CITATION: Quinte v. Eastwood Mall, 2014 ONSC 249
COURT FILE NO.: CV-12-458218-CP
DATE: 20140213

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: ELAINE QUINTE, JOHN QUINTE and 1358896 ONTARIO INC. (CARRYING ON BUSINESS AS HUNGRY JACK'S) / Plaintiffs / Moving Parties

AND:

EASTWOOD MALL INC., BOB NAZARIAN, THE CORPORATION OF THE CITY OF ELLIOT LAKE, M.R. WRIGHT & ASSOCIATES CO. LTD., R.G.H. WOOD, G.J. SAUNDERS, HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO, ALGOMA CENTRAL PROPERTIES INC., CORESLAB STRUCTURES (ONT) INC., JOHN KADLEC, JAMES KEYWAN, NON-PROFIT RETIREMENT RESIDENCES OF ELLIOT LAKE INC. (CARRYING ON BUSINESS AS RETIREMENT LIVING), AND 1425164 ONTARIO LTD. INC. (CARRYING ON BUSINESS AS NORDEV) / Defendants / Responding Parties

Proceeding under the Class Proceedings Act, 1992

BEFORE: Justice Edward Belobaba

COUNSEL: *David O'Connor and Adam Dewar* for the Plaintiffs

Sarah Pottle for Eastwood Mall and Bob Nazarian

John Walker for the Corporation of the City of Elliot Lake

James Le Ber for M.R Wright and Assoc., R.G.H. Wood and G.J. Saunders

Joseph D'Angelo and Judie Im for Her Majesty the Queen in Right of Ontario

Paul Tushinski for Algoma Central Properties Inc.

Francis De Santis and Devon Ryerse for Coreslab Central Structures

Eric Baum for James Keywan

Laura Day for Retirement Living

David Young for Nordev

No one appearing for John Kadlec

HEARD: November 12, 2013

CERTIFICATION DECISION

[1] On June 23, 2012 the roof-top parking deck of the Algo Centre Mall in Elliot Lake collapsed into the Mall's food court. Two people were killed[1] and dozens were injured. Businesses were closed. Hundreds of people lost their jobs. Many remain traumatized.

[2] Elaine and John Quinte were the owners of Hungry Jack's restaurant, one of the businesses affected by the Collapse. Elaine also sustained personal injuries. They ask that their action be certified as a class proceeding.

[3] The class action would be brought on behalf of about 300 potential members and would include the following categories of claimants: everyone who was in the mall at the time of the Collapse, as well as their parents, children and siblings; the business tenants and subtenants; and everyone who was employed at the mall at the time of the collapse (even if they weren't working that day). The proposed class action would thus include personal injury and family claims, and the financial and economic losses of affected individuals, businesses and their employees. The defendants would be the only individuals and companies that would be excluded.

[4] The cause of the Collapse has not yet been officially determined.[2] But the evidence seems to point in one direction. According to one of the engineering reports

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[1] Lucie Aylwin, age 37 and Doloris Perizzolo, age 74.

filed by the plaintiffs, the parking deck roof collapsed into the Mall when supporting steel beams gave way because years of on-going water leakage had severely corroded some of the steel welds and connections.[3] According to another report, also filed by the plaintiffs, water leakage was a continuing problem over many years. There were numerous complaints and warnings – from mall customers and workers, city inspectors and tradesmen. But, apart from some ineffective half-measures, nothing was done.[4]

[5] Not surprisingly, the plaintiffs have sued everyone involved in the planning, construction, inspection, ownership and maintenance of the shopping centre over the years: the architects and structural engineers who designed the mall; the company that built the mall; the company that supplied the pre-cast concrete; the private and public sector engineers and inspectors who conducted numerous inspections; and the former and current owners.

[6] The plaintiffs' claim is framed in negligence as against all defendants. As against the current owners Eastwood and Nazarian, the plaintiffs also allege a duty of care under the *Occupiers' Liability Act*.[5]

[7] The plaintiffs say that a class action, and in particular the resolution of the proposed common issues (in essence, who's to blame and in what proportions?) will significantly advance the litigation and expedite the determination of the individual damage claims. They say that the certification of this action as a class proceeding will enhance the class members' access to justice, further judicial economy and achieve some measure of behaviour modification on the part of those defendants that are found liable

[8] I agree.

[9] In my view, this is precisely the kind of case for which the class action was designed. Compensation is obviously owing to those who were killed, injured or suffered financial losses. The damage amounts that may be recovered will most likely require

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[2] The Belanger Commission of Inquiry's final report is expected at the end of October, 2014. Criminal charges, including criminal negligence causing death, have been laid against one of the private sector engineers but the trial is many months away.

[3] R.F. Jeffreys and Brian Sanders, *Engineering Report: Mall Roof Collapse* (Ontario Ministry of Labour, May 2013), at page 100.

[4] NORR Limited, *Forensic Engineering Investigation: Algo Centre Mall Collapse*, (March 8, 2013) at page 129.

[5] R.S.O. 1990, c. O.2.

individual assessments but a common issues class action trial that asks, in essence, "what happened and who's to blame" would definitely advance the overall litigation.

[10] As explained in more detail below, all of the prerequisites set out in section 5 of the *Class Proceedings Act, 1992*[6] (the "CPA") have been satisfied. The plaintiffs' statement of claim discloses a fully particularized claim in negligence against each of the defendants and a claim under the *Occupiers' Liability Act* against the current owners, Eastwood and Nazarian. The class is defined objectively and consists of approximately 300 individuals and businesses affected by the Collapse. The common issues will significantly advance the claims of the class members. A class proceeding is a fair and efficient procedure and Mr. and Mrs. Quinte are genuine plaintiffs who will diligently advance the interests of the class members. The action should be certified as a class proceeding.

[11] Let me explain this in more detail.

Certification analysis

[12] Under s. 5(1) of the CPA, the court shall certify a proceeding as a class proceeding if: (a) the pleadings disclose a cause of action; (b) there is an identifiable class; (c) the claims of the class members raise common issues of fact or law; (d) a class proceeding would be the preferable procedure; and (e) there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[13] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim. The question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding. Although s. 5(1) of the CPA, as just noted, requires the plaintiff to satisfy five prerequisites, the bar for certification is actually quite low. The plaintiff only has to plead a cause of action that will not plainly and obviously fail and establish "some basis in fact" for each of the remaining four prerequisites.[7]

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[6] S.O. 1992, c. 6.

[7] The case law supporting these general propositions is well-known to counsel and will not be repeated here. For a summary, see *Arora v. Whirlpool Canada*, 2012 ONSC 4642, 24 C.P.C. (7th) 68 (S.C.J.), at paras. 120-24.

[14] I will consider each of the five prerequisites in turn.

(a) Cause of action

[15] The first question is whether the plaintiffs have a cause of action. The test under s. 5(1)(a) of the CPA is the same as under Rule 21 of the *Rules of Civil Procedure*, i.e. that the claim should be permitted to proceed unless it is "plain and obvious" that it cannot succeed.[8] This is a low hurdle. Here, it is easily cleared. The cause of action in negligence (as against all of the defendants) and occupier's liability (as against Eastwood and Nazarian, the current owners) is properly pleaded and should proceed. To their credit, the defendants, with one exception, do not disagree. The only defendant that takes issue with the cause of action requirement is the province of Ontario.

[16] Ontario argues that the pleading does not disclose a reasonable cause of action in negligence against Ontario because it is plain and obvious that there is no private law duty of care owed by Ontario to the plaintiffs based on the facts as pleaded.

[17] The plaintiffs reply that under the *Occupational Health and Safety Act*[9] ("OSHA"), Ontario is responsible for conducting inspections relating to the safety of workplaces. The provincial Ministry of Labour inspectors performed over 130 inspections of the Mall between 1981 and the date of its collapse. In doing so, they received numerous complaints about the condition of the Mall and the dangers the leakage problems posed to its occupants. The plaintiffs say that the provincial inspectors should have followed up with reasonable investigations and in failing to do so, they were negligent and under the case law should be held liable. The plaintiffs say it will be up to the common issues trial judge to determine whether Ontario met the requisite standard of care in respect of these inspections and any necessary follow up. Ontario cannot establish at this early stage of the proceeding that that the claims of negligent inspection on the part of the provincial authorities are "doomed to fail" and have no chance of success.

[18] I agree with the plaintiffs. The allegations of negligence are not just bald pleadings but are supported with material facts. Tracking the language of the Court of Appeal in *Trillium Power*,[10] the pleading as against Ontario "is detailed and as fact-specific as [the

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[8] *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959; *Taylor v. Canada (Attorney General)*, 2012 ONCA 479, 111 O.R. (3d) 161.

[9] R.S.O. 1990, c. O.1.

[10] *Trillium Power Wind Corporation v. Ontario (Natural Resources)*, 2013 ONCA 683, 117 O.R. (3d) 721.

plaintiffs] can be at this stage of the proceeding. The allegations link to actual events, documents and people."[11]

[19] The plaintiffs' allegations against Ontario are particularized at paragraphs 7, 28, 32, 45-47, 52-53, 70, 72, 84-89 and 145-153 of their statement of claim. These paragraphs plead a sufficient basis for the duty alleged vis-à-vis the class. The statement of claim clearly refers to leaks through the parking deck or roof that led to a lack of structural integrity and the Collapse. The claim clearly asserts that these leaks and the poor condition of the roof and the unsafe working conditions were brought to the attention of the provincial inspectors during their many inspections. The claim specifically pleads that Ontario knew that leaks would corrode steel and could lead to a breakdown and structural failure of the parking deck. The plaintiffs' allegations against Ontario clearly relate to its duty to ensure workplace safety. As set out in s. 25(1)(e), s. 25(2)(h) and s. 54(1)(m) of OSHA, part of that duty relates to issues such as the structural integrity of a workplace and the ability of the structure to bear weight.

[20] The plaintiffs plead that any reasonable or prudent investigation would have led Ontario to require the Mall's owners to remediate and/or repair the water penetration and leakage problems. Among other things, Ontario should have directed the Provincial Engineer to inspect the condition of the Mall and order that necessary corrective measures be taken to ensure that the Mall was safe for both the workers and the public. The plaintiffs plead that any reasonable or prudent investigation would have led Ontario to follow-up with the Mall's owners and verify that reasonable and effective corrective action had been taken and that the Mall was in fact safe. The plaintiffs plead that because Ontario failed to carry out a reasonable or prudent investigation of the condition of the Mall, the plaintiffs and class Members suffered the damages claimed.

[21] I am therefore satisfied that the plaintiffs have pled material facts to establish that Ontario knew or ought to have known about the threat the leakage problems posed to the parking deck. Under Rule 25.06(8), a plaintiff can plead knowledge without pleading the circumstances from which it is to be inferred.

[22] I am also satisfied that there is an arguable cause of action. The plaintiffs submit that their claims against Ontario fall within two well-recognized categories of negligence: acts causing personal injury or property damage[12] and negligent inspection by a

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[11] *Ibid*., at paras. 31 and 60.

[12] *Cooper v. Hobart*, 2001 SCC 79, [2001] 3 S.C.R. 537.

government authority.[13] They also say, if needed, that the claims would satisfy a full-scale *Cooper-Anns* analysis.[14] For my part, it is sufficient to focus on the "negligent inspection" category.

[23] The "negligent inspection" cases have recognized that a public body statutorily empowered to conduct safety inspections may owe a private law duty of care to perform such inspections in a non-negligent manner.[15]

[24] Unlike policy-based decisions of a government that may be immune from suit, the adequacy or quality of the Ministry of Labour's inspections of the Mall is an "operational" issue that can give rise to civil liability.[16] A government body such as the Ministry of Labour that exercises statutory power to conduct safety inspections owes a duty of care to all who may be injured as a result of a negligent inspection. Thus, for example, once the decision to inspect has been made, the court may review the scheme of inspection to ensure it is reasonable and has been reasonably carried out in light of all the circumstances, including the availability of funds, to determine whether the government agency has met the requisite standard of care.[17] As the Supreme Court noted in *Ingles*:

> Once it is determined that an inspection has occurred at the operational level, and thus that the public actor owes a duty of care to all who might be injured by a negligent inspection, a traditional negligence analysis will be applied. To avoid liability, the government agency must exercise the standard of care in its inspection that would be expected of an ordinary, reasonable and prudent person in the same circumstances.[18]

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[13] *Just v. British Columbia*, [1989] 2 S.C.R. 1228; *Rothfield v. Manolakos*, [1989] 2 S.C.R. 1259; *Ingles v. Tutkaluk Construction Ltd.*, 2000 SCC 12, [2000] 1 S.C.R. 298; *Fullowka v. Pinkertons of Canada Ltd.*, 2010 SCC 5, [2010] 1 S.C.R. 132; *Adams v. Borrel*, 2008 NBCA 62, 336 N.B.R. (2d) 223.

[14] Referring to the House of Lords decision in *Anns v London Borough of Merton*, [1977] U.K.H.L. 4, and to the Supreme Court decision in *Cooper, supra* note 12.

[15] *Cooper, supra* 12, at para. 36; *Fullowka, supra* note 13, at paras 46-51; *Adams, supra*, note 13, at paras 41-49.

[16] *Ingles, supra* note 13, at paras. 19-20.

[17] *Just, supra* note 13, at 1243.

[18] *Ingles, supra* note 13, at para. 20; Also see *Rothfield, supra* note 13, at 1266-7; and, generally, *Kamloops (City of) v Nielsen*, [1984] 2 S.C.R. 2.

[25] The actual identification of a serious and specific danger is not a condition precedent to holding the inspector liable. In *Fullowka*, the Supreme Court noted that inspectors are to detect problems before they translate into safety issues:

> As with the building inspectors, there is some discretion as to how they [the mining inspectors] carry out their duties, but also like building inspectors, once the mining inspectors embark on their inspections, it is reasonable to think they will exercise care in the way they carry them out…Similar to the role of building inspectors, the job of the mining inspectors includes protecting the miners from risk arising from other people's defaults. To paraphrase La Forest J. in *Rothfield*, the role of the mining inspector is to detect those defaults before they translate into dangers of health and safety."[19]

[26] The Supreme Court also made clear in *Ingles* that an inspector "will be liable for those defects that it could reasonably be expected to have detected and to have ordered remedied."[20] *Ingles* involved a claim by a property owner against a municipality for negligent inspection of the lowering of a house basement. Lowering the basement required the contractor to install underpinnings under the existing foundations to keep the walls from cracking and the house from falling down. The municipal inspectors failed to identify that the underpinning construction was inadequate and the danger that this inadequacy posed. The Supreme Court held that the city owed the plaintiffs a duty of care to exercise reasonable care in its inspections of the renovations and that it could be found negligent for conducting an inspection without adequate care.

[27] The statutory inspection provisions of the OHSA are similar to the safety inspection powers given to the government bodies found to owe a duty of care in the building code inspection cases of *Ingles*[21] and *Rothfield*[22] and the mining safety inspection case of *Fullowka*.[23] Given the similarity of the statutory safety inspection powers, I agree with counsel for the plaintiffs that there is no principled basis for distinguishing the present case on a "plain and obvious" standard from the recognized

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[19] *Fullowka, supra* note 13, at paras. 49-55.

[20] *Ingles, supra* note 13, at para. 20.

[21] *Supra* note 13.

[22] *Supra* note 13.

[23] *Supra* note 13.

category of negligent inspection cases. Moreover, section 65(2) of OHSA expressly provides that the Ministry of Labour may be held liable for torts committed by "a Director, the Chief Prevention Officer, an *inspector* or an engineer of the Ministry" [emphasis added].

[28] The claim of "negligent inspection" as against Ontario may or may not prevail on the merits. But for the purposes of s. 5(1)(a) of the CPA, the claim clears the low "cause of action" hurdle. In my view, it is not plain and obvious that the "negligent inspection" pleading has no chance of success and is doomed to fail. Indeed, Ontario has not presented a single analogous authority for the proposition that a negligent inspection by a government department cannot lead to liability to those who suffered damage as a result of unsafe conditions which the inspection(s) failed to catch or remedy.

[29] In sum, the statement of claim passes muster as a valid pleading of negligent inspection on the part of the Ontario authorities. The cause of action hurdle as against Ontario, indeed as against all of the defendants, is cleared.

(b) Identifiable class

[30] The next hurdle, section 5(1)(b), requires an identifiable class of two or more persons that would be represented by the representative plaintiff. Here, we have three proposed representative plaintiffs, Elaine and John Quinte and their business Hungry Jack's. Each of them has sustained personal injury losses and/or financial damage.

[31] We also have an identifiable class. Class definition is important because it describes the persons entitled to relief, those who will be bound by the decision and those who are entitled to notice of certification.[24] Class membership must be determinable by stated, objective criteria. And, there must be a rational relationship between the class and the common issues.[25]

[32] Although the plaintiffs have set out several categories of potential class members, these categories are not presented as sub-classes. The plaintiffs are seeking to certify all of the 300 or so potential victims of the Mall Collapse as a single class. For my part, I would prefer and I would certify the class definition proposed by the plaintiffs in their factum, as further revised by me, because it is easier to understand, namely:

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[24] *Bywater v. Toronto Transit Commission* (1998), 27 C.P.C. (4th) 172 (Gen. Div.), at para. 10.

[25] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 38.

> *The class consists of all individuals or businesses (except the defendants) who:*
>
> - *Were occupants in the Mall at the time of the Collapse, or were the occupants' parents, spouses, children and siblings;*
> - *Were tenants in the Mall at the time of the Collapse; or*
> - *Were employed in the Mall at the time of the Collapse (even if they were not working on the day of the Collapse).*

[33] There is obviously overlap amongst the categories but this can be sorted out at the damages phase of the trial. It is also obvious, contrary to the submissions of some of the defendants, that "Collapse" means the collapse of the upper primary deck structure of the Algo Centre Mall on June 23, 2012.

[34] Four of the defendants, Retirement Living (a former owner), Eastwood and Nazarian, (the current owners) and the province of Ontario, take issue with the class definition. They argue that the definition is overly broad because it includes potential claimants whose class action-claims may be statute-barred if they choose to pursue claims under the *Employment Standards Act, 2000*, ("ESA")[26] or receive benefits under the *Workplace Safety and Insurance Board Act, 1997* ("WSIA").[27]

[35] In my view, this submission fails on at least five bases.

[36] One, there is no evidence that any of the potential class members have elected either of these statutory routes.

[37] Two, even if potential class members have elected or choose to do so in the future, the recovery of ESA or WSIA benefits will not exhaust the damage claims. The damage claims target all of the defendants, not just the sub-set of defendants that would be implicated in an ESA or WSIA claim. They involve claims for more than lost wages or work-place injuries. The claim, for example, by persons who were employed at businesses within the Mall is not just a claim for personal injuries or unpaid wages, but also a claim that their place of employment was destroyed and, for that reason, they can no longer earn an income. Thus, even if it is established that one or more specific causes

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[26] S.O. 2000, c. 41.

[27] S.O. 1997, c. 16, Sch. A.

of action or heads of damage of a given class member are barred as against a particular defendant by operation of the ESA or the WSIA, that class member would still have other viable claims and should not be excluded from the class.

[38] Three, even if certain class members are statutorily barred under the WSIA from asserting certain causes of action in their personal capacity as against certain defendants, the Workplace Safety and Insurance Board, in its capacity as subrogated insurer for Schedule 1 Employers, has the right to assert those same causes of action against those defendants in the name of affected class members. In other words, the claim still exists. The WSIB will decide whether the claim should be prosecuted and, arguably, whether to opt out of the class proceeding. Because it is not yet known whether any such subrogated claims exist or whether the WSIB would wish to have any such claims advanced in the class proceeding, any attempt to narrow the class on the basis of potential WSIA exclusions would have the effect of arbitrarily excluding potential subrogated claims of the WSIB.

[39] Four, adding the "statutorily-barred" exclusions to the class definition would inject a merit-based test for class membership which under the case law is impermissible.[28]

[40] And five, it would needlessly complicate the class definition with technical-legal terms that would not be easily understood by the average class member. As counsel for the plaintiffs put it, a class definition that requires a class member to seek legal advice as to whether or not they are in the class is "anathema" to the text and spirit of the CPA. And, to repeat what has already been said, questions relating to individual damage assessments, including eligibility, are best left to the individual damages portion of the trial.

[41] It may be useful to recall what the Supreme Court said in *Hollick* about the class definition requirement:

> In a single-incident mass tort case (for example, an air plane crash), the scope of the appropriate class is not usually in dispute. The same is true in product liability actions (where the class is usually composed of those who purchased the product), or securities fraud actions (where the class is usually composed of those who owned the stock) ...

[28] *Crisante v. DePuy Orthopaedics*, 2013 ONSC 5186 at para. 37.

> The requirement is not an onerous one. The representative need not show that everyone 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 unnecessarily 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 issue.[29]

[42] This is a single-incident mass tort case. Here, as it turns out, everyone in the class does share the same interest in the resolution of the proposed common issues and the class definition is not unnecessarily broad. In short, the s. 5(1)(b) hurdle is cleared. There is at least some basis in fact for the identifiable class of two or more persons as defined by the plaintiffs.

(c) Common issues

[43] Section 5(1)(c) of the CPA requires that the claims of class members raise common issues of fact or law that will move the litigation forward. The plaintiffs propose the following revised common issues:

> ***Common Issue 1 – Duties & Breach***
>
> *a. Did the Defendants (or any of them) owe a duty of care (whether at common law, statute or otherwise) to the Class Members regarding safety of the Mall?*
>
> *b. If the answer to Common Issue 1(a) is yes, did the Defendants (or any of them) breach the foregoing duty (or duties) of care? If so, how?*
>
> ***Common Issue 2 – Causation & Damages***
>
> *a. If the answer to Common Issue 1(b) is yes, did the Defendants (or any of their) breaches of duty cause or contribute to the Collapse?*
>
> *b. If the answer to Common Issue 2(a) is yes what types or heads of damages may Class Members be entitled to recover from the*

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[29] *Hollick v. Toronto (City)*, 2001 SCC 68, [2001] 3 S.C.R. 158, at paras. 20-21.

Defendants (or any of them), subject to any individual defence to the claim of individual class members?

Common Issue 3 – Apportionment of Liability

a. If the answer to Common Issue 1(b) is yes, what degree of fault should be assigned to the defendants under the common law, the Negligence Act[30] *or under any other statue?*

[44] There is certainly some basis in fact for a finding that these issues are common to all of the class members. The Mall Collapse was a single incident, mass tort event that killed, injured and/or harmed several hundred individuals or businesses. Cases arising from a mass, single event disaster – for example, a plane crash, train derailment, or in this case, a building collapse – are text-book examples of the type of cases ideally suited to being litigated as class actions precisely because the question of liability, including general causation, (i.e. questions such as "how did it happen?" and "who is to blame?") can be commonly resolved.

[45] Ontario argues that the common issues hurdle is not cleared as against the province because there is no evidentiary basis for establishing the existence of the threshold common issue of whether a private law duty of care is owed by Ontario to the plaintiffs. Ontario argues that the plaintiffs have failed to establish a basis in fact for the first proposed common issue as against Ontario, namely, did the defendants (or any of them) owe a duty of care (whether at common law, statute or otherwise) to the class members regarding safety of the Mall?

[46] In my view, Ontario misunderstands the common issue requirement. As the Supreme Court recently affirmed in *Pro-Sys Consultants*,[31] the common issue requirement asks not "whether there is some basis in fact for the claim itself" but "whether these questions are common to all the class members."[32] The Court made clear that evidence that the acts alleged actually occurred is not required. All that is needed is "some assurance … that the questions are capable of resolution on a common basis."[33]

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[30] R.S.O. 1990, c. N.1

[31] *Pro-Sys Consultants Ltd. v Microsoft Corporation,* 2013 SCC 57, 364 D.L.R. (4th) 573.

[32] *Ibid*., at paras. 100 and 110.

[33] *Ibid*., at para. 114.

[47] In my view, there is more than enough evidence in the material before me – for example, in the affidavit evidence and the forensic engineering reports – that the Mall Collapse was a single-incident mass tort event that had a tragic but common impact, in terms of deaths, injuries and economic losses. There is ample evidence (not to mention common sense) that provides me with "some assurance" that there are common questions (such as what happened? and who's to blame?) that are "capable of resolution on a common basis." As already noted, this is exactly the kind of case for which the class action vehicle and the common issues trial was designed.

[48] Two of the defendants want to tinker with the language in the common issues. But in my view, the revisions proposed by Retirement Living and Ontario make no material improvements to the plaintiffs' common issues. For example in common issue 1(a), replacing the phrase "regarding the safety of the Mall" with "in the circumstances pleaded" is, among other things, redundant. Common issues are rooted in the statement of claim and, as such, can only relate to the circumstances pleaded. None of the other suggested revisions merit any further comment.

[49] In sum, the s. 5(1)(c) hurdle is cleared. There is at least some basis in the evidence for each of the proposed common issues. Their adjudication at a common issues trial will significantly advance the litigation, even if individual assessments will still be needed for the damage claims.

(d) Preferability

[50] Section 5(1)(d) of the CPA requires that a class proceeding be the "preferable procedure for the resolution of the common issues." Preferability is broadly construed to capture the two ideas of whether the class proceeding would be a fair, efficient and manageable method of advancing the claim and whether a class proceeding would be preferable to other procedures such as joinder, test cases, consolidation or any other means of resolving the dispute.[34]

[51] In my view, as I have already noted, this is precisely the kind of case for which the class action vehicle was designed. The adjudication of the common issues will significantly advance the litigation even if individual damage assessments will be

[34] *Pearson v. Inco Ltd.* (2005), 78 O.R. (3d) 641 (C.A.), at para. 67, rev'g (2004), 44 C.P.C. (5th) 276 (Div. Ct.), which had aff'd (2002), 33 C.P.C. (5th) 264 (S.C.J.), leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 1.

required. I frankly cannot imagine a more preferable overall procedure than a class proceeding.

[52] But here again, Ontario takes issue with this observation. Ontario argues that the no-fault compensation scheme provided under the WSIA for class members who fall within the "employee" category would be fairer and more efficient and thus a more preferable procedure.

[53] Here again, the submission is misguided and fails on at least four grounds. One, the WSIA claims procedure is elective: persons entitled to participate in that procedure may elect either to pursue benefits under the Act or to seek a remedy by civil action.[35] A judicial determination that the WSIA regime is a preferable procedure would effectively remove the statutory right of class members to choose between the statutory mechanism and this class proceeding.

[54] Two, there is no evidence as to the number of employees that were injured in the Collapse or that any of them have elected to pursue benefits under the WSIA. There is therefore no factual basis for Ontario's preferability argument.

[55] Three, Ontario's submission amounts to an argument that a subset of the proposed class (people who were working at the Mall and sustained injuries from the Collapse) should limit their claims to whatever is recoverable under the WSIA and be denied the opportunity to pursue other claims for other heads of damage. This is unfair and frankly doesn't make sense.

[56] Four, the existence of a WSIA election would not extinguish that claim but merely put that claim in the control of the WSIB. That is, for those class members who made a claim under the WSIA, the rights of action that may be barred could still be advanced by the WSIB by way of subrogation.

[57] In short, the suggestion that the WSIA provides a preferable procedure, even for a subset of class members, denies the individual's right of election, lacks overall factual support, limits the scope of recovery and, overall, is unfair and does not enhance efficiency. Ontario's submissions on preferability are misguided and cannot succeed.

[58] The s. 5(1)(d) hurdle is easily cleared.

(e) Suitable representative plaintiff

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[35] S*upra* note 27, s. 30(2).

[59] Finally, under s. 5(1)(e) of the CPA, the court must be satisfied that there is a representative plaintiff who (i) would fairly and adequately represent the interests of the class, (ii) has produced a workable litigation plan and (iii) does not have a conflict of interest. The proposed representative need not be 'typical' of the class, but must be "adequate" in the sense that he or she will vigorously prosecute the claim.[36]

[60] I am satisfied that John and Elaine Quinte, and their restaurant, Hungry Jack's, are suitable representative plaintiffs. They fall within the class definition, they understand the duties required of a representative plaintiff and they do not have a conflict of interest with other class members. They have also produced a workable litigation plan that provides a reasonable road-map of both the common issues trial and the individual damage assessments.

[61] In sum, all five of the prerequisites set out in s. 5(1) of the CPA have been satisfied. I have no difficulty granting the motion for certification.

Costs of giving notice

[62] The plaintiffs ask that the notice costs be paid by the defendants. The general rule is that plaintiffs (or their counsel) pay the notice costs.[37] Here as well, the plaintiffs have stated in their affidavit material that class counsel has the "financial resources to … pay the costs of any disbursements that may be incurred in the course of this proceeding." This would include the notice costs. There is therefore no reason to depart from the general rule at this time. If circumstances change and the costs of notice prove to be much more than expected, I will allow class counsel to revisit this issue at the appropriate time on notice to the defendants.

Disposition

[63] The proposed class action is certified as a class proceeding.

[64] Counsel shall prepare a draft order in the form contemplated by s. 8 of the CPA. If any questions arise in this regard, please let me know.

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[36] *Campbell v. Flexwatt* (1997), 15 C.P.C. (4th) 1 (C.A.), at paras. 75-76, leave to appeal to S.C.C. refused [1998] S.C.C.A. No. 13.

[37] *Markel v. Toronto (City)*, [2004] OJ No 3024 (S.C.J.) at para 5.

[65] The plaintiffs are entitled to costs. If costs cannot be resolved by the parties, I would be pleased to receive brief written submissions within 14 days from the plaintiffs and within 10 days thereafter from the defendants.

[66] My thanks to all counsel for their assistance.

Belobaba J.

Date: February 13, 2014