care would be an essential step in establishing liability, the plaintiffs have not persuaded me that, notwithstanding the existence of the disputable individual issues that would remain, such proof would sufficiently achieve the objectives of access to justice, or judicial economy. The procedure under the CPA is not appropriate, or available, in every case where there are common issues. As Nordheimer J. observed in *Moyes v. Fortune Financial Corporation* (2002), 61 O.R. (3d) 770 (S.C.J.), at pages 779 - 80:

> The question on a motion for certification is not simply whether there are common issues raised by the claims advanced. Any proposed class action that has any chance of being certified will, virtually by definition, have common issues. Rather, the issue is whether the resolution of the proposed common issues is going to move the litigation forward to a sufficient degree so as to justify certification of the action as a class proceeding. An important

> consideration in this regard is whether any individual issues that will remain for determination after the common issues are resolved are limited or whether what remains to be determined is sufficiently extensive that the determination of the common issues essentially marks the commencement, as opposed to the completion, of the liability inquiry.

[79] It follows that, even if - contrary to my understanding of the authorities - the plaintiffs have satisfied the requirement that there be an identifiable class, I would not certify the proceedings on the basis of the common issues that bear on the defendant's liability to the class in negligence. As, in consequence, neither liability, nor the quantum of compensatory damages, would be decided in the proceeding there would, I believe, be no question of certifying them in respect of the claim for punitive damages: *cp.*, *Cassano v. Toronto-Dominion Bank*, [2005] O. J. No. 845 (S.C.J.), at paras 72 - 9.

[80] Accordingly, the motion is dismissed. Unless the parties are able to reach agreement on the question of costs, it will probably be convenient to deal with it at the same time as the hearing of counsels' further submissions on the costs of the defendant's unsuccessful motion for summary judgment.

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CULLITY J.

Released: October 31, 2005

COURT FILE NO.: 00-CV-183165 CP
DATE: 20051031

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

JASMINE RAGOONANAN AND PHILIP RAGOONANAN, BY THEIR ESTATE REPRESENTATIVE, DAVINA RAGOONANAN, AND RANUKA BABOOLAL, BY HER ESTATE REPRESENTATIVE, VASHTI BABOOLAL

Plaintiffs

- and -

IMPERIAL TOBACCO CANADA LIMITED

Defendant

REASONS FOR DECISION

CULLITY J.

Released: October 31, 2005